

## PROPOSAL FOR A NEW SYSTEM OF PRESS REGULATION

Four major problems must be solved.

- First, litigation for breach of privacy or defamation is beyond the means of all but the richest, be they newspapers or individuals. Justice is thus denied to most of the population. Recent changes to CFA and AEI arrangements will make matters worse.
- Second, a section of the British press has for many years repeatedly gone well beyond the bounds of civilised behaviour, routinely breaking the law, ignoring rules devised by the newspaper industry itself and adopting a bullying and dishonest approach to litigation.
- Third, the body charged with regulating the British press, the Press Complaints Commission (PCC), has produced broadly acceptable rules but has not been able to enforce them.
- Fourth, the internet has increased the difficulty of imposing standards by making publication available to all in a multi-jurisdictional environment.

And we need to resolve these problems without in any way restricting public interest and serious investigatory journalism - the freedom of the press.

The proposed solution is to create an entirely new body, the **Press Tribunal** (Tribunal), to mediate and where necessary enforce the rules, while keeping the existing rule-making body, the PCC, albeit in modified form, as the **Press Commission** (PC).

Even if the current PCC were given power to enforce its own rules, this would be unsatisfactory. It would mean the newspapers continuing to sit in judgement on themselves. The experience of the past 60 years has shown this does not work. However it would be unrealistic to have a rule-making body without input from the newspaper industry.

With a new independent body to apply the rules, the newspaper industry could continue to be broadly responsible for the standards which govern its conduct in the UK. This would eliminate any suggestion of state control.

### THE PRESS COMMISSION

The Press Commission (PC) would be the successor to the PCC. Its function would be exclusively to make and amend the rules which, together with the law, govern the press and its agents as well as the internet in the UK. The PC would have no role in the application or enforcement of its rules. This would be the responsibility of a new and entirely separate body, the Press Tribunal (see below).

The membership and structure of the PC would be the same as the PCC except (i) the chairman would be appointed independently and not by the newspaper industry, (ii) the Editors' Code of Practice Committee would disappear, its functions now being those of the PC itself and (iii) a greater proportion of the membership would come from outside the newspaper industry.

The current PCC would be invited to submit detailed proposals for the membership and structure of the new PC including representatives of the internet and media academics. These should fulfil the above objectives while providing guarantees that the rule-making body will be independent of government. But the new PC must also be demonstrably independent of the proprietors of large newspaper groups.

The PC's first task would be to undertake a comprehensive review of the current PCC rules. There

have been many such reviews during the past 20 years (see <http://www.pcc.org.uk/cop/evolving.html>). These have had little effect on the conduct of some sections of the press and photographic agencies because of the lack of enforcement.

The review should include administrative proposals, for example a provision that a verifiable audit trail must exist for every newspaper story from first report to published article and that each newspaper should have a designated senior editorial figure from whom journalists could seek informal and formal advice (which would be recorded), and who might be a point of contact for the Tribunal if it initiated an investigation. There should also be a clear mechanism for the protection of whistleblowers.

The PC would also carry out an in-depth study of the ethics of journalism with the help of specialist media academics. This should result in a statement of ethics which would be incorporated into the rules. A breach of these ethical standards would then be a matter for the Tribunal.

## **THE TRIBUNAL**

The following proposal for an entirely new body to apply the rules is necessarily complex. To avoid the essentials becoming lost in lengthy explanation, the basics are set out in skeleton form below. Each non-obvious point has a reference number in square brackets which identifies the relevant passage in the explanatory notes at the end of this proposal.

### **Creating the Tribunal**

A new body, the Tribunal, is set up to deal with privacy, defamation, media harassment and accuracy. [1]

The Tribunal derives its powers from a short statute [2] which also:

- Defines the public interest; [3]
- Provides a public-interest defence in circumstances where the public interest in disclosure is greater than the public interest (if any) against disclosure; [4]
- Imposes a requirement to give reasonable notice before publishing private information relating to medical, sexual or family (children) matters [5] unless there are strong public interest reasons for not notifying; [6]
- Provides that prior notice of a story is confidential; [7]
- Gives the Tribunal the same powers as a court under S.3 of the Protection from Harassment Act.

