

Privacy, the Law and Media Regulation

- 1 The increasing involvement of the courts in privacy issues over the past twenty years has been mirrored by the increasing activity of media regulators. From the 1960's concerns over media invasions into privacy have resulted in a number of draft privacy bills being promoted and since the early 1970's numerous committees have published reports which, in general, have recommended greater regulation of the media. The Broadcasting Act 1981 created a Broadcasting Complaints Commission ("BCC") to deal with complaints about fairness and invasion of privacy. In 1996 this was replaced by the Broadcasting Standards Commission ("BSC") which, amongst other responsibilities, is required to draw up a code which will help to avoid "unwarranted infringement of privacy in, or in connection with the obtaining of material" included in radio and television programmes.
 - 2 The Communications Act 2003 created OFCOM which replaced the BSc, the Independent Television Commission (ITC) and others. After lengthy consultation process on a draft code The final OFCOM Code is to be released after the 2005 general election.
 - 3 Statutory regulation of broadcasters has never been extended to the print media. The Press Council was set up in 1953 in order to censure unacceptable journalistic conduct but was widely perceived as a toothless watchdog and in 1989 a private members' bill aimed at setting up a statutory complaints body received support. In response, the government set up a committee chaired by David Calcutt QC to consider "Privacy and Related Matters". In 1990 the Calcutt report recommended, amongst other things, that the Press Council should be replaced by a Press Complaints Commission ("PCC") which would have eighteen months to demonstrate "that non-statutory self-regulation can be made to work effectively. If it fails we recommend that a statutory system for handling complaints be introduced."
 - 4 In response, and in order to avoid statutory privacy controls, the press set up the PCC at the beginning of 1991. Calcutt's 1993 review of self-regulation in 1993 was highly critical and recommended a statutory complaints procedure. In 1995, the Conservative Government's White Paper Privacy and Media Intrusion rejected all recommendations for statutory regulation and for a new tort of invasion of privacy. It approved continuing self-regulation. The Labour Government continued this approach after 1997 and there are currently no government plans for statutory press regulation.
 - 5 Both the statutory and the non-statutory regulators have drawn up detailed codes of practice. These codes have acquired extra significance as a result of section 12(4) of the HRA, which requires the court to have particular regard to "any relevant privacy code" when considering any remedy which may affect freedom of expression. Section 12 of the HRA was brought in after representation from the media.
 - 6 It was thought originally that Section 12 would protect the media. The section was brought in by amendment after representations from the media. It is ironic that in fact section 12 has not had the intended effect. It is now clear that article 10 does not have priority over article 8; they have presumptive equality. In addition, the media codes now appear centre stage in any legal claim for invasion of privacy and breach of the privacy codes may well persuade a Court to find in the complainant's favour.
- ### OFCOM
- 7 OFCOM has taken over the functions of the broadcast regulators (including the ITC, Radio Authority and BSc) and OFTEL. There will be a single code and hopefully more consistent adjudications than before.
 - 8 Under the Communication Act 2003 OFCOM has a duty to apply standards that ensure an adequate protection to persons from "unwarranted infringements of privacy resulting from activities" carried on for television and radio. There is express provision that OFCOM must have regard to the vulnerability of children and others in need of protection and the needs of the elderly and the disabled.
 - 9 All broadcasters can be fined and directed to broadcast decisions. OFCOM can also direct that there be no further publication of the offending material. OFCOM has no power to intervene before broadcast but can investigate unbroadcast material - the rushes - after publication.
 - 10 Commercial broadcasters can have their licences withdrawn and all broadcasters, including the BBC, can be fined substantial sums.

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- 11 Under the previous BSc/ITC regime, there was a clear element of overregulation and sometime double jeopardy for broadcasters.

