PRESS COMPLAINTS COMMISSION

From the Director

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9 June 2009

Dear Alan,

I have been meaning to write to you with some thoughts about where we are on privacy, following the Code Committee meeting, and your appearance before the Select Committee. In any case, I value our discussions on the matter as you know.

There are big structural changes in the way we deal with privacy as a result of the Human Rights Act. There is no doubt about that. The question is whether the HRA has undermined the PCC, as some people suggest. My first point is that it can be no surprise that media lawyers and some wealthy individuals have helped to drive the law forward: it was, after all, widely forecast ten years ago that the judges would look quickly to develop the law on privacy once given the opportunity. This has only been made easier by the absence of financial risk as a result of CFAs. It seems inevitable that if a choice is provided about whether to sue or use the PCC, when none previously existed, some people will decide to go to law. The fact of these actions alone cannot be a poor reflection on the PCC. Or, if it is, the fact that some people also sue

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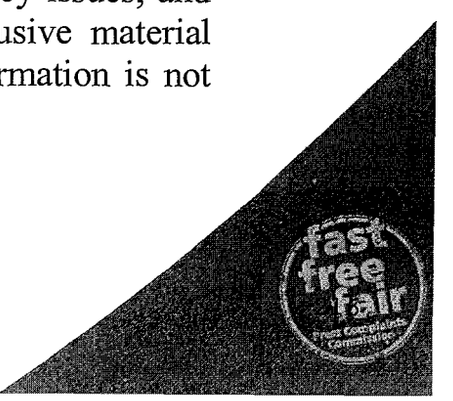
television stations under the HRA must similarly reflect badly on Ofcom – but I do not recall anyone making that point.

I was struck by your comment at the Code Committee that the proposed changes to the Code were to get the PCC 'back in the game' on privacy. I wondered whether this implied that you thought we were out of the game. If so, these statistics might surprise you: last year we handled 35% more privacy cases than 2007, leading to 327 different rulings, of which 165 involved a breach of the Code (and could therefore presumably have had a reasonable chance of success at law in the current climate). These people include the usual cross section of the British public, alongside many high profile individuals who are now normally assumed to go to court but, in fact, more generally come to us.

The question is why the assumption that the PCC is routinely bypassed on privacy has arisen. I think it is a consequence of the fact that the profile of our privacy work has diminished – something I do not welcome – while that of the courts has increased, even though we deal with many times the number of litigated cases. The reason that the profile is lower is that it is more difficult to get privacy cases to the adjudication stage – because, where there is a clear breach of the Code, newspapers now do so much more to settle them. Moreover, people who complain to us about privacy intrusion tend to want the matter dealt with discreetly – for the prospect of a Max Mosley-style circus at the High Court fills them with horror. So most disputes are settled amicably. This means that, while we try to adjudicate more cases, it is actually easier said than done.

Why do increasing numbers of people come to us when the courts can do more than us in terms of restraining publication and making financial awards? People could simply instruct Schillings (perhaps using CFAs) to injunct or sue each time a privacy issue arises. I hope that part of the reason is that we have actually taken steps to adapt to what has been going on.

In particular, there have been two key developments. The first is that we have developed, over the last five years or so, a system of private advisory notices. These are like 'DA Notices' for privacy issues, and are a way of warning the press about potentially intrusive material before publication. The result is usually that such information is not



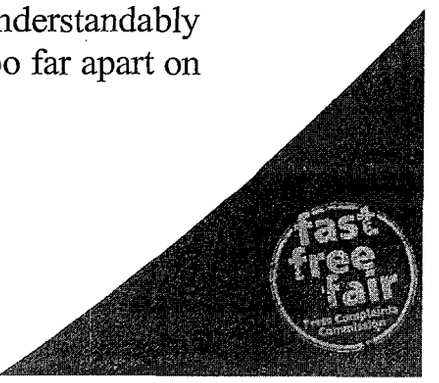
published. They have the effect of an injunction without the cost or hassle of obtaining one, and they preserve the environment in which a free press can operate because they do not add to the legal restrictions on the media.

The other development is that money now routinely crops up in the settlement of serious privacy cases that are brought to us. While some newspapers – including *The Guardian* – are uncomfortable with this, it does reflect the fact that these complainants would otherwise have a legitimate legal claim and be entitled to compensation. They can now achieve this through the PCC without the downsides of going to law.

There are clearly therefore positive reasons for people still to come to us. The numbers of people who use our services, and the fact that we have adapted what it is we have to offer mean that I do not believe that the PCC is 'out of the game' on privacy, although I do regret not being able to make more of a noise about our work in this area. But while we may still be hovering up genuine privacy cases, there are other serious concerns about where the law is going, and the likely impact on the free press.

There is clearly a danger that the environment in which the free press has traditionally operated is being undermined by the ease with which people can obtain injunctions. Some editors now only have to be threatened with an injunction to drop a story – because they know that it is unlikely they will win in the current climate, and because it will cost several thousand pounds to contest. In some cases there will of course be merit in the application. But in others, there is more than a strong suspicion that it is designed to prevent unflattering publicity.

This leads to the second concern. We have not quite got to the stage where people have legal 'image rights' here. But it now looks like there is a serious danger that this is how the courts will develop the common law. It might not be of much relevance to the sort of journalism that the *Guardian* undertakes, but the idea that someone can mislead the public about their private lives (often in turn for some financial reward) and then expect the protection of the law to prevent exposure of their hypocrisy seems to be profoundly wrong, and it is something that our private research shows the public are understandably hostile to. So far, the PCC and the courts have not been too far apart on



the substantive issues – but that may change if the courts effectively grant a new right under the cloak of the HRA and law of confidence.

I think these are the reasons that there has been a renewed focus on the Code and privacy recently, and why the board of the PCC – led by the lay members – last year asked the Code Committee to look at the Code again. Whether it will be possible to make any meaningful changes is another matter.

I hope you don't mind me setting out some thoughts on this subject – it is clearly developing all the time and I just wanted to make sure that you were aware of what is going on here, and what our main concerns are. As always, if you ever want to come here to see for yourself how we deal with privacy on a day to day basis then you would be very welcome.

With kind regards.

Tim Toulmin