### **The Tribunal consists of:**

- A secretariat headed by a director general;
- Adjudicators who are legally qualified but generally part time; [8]
- A network of adjudicators throughout the UK appointed by an independent body in the same way as the judiciary.

**The Tribunal has authority over:**

- The printed press (including magazines) and all associated websites; [9]
- The agencies of the press including photographic agencies; [10]
- The full internet (subject to the necessary legislation); [11]
- But not any organisation within the jurisdiction of OFCOM.

**The Tribunal procedures:**

- Speed and simplicity are of the essence;
- On receipt of a legitimate complaint the Tribunal (secretariat) will summon both parties in front of an adjudicator; [12]
- At a location convenient to both complainant and adjudicator;
- At very short notice if publication has not yet taken place;
- The adjudicator makes an immediate attempt at mediation;
- Urgent hearings are available as needed;
- Hearings are before a single adjudicator;
- All proceedings on privacy matters are in private; [13]
- But are recorded and can be published later if no breach of privacy was involved (i.e. the complainant loses);
- No lawyers unless the complainant appoints a lawyer whereupon the newspaper can do so too. Thus, in general, both the complainant and the journalist responsible for the story appear in person; [14]
- The newspaper must satisfy the adjudicator that its representative is the journalist responsible for the story;
- The adjudicator has no power to make orders for costs other than wasted costs. [15]

**The Tribunal has the power to:**

- Fine up to 10% of the publication's group turnover; [16]
- Award damages (capped at £10,000) but with a power to send a case to the High Court for assessment of higher damages; [17]
- Order a correction within a fixed time limit, specifying content, location and prominence;
- Order a newspaper to publish a correction in other newspapers; [18]
- Investigate any apparent breach of the rules of its own motion; [19]
- Deal with complaints by individuals, groups or companies;
- Prevent publication of a story;
- Issue a (binding) ruling in response to a request from an editor (e.g. on the need to give notice); [20]
- Order newspapers or photographers to desist and leave a complainant alone;
- Impose a *per diem* fine for each day of failure to comply with an order;
- Ban the use of photographs from any photographer or agency in breach of a desist order;
- Order a photographic agency or newspaper to reveal the identity of a photographer;
- Exercise the powers of the courts under S.3 of the Protection from Harassment Act;
- Order an item removed from the internet; [21]
- Order the production of documents (in any form) relevant to any complaint or investigation;
- Order the attendance of witnesses.

### **The Tribunal's relationship with High Court**

- The Tribunal exists in parallel with the High Court;
- Complainants will remain free to bring a case in the High Court but it will usually be sent straight to the Tribunal;
- And (except in urgent interim applications), the complainant must first seek a mediation hearing in front of a Tribunal adjudicator;
- The High Court can remit a case to the Tribunal at the request of either party and at any stage; [22]
- A case brought in the Tribunal can be moved at any stage to the High Court if both parties agree.

### **Appeals**

Decisions of the Tribunal are binding but either party can appeal to the High Court with leave of the Tribunal or of the High Court itself. A newspaper which brings an unsuccessful appeal risks further sanction by the Tribunal.

### **Paying for the Tribunal**

The Tribunal is available to both public and media free of charge; [23]

Its finances come from two sources:

- Fines; [24]
- A levy of less than 1p (possibly as little as 0.1p) for every copy distributed of any publication with a circulation exceeding 30,000. [25]

The cost of the Tribunal levy is likely to represent a very significant saving to the newspaper industry as a whole when compared to current costs in privacy and libel cases.

### **Enforcement**

Decisions of the Tribunal to be enforced, if necessary, by the High Court on application of the Tribunal, using all the usual means.

### **Generally**

The proposed Tribunal would be rough and ready compared to the Rolls Royce procedures which currently apply in defamation, privacy and even harassment. However Rolls Royce standards are pointless, even unfair, if only a tiny privileged minority can afford them. It is essential that justice should be available to all. It is submitted that the proposed Tribunal would achieve an acceptable standard of free justice at a cost that society can afford.

### **EXPLANATORY NOTES**

[1] In addition to privacy, defamation and harassment, the Tribunal should deal with accuracy, covering individuals or groups who may not have a case for defamation but about whom material inaccuracies have been published which deserve prompt correction with equal prominence.