Press Complaints Commission

- 12 The PCC is a voluntary organization set up and paid for by the print media. Most but not all print media subscribe to the PCC and there has been substantial debate over its operations. Unlike most other regulators, working editors serve on the Commission together with lay members. Any publication which is criticised by the PCC must print the adjudication in full and in due prominence.
- 13 The PCC code, which is sometimes updated, is the shortest of the regulators' codes and it has been regularly updated. Clause 3 of the code provides:
- i. everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.
 - ii. the use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note: Private places are public or private property where there is a reasonable expectation of privacy."
- 14 Privacy is also protected in other clauses; clause 4 in relation to harassment; clause 5 in relation to intrusion to grief or shock; clause 6 in relation to children and clause 9 in relation to hospitals.
- 15 In some circumstances the PCC will adjudicate even if there has been no publication, for example where there has been breach of Clause 4 (harassment) Clause 6 (children) or Clause 9 (hospitals) of the Code. There is no formal power for the PCC to make adjudications in advance of publication or to prevent publication.
- 16 If a newspaper has been found to be in breach of the Code of Practice, the newspaper is bound by the Code to print the adjudication by the PCC in full and with due prominence. However, the PCC has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim.

Regulators and the Courts

- 17 In the absence of statutory appeal procedures, the only remedy for a complainant or respondent who is aggrieved is to bring an application for judicial review or, since 2 October 2000, a claim under the HRA. There is no doubt that statutory media regulators are "public authorities" for the purposes of judicial review and HRA proceedings. Non-statutory regulators are probably similarly reviewable. Judicial review has conventionally been seen as a process of "second order" review in which the courts consider the lawfulness of the decision making process but not the merits of the decision. In general the courts would not substitute their decisions for those of public authorities, quashing a decision as unreasonable only if it is "so absurd that no sensible person could ever dream that it lay within the powers of the decision maker". This Wednesbury doctrine gives decision-makers a very broad "margin of discretion". Provided a decision falls within this, the court will not interfere.
- 18 Where "fundamental rights" are involved, even in ordinary judicial review proceedings, the decision calls for "anxious scrutiny". Where a decision interferes with Convention rights, the Court applies an even more stringent test of "proportionality". This requires the court to examine:
- i. whether the legislative objective is sufficiently important to justify limiting the fundamental right;
 - ii. whether the measures designed to meet the legislative objective are rationally connected to it; and whether the means used to impair the freedom are no more than is necessary to accomplish that objective.
- 19 The Courts have made clear that the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. The proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

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Barclay Brothers

- 20 Like OFCOM the BSc (and its predecessor the BCC) did not have jurisdiction to deal with privacy complaints prior to the programme being broadcast. The point arose in relation to the BSC's predecessor, the BCC, in *R v Broadcasting Complaints Commission, ex p Barclay*. The Barclay brothers complained prior to broadcast that a BBC film crew had, without permission, visited their private island. The BCC declined to adjudicate on the basis that it no jurisdiction to entertain such a complaint. The complainant's application for judicial review was refused by Sedley J. He held that the terms of the Broadcasting Act 1990 limited the power of the BCC and that it could not deal with a privacy complaint prior to the programmes being broadcast. He suggested that this meant that there was no effective remedy for breach of privacy and that this was inconsistent with European Convention rights.

Anna Ford

- 21 The interpretation of "privacy" under the PCC Code was considered in *R (Ford) v Press Complaints Commission*. The applicant, the well known television journalist, Anna Ford, sought permission to apply for judicial review of the PCC decision rejecting her complaint about publication of photographs of her and her partner on a secluded but public beach abroad. Silber J refused permission on the basis of the "broad discretion" given to media regulators and the "extended deference given by the courts" to their decisions.

" ... the type of balancing operation conducted by a specialist body, such as the Commission is still regarded as a field of activity to which the courts should and will defer. The Commission is a body whose membership and expertise makes it much better equipped than the courts to resolve the difficult exercise of balancing the conflicting rights of Ms. Ford and Mr. Scott to privacy and of the newspapers to publish. Put in another way, the courts should only interfere with decisions of the Commission when in the words of Lord Woolf, 'it would be clearly desirable to do so'. So the threshold for interference by the courts is not low as it must be satisfied that it is not merely desirable but clearly desirable to do so."

- 22 In my view this approach was not correct. In contrast to the decision in *Ex Parte BBC* on which the court relied, the PCC was taking a narrow view of the ambit of "private life". In such a situation it is not appropriate to defer to the regulator. This is a case in which the court should have made a primary judgment as to whether the applicant's privacy had been invaded by the publication of the photographs. This required a full hearing and permission for judicial review should have been given.
- 23 The extent of the positive obligation to secure respect for private life was considered in United Kingdom cases in Strasbourg.