[2] Despite everything that has happened, newspaper editors object to anything other than self-regulation. Any suggestion of a statute is seen as the beginning of state control. However most

editors recognise the need to enforce whatever laws or rules are in place and have themselves raised the prospect of an Ombudsman as well as fines and compulsory membership, all of which would require backstop statutory powers.

The proposed solution is a successor body to the PCC, very similar in constitution, to make the rules, and an entirely new, separate body to enforce them. If the rules are made and amended by a PCC-type body wholly independent of government and with significant input from the newspaper industry, it becomes difficult to argue that this is state control. If, in addition, the rules are enforced by a Press Tribunal, also entirely independent of government, surely we then have all the guarantees of a free press operating within rules agreed by the industry itself.

Attempts at enforcement without any statute-based authority lead to difficulty. One suggestion is a contract but this needs a signature and in any event could not compel the complainant to participate. With the internet an ever-bigger factor, this becomes increasingly impractical. There are suggestions of an incentive to sign up to the rules - for example VAT - but then we are back to a (tax) statute and have further practical difficulties. A voluntary "kitemark" is unlikely to deter the more extreme tabloids, at least not for very long, and some publications might even take pride in not being part of the kitemark group.

The most rational approach would surely be a minimalist statute allowing the Tribunal to enforce its decisions. It would be convenient to couple this with a definition of public interest.

**[3]** It is not easy to define "the public interest" precisely. Perhaps the best approach might be a broad definition as in the FOI Guidelines of 1 March 2007 "*the Public Interest is something which serves the interests of the public*", coupled with rebuttable presumptions that certain things are in the public interest, for example information which:

- reveals injustice or serious incompetence or abuse of office by public or private officials,
- reveals a potential danger to the public,
- prevents the public being misled to its detriment on a serious issue;
- genuinely assists the public in reaching decisions of clear democratic importance,

but with equally rebuttable presumptions that certain things are not in the public interest, for example information about:

- private medical information,
- sexual conduct between consenting adults in private,
- family matters, particularly concerning children.

Both Ofcom and the BBC have thoughtful and workable definitions of public interest which already apply to journalism. The crucial addition is the need to state explicitly that private health/sex/family matters are off limits without clear public interest justification.

**[4]** Given a statute, there is a powerful argument for introducing a general public interest defence applicable in all circumstances, even, for example, to the Official Secrets Acts. After all, in a democracy all laws (even official secrets) must ultimately be in the public interest. There can be no other (proper) reason for having them. It seems logical, therefore, to allow a defence of greater public interest to trump any other statute or rule of law.

In each case the court would have to balance the public interest in secrecy against the public interest in revelation (perhaps with an HRA-style "intense focus" on the facts). But it cannot be right to allow no public interest defence no matter how strong the public interest may be in making the facts known.

By definition, if the public interest in revelation is greater than the public interest in concealment, it must be in the public interest to reveal. Then, far from being a move to constrain good journalism, a formal public interest test would actually serve to liberate good watchdog journalism which holds power to account.

However we should resist the temptation to extend a public interest defence to investigation. If an investigative journalist is to have a public interest defence for his actions, we would have to give at least the same to the police. A (proper) police investigation is by definition in the public interest, yet in a democracy is subject to stringent safeguards. For example the police currently need the home secretary's consent to tap a phone. If they could tap any phone at any time when carrying out an investigation "in the public interest" we would quickly have a Stasi state. *A fortiori* journalists. The public interest defence should be extended to cover all areas of the law but always restricted to whistleblowers.

[5] A requirement for prior notification is often objected to as a form of "prior restraint", which some newspapers are against on principle. They believe that an editor should take responsibility for what he publishes and accept the consequences if he breaks the law. They say he should not be prevented from publishing by a judge. They consider injunctions to be a form of censorship.

As an argument against prior notification this is irrelevant. We already have "prior restraint" in that a judge can (and sometimes does) order a newspaper not to publish something. This happens if the subject learns of the story and satisfies a judge that he is more likely than not to win a privacy action should the story be published. An editor might argue this should not be the law and seek to change it. But that has nothing to do with prior notification which is a separate question.