Spencer v UK

- 24 The case of *Spencer v United Kingdom* concerned publication in tabloid newspapers of photographs and information about Countess Spencer being in a clinic for the treatment of an eating disorder and for alcoholism. Information about her personal and family problems was also published. The PCC had adjudicated in the complainant's favour, finding a breach of clause 3 of the Code. The Commission of Human Rights reviewed the common law development of the law of confidence. It found that although there was no general right of privacy, the applicant had the remedies of injunction, damages or an account of profits available to protect privacy. As a result, the Commission dismissed the complaint, since the applicants had not "exhausted their domestic remedies".

Peck v UK

- 25 In January the Strasbourg Court decided *Peck v UK* ((2003) 36 E.H.R.R. 41). The case concerned CCTV footage of a man with a knife walking along a public street. In fact Mr Peck, who was severely depressed, had slashed his wrists in a suicide attempt. Mr Peck tried, unsuccessfully, to obtain judicial review of the council's decision and also complained to the BSc, the ITC and the PCC (the media regulators). The PCC dismissed the complaint as inadmissible. The BSc and ITC upheld his complaints. Mr Peck claimed that his Article 8 rights had been infringed and his claim was upheld. The Court said the exposure to which he was subjected far exceeded anything which he could reasonably have anticipated. The court went on to conclude that as Mr Peck had no effective remedy under domestic

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law and therefore the UK was in breach of its Article 13 obligation to provide effective remedies. This appeared to highlight the glaring lack of domestic "privacy remedies".

Conclusions

- 26 The adjudications of regulators whether published, broadcast or merely received have limited effect. Since regulators seek to avoid repeating the offending material, the adjudication tends to be cryptic. Some adjudications are anonymous. This means that they often have limited value in providing either vindication for the complainant or future guidance for the media.
- 27 There is no doubt that the possibility of adverse decisions by regulators does have some deterrent effect on the media. Some OFCOM decisions must be broadcast. All adverse PCC decisions must be published. Broadcasters tend to take more steps to avoid invasions of privacy than newspapers do. In practice invasions of privacy occur in all forms of media.
- 28 As Alistair Brett has already pointed out, although privacy is protected to a certain extent by regulators, and they have had a significant effect in improving standards, their powers are limited, and the ability to challenge their decisions has, up to now, been very limited. The major flaw in the regulatory system as regards the protection of privacy is that the regulators have no power to stop broadcast or publication. The only remedy is adjudication, by which time the information has already been published and the damage done.
- 29 The codes are now clearly relevant to legal claims being made as a result of S.12 HRA. Whether the significant developments in the law such as Douglas, Campbell and Caroline have any significant effect on media regulation remains to be seen. I suspect that the Anna Ford and Peck adjudications would be decided differently today. It is not clear when the PCC would consider any beach photographs as permissible. Broadcasters still show "ridealongs" where the film crew accompany the police in an arrest and still show extensive undercover filming.

Footnotes:

"Privacy Bills" were introduced by Lord Mancroft in 1961, by Alexander Lyon MP in 1967, by Brian Walden MP in 1969, by William Cash MP in 1987 and by Lord Stoddart in 1989.

Younger Committee Report On Privacy (1972) Cmnd 5012; Calcutt Committee Report on Privacy and Related Matters (1990) Cm 1102; Calcutt Review Of Press Self-Regulation (1993) Cm 2135; National Heritage Select Committee Fourth Report on Privacy And Media Intrusion 1993; Lord Chancellor's Department and Scottish Office consultation paper, Infringement of Privacy 1993. Broadcasting Act 1996, s.107.

For example, the Sunday Sport completely ignored the Press Council condemnation of its behaviour in the Gordon Kaye case (see *Kaye v Robertson* [1991] FSR 62).

For an account of the PCC from 1991 to 2001, see Richard Shannon *A Press free and responsible: self-regulation and the PCC 1991-2001* (John Murray, 2001). (1995) Cm 2918.

See *R v Home Secretary, ex p Daly* [2001] 2 WLR 1622.

See Lord Steyn in *Daly* at 1634-1636; see also *R (Samaroo) v Home Secretary* [2001] EWCA 1139; [2001] UKHRR 1150.

(1997) 9 Admin LR 265.
[2002] EMLR 95.

At 104 (para 26).

At 105, para 28.

(1998) 25 EHHR CD

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Presentation given to the IBC/Matrix Conference on "Privacy and the Media"