Under the current law, the need for prior notification only arises in the small minority of cases where the subject does not already know of the story. It is not rational or fair that these individuals should be in a far worse position than the great majority (99 percent according to Paul Dacre in evidence to the CMS Select Committee) who have already had notice by one means or another.

The need is particularly strong because some newspapers, when they have a story which they know is an egregious breach of privacy (and therefore illegal), do not inform the subject and maintain a high level of secrecy (even spoof first editions) precisely because they know an injunction would be granted were their victim to find out in time. But they also know that once the story is published the victim will not sue because of the cost, increased exposure and inability of the court to make the information private again. As things stand today, (i.e. in the absence of a requirement of prior notification), this enables a section of the newspaper industry to flout the law at will.

On the more general question of whether editors should simply take responsibility and never be subject to prior restraint there are a number of points to be made. An editor who wants this freedom is potentially asking for the power of life and death. Breach of privacy can be that important (there have been suicides). The damage is also irreparable because once the information has been published, it cannot be made private again. We should be giving the editor a power potentially far greater than the right, for example, to help himself to another person's property.

But then we give a similar power of life or death every time we hand out a driving licence. And a comparable power to steal another person's valuables to any young man on the street. But the difference is that there are draconian penalties for deliberately (or even negligently) killing with a car as there are for mugging someone. But there are no comparable penalties for an editor who deliberately breaches privacy, no matter how awful the consequences to the victim.

So perhaps the answer is not prior restraint but draconian penalties for an editor who misuses his power? But this is less efficient than an injunction. If a person had prior warning and could go to a

High Court judge and ask for an injunction to stop a dangerous driver killing him (or his family), or prevent a mugging, it is inconceivable that the injunction would not be granted. But the problem with accidents and crime is there's almost never any warning. The necessary advance information is never to hand, so draconian penalties are the only restraint society has available.

In the case of the editor, however, the knowledge is there. We already have prior warning in 99% of cases and with a small change in the law that could be 100%. The irrevocable damage of a breach of privacy could then always be prevented if a judge were satisfied the claimant was more likely than not to win at trial. Prevention is always better than cure, particularly if there is no cure.

At present there is a loophole in the law which allows a newspaper to breach privacy with impunity. It merely has to keep its intentions secret until it's too late for the victim to apply to the court. There is a very strong (and logically irrefutable) case for closing this gap in the law.

[6] Very occasionally, there might be a genuine public interest in not giving notice. This should not be confused with the public interest (if any) in the material to be published. The latter will be considered by the judge once notice has been given. It is only if the giving of notice itself is contrary to the public interest (for example because the subject is a criminal who might flee, intimidate witnesses or destroy evidence) that this would apply. But such (very rare) cases could be the subject of a brief *ex parte* application to the Tribunal for permission to withhold notice. The resulting independent scrutiny would safeguard the interests of both newspaper and subject.

[7] When a newspaper gives notice of its intention to publish information which the subject might reasonably wish to keep private, the subject of the story would be bound to keep the information confidential except for those concerned with any proceedings to restrain publication. This would prevent the subject taking the story to another newspaper with a view to spoiling or putting a more favourable gloss on it.

[8] A person appointed as an adjudicator would be legally qualified and usually part time. A solicitor, for example. He would be paid for his time when engaged in Tribunal business. He or she would have attended a course on the applicable procedures, privacy law and defamation and have the necessary seniority and experience. They would be kept up to date with regular monthly newsletters from the Tribunal secretariat and periodic training and seminars which they would be paid to attend.

There would be a central Tribunal plus adjudicators in all large cities. In London and perhaps some other big cities there would be full-time adjudicators who would deal with sensitive questions such as a newspaper's request to refrain from giving prior notice on public interest grounds or difficult questions of public interest or internal controls which an editor might raise. Full time adjudicators would also be available to conduct an investigation into alleged misconduct within a newspaper group.

[9] Eventually, the Tribunal should cover all activity on the internet in the UK (see [11] below). However this will involve legislation which might delay the relatively simple statute needed to resolve current problems with the printed media and their websites as well as the harassment of individuals. Current research demonstrates that, at present, despite the rhetoric around an explosion of online information sources, the vast majority of online news consumption is from the online incarnations of traditional news media, both newspapers and broadcasters.

[10] The newspaper industry uses outside agents to do much of its work. These include photographers, inquiry agents and freelancers of various kinds. The Tribunal would exercise authority over these, primarily by means of sanctions on the newspaper employing them but also by demanding disclosure and attendance before the Tribunal and exercising the powers of the courts under S.3 of the Protection from Harassment Act.

[11] It will become increasingly difficult to regulate the press effectively in the UK without also regulating the internet. But while the system for regulating the press can be reformed quite quickly and without the need for complex legislation, the internet, because of its novel difficulties, may take longer.

It might therefore be best to proceed in two stages: first the press, then the internet. At the same time the structures for making and enforcing rules for the press set out in this proposal could quickly and easily be adapted to cover the internet when the time comes.

The starting point is to recognise that the internet is simply another medium. However it poses two novel problems. First, it is available to virtually the entire population, in contrast to newspapers where publication is at the discretion of editors. Second, it operates without regard for national borders and often with little regard for national laws.

These two problems have led some to suggest the internet is incapable of control, at least in a free society, and can therefore operate outside the law. It is, they suggest, a sort of Wild West.

This is nonsense. The law applies to everyone and to all media. The difficulties have to do with enforcement, not the law itself, still less the general duty to obey it.

A free society requires respect for the rule of law. Anyone using the internet must therefore obey the laws in their country. Similarly, they should obey the law in countries where their posts appear. As a practical matter, it is the search engines and service providers which can best prevent breaches of the law outside the country of origin of the original post.

Imposing the rule of law on the internet is likely to require three stages. First, national laws for the UK, second EU-wide laws (as to which the UK could and should take a lead) and third, international conventions. Only the latter are likely to present real difficulties or require much time.

The starting point would be a UK statute dealing specifically with the internet and its numerous applications to modern life. This will necessarily be complex, probably too complex to form part of a new short statute for the press.

Some examples of provisions which a UK internet statute should perhaps contain are:

- service providers must know the identity and address of their clients. All social media must know the identity of each user and the identity of the user's service provider. The IP address alone is not enough;
- service providers, social networks and search engines must have a workable internal complaints mechanism;
- search engines available to UK internet users should remove from their search results on demand any material which a court or Tribunal has found unlawful. It would be a defence if in a particular case the search engine could demonstrate that this was not possible for technical reasons;
- social media and service providers should warn their clients of the need to obey the law and make compliance with the law a contractual term, particularly in relation to privacy, defamation and on-line harassment;
- as part of the UK internet statute, the Tribunal's remit would be extended to cover the internet in

the UK. This would include a power to suspend an individual's access to the internet in addition to the Tribunal's other relevant powers;

- the Tribunal's powers should include authority to deal with any post on the internet, even from an individual. At first this sounds absurd - how could the Tribunal deal with every post, blog or tweet? However there are likely to be complaints, some of them serious, which cannot at present be remedied for reasons of cost or access to a suitable body. For example: in a case of a child being bullied by other children on a social medium it is unrealistic to expect parents to bring proceedings in the High Court but it can nevertheless be very distressing for the child victim and clearly requires a remedy (there have already been suicides). A network of adjudicators would be well placed to solve such problems quickly, easily and in every large city;
- a small levy on service providers and search engines imposing a (very small) financial burden comparable to that on newspapers would cover the cost (after fines) of extending the powers of the Tribunal to the internet;
- a comprehensive and well thought-out UK statute would be a good starting point for EU legislation. If the UK were to take the lead it could have a decisive influence on the EU. This in turn would greatly influence the future international conventions which are bound to follow. In theory, other countries could simply ignore what takes place in the UK. In practice this is difficult and unlikely to happen. Anyone who presents a good solution in an international forum will immediately attract support, if only from those who have more pressing problems and do not want to have to think about the matter under discussion. Even if, to begin with, the UK were alone (which is unlikely), it can still do a great deal to enforce its courts' decisions abroad through existing reciprocal enforcement provisions, particularly within the EU. There is a strong case for getting on with this without delay.

**[12]** In many cases, if complainant and journalist are brought face to face at an early stage, a compromise will be reached, particularly if the adjudicator, having heard both sides, gives an indication as to how he or she thinks the case would go at a full hearing. It's human nature to tend to compromise if protagonists meet face to face at an early stage before positions become entrenched. The journalist would then clear the compromise with the editor and the matter would be concluded.

Mediation is increasingly employed as a useful first step in many areas of the law e.g. employment disputes, divorce etc. Many mediators are former or practising lawyers.

The Tribunal would be able to refuse to hold a hearing if a complaint were obviously frivolous or ask for further details of the complaint in case of doubt.

**[13]** Despite the importance of open justice, the current practice of hearing a privacy trial in public is absurd. If the complainant wins, he has had the breach of privacy repeated, indeed reinforced, by the court. It is as if a person suing because his leg was broken has his other leg broken by the court before it considers his original complaint. There is nothing to stop a privacy trial being recorded so that it can be shown in full if the complaint fails. But if the complaint succeeds, the entire proceedings should remain confidential save for such details as the judge (adjudicator) might publish in his judgement without breaching the complainant's privacy. The current practice of immediate open trial renders a privacy action nugatory.

**[14]** The adjudicator would have a wide discretion to allow in a friend or a translator or to allow the presence of another newspaper representative (even the editor) who could agree a deal on the spot. However it would be entirely up to the adjudicator if such person were allowed to speak. The principle of equal arms would be the deciding factor.

[15] This system apparently works well in various tribunals, for example employment tribunals.

[16] Fining up to a certain percentage of turnover is a system used by the EU Competition Authority. It enables large and powerful organisations to be fined amounts commensurate with their means without creating inappropriate precedents for smaller companies. The headline figure is the percentage. The actual sum would come later. A fine of 10% of turnover would obviously only be used in the most serious cases (e.g. "monsterring" the McCanns, phone and computer interception).

[17] Damages should be capped. In defamation, a prompt correction and apology of equal prominence and on the same page as the original libel would be far more effective than damages as a means of restoring reputation, particularly if done immediately. However the adjudicator would be empowered to send a case to the High Court should he or she feel that damages of £10,000 were wholly inadequate or the case was extremely complex and document-heavy, subject always to arrangements to ensure equal arms for those involved.

But with privacy, money can do nothing to repair the damage to the victim. In a bad breach of privacy, published without notice, there should be a very large fine. However, if the newspaper gave adequate notice but the complainant did not approach the Tribunal before publication, the fine would be very much smaller or even nominal.

Exemplary damages for serious privacy proceedings are superficially a nice idea but unless of lottery-like proportions, would not deter a major newspaper group, and would do nothing to preserve or restore an individual's privacy. A very large fine for the benefit of the public purse (i.e. the Tribunal) is the best sanction if a newspaper should ambush an individual with a serious breach of privacy despite a statutory requirement not to do so and notwithstanding the availability of the Tribunal for consultation (see [20] below).

[18] This remedy is available in France where damages for defamation are small but a newspaper can be ordered to buy space in other newspapers to publish a statement of correction with wording approved by the court. It augments the restoration of reputation, is salutary for the guilty newspaper and brings welcome advertising revenue to other newspapers.

[19] The Tribunal would have the power to initiate an investigation into serious or persistent wrongdoing and impose sanctions as appropriate. So as to assist the Tribunal monitor a newspaper's conduct the newspaper would be compelled to keep (and disclose to the Tribunal) a full and accurate record of all complaints it receives whether it disposes of it itself or whether the complaint proceeds to the Tribunal or Court.

[20] Editors who feel they have a public interest reason for not notifying an individual whose privacy they are about to breach could safeguard their position by applying *ex parte* to the Tribunal. This would at least provide independent scrutiny which would help safeguard the interests of both subject and newspaper.

A finding in the editor's favour would normally prevent an action for defamation or breach of privacy.

A wealthy individual might, of course, apply to the High Court for an injunction having found out about the story himself but should then face paying indemnity costs if the Tribunal has given clearance and the High Court agrees.

[21] An internet site is already an important element for most newspapers and likely to become more so. The Tribunal's jurisdiction would therefore extend to a newspaper's website. A newspaper which puts an item on its website should ensure that it can, if ordered to do so, remove the item from its own and any other website where the item appears. In publishing on the internet, newspapers need to take

account of the potentially permanent and universal availability of items in this medium.

Once the relevant statute were in force (see [11] above), this would apply all websites.

[22] The High Court would remit a case to the Tribunal on application of either party unless satisfied that (i) the matter was so complex as to either law or fact that it would not be an appropriate case for the Tribunal and (ii) both parties had the means to fight the case in the High Court on an equal-arms basis. The necessary finance could be provided by just one of the parties (on an indemnity basis) subject to the consent of the court.

If Tribunal proceedings had been initiated by one party, the other party could only issue Court proceedings with the leave of the Tribunal. Thereafter the Court would only accept jurisdiction if it agreed that the case was not suitable for the Tribunal. If proceedings were issued by a Claimant in the Court (as opposed to the Tribunal), they would be struck out with an order for costs if the Court decided they should have been brought in the Tribunal.

The new system must be seen to be compulsory for all but the most complex, novel, document-heavy and/or heinous cases. Whilst the Tribunal would have the power to award only limited damages, simply arguing in Court that the damages the Court may award in the claimant's case would exceed the Tribunal limit would not be enough for the Court to accept jurisdiction. The Claimant has the benefit through the Tribunal of achieving much speedier resolution and vindication than would be possible with the Court system.

[23] This is an essential feature. Without legal aid, even county court costs are beyond the means of most of the population. Apart from the difficulty of persuading the government to extend legal aid to defamation, the complexities of applying for it would be inconsistent with the need for speed in privacy matters.

No one questions that the services of the police should be free. A crime is a crime, irrespective of the means of the victim. It would be considered an outrage if the police protected only the rich. Yet breach of privacy is often worse than burglary and more damaging than many other crimes. Possessions can be replaced but privacy, once breached, is gone forever. Even at local level, a breach of privacy can be utterly devastating for the individual and his or her family.

CFA funding in privacy and defamation cases is shortly to be eliminated. In disputes with the press, the protection of the law will once more only be available to the very rich (meaning those who can afford tens of thousands for an injunction or upwards of £1 million for a full trial). And faced with a rich claimant, only a wealthy newspaper can afford the protection of the law.

With actions for breach of privacy or defamation beyond the means of all but the wealthiest, the vast majority of the population are currently excluded from the courts and deprived of a remedy just as surely as if they were barred on grounds of race or religion. This is wrong and must be put right. A system which is free of charge is essential in the interests of both newspapers and public.

If we are to ensure that everyone is equal before the law, the general population must be protected. In the 19th century, defamation was really only an issue for the well-to-do. Today, as a result of the internet and social media, protection from defamation, breach of privacy, harassment and inaccuracy are universal needs. Once on the web, deletion of private information or images becomes almost impossible. A breach of privacy is constantly repeated. A libel can appear again and again.

It is not enough to reduce costs, even radically. If we want the rule of law to apply, remedies and enforcement must be free of charge. It follows that the starting point is a regulatory system which is free. We must then evolve the best possible system consistent with the limited means available to pay

for it.

[24] In the case of national tabloids, a fine would have to be very heavy to have any effect. Income from fines would drop if behaviour improved but so would the level of activity in the Tribunal. With mainly part-time adjudicators, costs would be largely self-adjusting.

[25] Given that the total number of relevant newspapers and magazines distributed in the UK averages over 13 million copies per day, a levy of 1p per copy distributed would raise upwards of £130,000 daily, about £47.5 million annually. Taking into account fines, it is unlikely that much more than a fraction of 1p per copy would be needed. Set against the savings in legal fees and management time which would result from moving almost all privacy and defamation actions from the High Court to the Tribunal, this would seem strongly in the interests of all sections of the press.

### **IN CONCLUSION: CHECK LIST OF ESSENTIALS FOR A NEW SYSTEM**

The above proposal is just one possible blueprint for future press regulation. But it is submitted that whatever solution is adopted, six basic requirements must be satisfied.

#### **First, it must be free of charge to both complainant and respondent**

The costs of a defamation or privacy action are currently beyond the means of all but the wealthy, whether individual or media group. Most people have no access to justice (and the position will be significantly worsened with the abolition of CFAs). A country cannot claim to live under the rule of law if its courts are closed to almost everyone. The idea that defamation and privacy are only problems for the rich, and that an ordinary person with a good case would find a *pro bono* lawyer, is completely out of date. With the internet, anyone can publish and everyone is at risk. Even if there were endless lawyers waiting to take cases on a *pro bono* basis, it would not be right to have a justice system which depended on charity. At best this would produce a two-class system of justice, at worst (and most probably) it wouldn't work at all. After all, *pro bono* lawyers don't pay the costs if the complainant loses.

#### **Second, it must have jurisdiction to the exclusion of the courts**

If the new system does not have the ability to exclude the courts, a wealthy individual or newspaper group could simply ignore it. If necessary, they would go through the motions of mediation, and then go straight to court. In this way an oligarch could still bully a national newspaper, a rich business man could intimidate his local newspaper and national newspapers could continue to frighten off ordinary individuals with the prospect of huge costs and the loss of their family home.

This form of intimidation and bullying, which is familiar to everyone involved in privacy and defamation actions, is quite simply unacceptable. It has no place in a fair or just society. In the absence of massive government funding (which will never be available), a free-of-charge system will necessarily be simplistic, even crude, in comparison to Court or Arbitration proceedings. But it will be infinitely better than the current denial of justice.

Access to the High Court (or county courts) should be allowed only in exceptional circumstances and with leave of the regulator or the High Court itself.

#### **Third, it must have similar powers to the courts**

If the courts are generally excluded from the system it is self-evident that the regulator must have the powers of the courts. Otherwise, the necessary remedies and defences would not be available. Arguably, there should be additional powers - for example a heavy fine going to the public purse

might be preferable to exemplary damages for bad cases of defamation or breach of privacy or persistent wrongdoing. But the essential element is that the regulator should have at least the courts' existing powers with certain minor exceptions.

#### **Fourth, it must be able to deal promptly with internet problems right down to local level - for example bullying among schoolchildren on Facebook**

There is a tendency to see the internet as ungovernable, a medium outside the law. This is nonsense. In time the rule of law will apply to the internet as it does elsewhere. National laws followed by international conventions are bound to come.

Our new regulator must be able to offer remedies as and when they become available (as some already are). Although current problems with some sections of the press are serious, it is no good setting up in the 21st century a system which solves only the problems of the 20th. Our regulator must have the ability to deal with the internet, right down to micro level. This will increasingly be where the problems lie.

#### **Fifth, it must be able to act very quickly indeed**

Privacy and defamation require very quick resolution, particularly when publication has not yet taken place. Even after publication of a libel, the faster the matter is corrected, the less the damage to the victim. The procedures must therefore be very simple. This will also reduce costs.

#### **Sixth, the enforcement process must be entirely independent of both media and government**

If the public are to have confidence in the new regulator, it must be independent of both media and government, particularly when applying (as opposed to making) the rules. Any element of the press sitting in judgement on itself would devalue the entire project.

#### **The need for a statute**

A body with appropriate powers and jurisdiction will require a statute. If we are to stop the process of oppression through cost, we have to exclude access to the ordinary courts save in very exceptional circumstances. This can only be done by statute. There have been many suggestions for regulation on a voluntary basis but the fundamental problems of access, cost and compliance cannot be solved voluntarily. A contract cannot bind third parties, particularly rich individuals. Analysis will show that no matter what contortions are gone through, in the end a statute is inevitable.

So how to assuage the worries of some sections of the press that a statute would be the thin end of the wedge? The proposed solution is a complete separation of the rule making body from rule enforcement. The rule making body could have significant input from the media, indeed it would need it. And it could be voluntary - only newspapers which wanted a part in the rule making process would need to join. But rule enforcement should be an entirely separate service with the power to apply the rules to everyone concerned. Given that the rules would be very much the press's own, there could be no suggestion of government control if the statute did no more than ensure that the rules in question were observed.

There will not be another opportunity to solve these very serious problems for several decades if ever. If the above six basic requirements are not met by the new system, it will be back to business as usual with perhaps a few minor improvements. It will not be enough to create a regulator with "teeth" - for example the ability to fine. It must have the powers of a court and be accessible to all. And we absolutely must put an end to the current abuse whereby a rich individual or wealthy newspaper can use money and legal costs as an instrument of oppression. A complete answer will inevitably be

radical. And the lower the available expenditure, the more radical it will have to be. But better a radical solution than a half-baked compromise and denial of justice.

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