

Media Freedom in 2010

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Foreword

By the President of the Society of Editors

IT is nearly four decades since Harold Evans made his landmark pronouncement on the UK's half free press.

Now 13 years after what promised to be a reforming, liberalising government we are forced to conclude that instead of being 50 per cent free, the UK media are now less than half free to do their job on behalf of the public and democracy.

It is simply astonishing that in the first decade of a new century and a new millennium there are now more threats to the media than when Evans called us to arms. He encouraged the former Guild of Editors, the Newspaper Society and the Newspaper Publishers Association along with many individual media companies and organisations and journalists to take the battle forward.

Since 1999 the Society of Editors has been at the spearhead, which, given its cross-media membership, is precisely where it should be.

As this brief but revealing analysis by Professor Peter Cole shows, under the guidance of my distinguished predecessors as president, its Parliamentary and Legal Committee so ably led first by Phil Harding, when he was controller of editorial policy at the BBC, and now by Robin Esser, executive managing editor of the Daily Mail, and our executive director Bob Satchwell, the society and many of its members have, with skill and determination, fought long and often exhausting battles to defend the public's right to know and freedom of expression.

Greater openness informs, involves and encourages recipients of information and promotes greater confidence in all those who can affect their lives.

Intended and welcome reforms concerning the pernicious and over-restrictive law of libel and the opening up of the Family Courts to public scrutiny were held up when Justice Secretary Jack Straw's promises were interrupted by the General Election. This document is an aide memoire to the political parties of what we shall expect of them after the election. We are entitled to ask any prospective MP how he or she views the importance of free and independent media to our democracy.

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There are too many threats to the media, sometimes unintended in poorly drafted legislation. Worse, there are far too many misguided or simply ill-informed criticisms, and denigration of self-regulation of the media industry, often from those with vested interests, which undermine both our newspapers and our broadcasters. There is still much to be done to change ambivalent attitudes to freedom of the media. A spell in Zimbabwe might open the eyes of those critics!

While the media may be imperfect, news outlets must be free, warts and all, to investigate, expose and criticise on behalf of the public.

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Editor-in-Chief, The Herald & Times Group, Glasgow

Editor-designate, the Sunday Post

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Introduction

The great Sunday Times editor Harold Evans famously, in the 1974 Granada Guildhall Lecture, described the British press as 'half free.' Giving the Index Lecture in 2002 at the Hay-on-Wye Literary Festival, he said he was amazed at his own moderation 28 years earlier: "I should have said the Risibly Half Free Press."

So where are we today? 55 per cent free? 47 per cent free? Since its creation 11 years ago as a result of the merger of the Guild of Editors and the Association of British Editors, the Society of Editors has placed great emphasis on its lobbying and campaigning role in the defence and expansion of media freedoms in Britain. Its stated mission is to work 'to protect the freedom of all sectors of the media to report on behalf of the public.' Society members share these values:

- The universal right to freedom of expression
- The importance of the vitality of the news media in a democratic society
- The promotion of press and broadcasting freedom and the public's right to know
- The commitment to high editorial standards

The society, since its inception, has grown in standing and influence. It is regularly consulted by government over policies and legislation affecting the press. It gives evidence to select committees. Its advice is sought by public bodies, from local authorities to the police and security services, from the armed services to the Royal household, from the judiciary to the Churches. It reacts to controversial issues. It works closely with media managements and regulators, with trainers and other influential campaigning groups. Its concerns are unambiguously journalistic and its annual conference is the most high profile gathering of the leading movers and shakers in the media.

While there has clearly been some progress the need for vigilance is undiminished. Freedom of Information law may have brought us the facts about the House of Lords and MPs' expenses; super injunctions and the restrictions on reporting and photography at some football grounds have had the opposite effect. Family courts are open to the media but reporting is still strictly limited and contempt orders and (over) interpretation by judges of the Human Rights Act in the area of privacy give continuing cause for concern.

It is not only legislation that affects press freedom, although for obvious reasons it is the most powerful restraint. The ever-increasing sophistication of those who seek to protect information from public scrutiny, the use of media management and spin, the denial of access to events and people all play their part. So too do economic pressures on media organisations themselves. The lack of physical capacity among newspaper staff to report courts and councils is now giving rise to the so-called 'democratic deficit'. There is no doubt that the Freedom of Information legislation has had the opposite effect, despite government attempts to weaken it. The society played a lead role in resisting that and politicians and corporations can now be made to reveal certain kinds of information. But that does not stop them developing new strategies to avoid it.

New media forms, like Facebook and Twitter, once ignored or scorned by professional journalists, are now, used in the right way, excellent and valid reporting tools, which broaden traditional ideas of sources. Likewise, the digital camera buried in the mobile phone. They played a great part in piecing together the causes and detail of the G20 demonstration death and play an increasing role in everyday reporting across the media.

There is one further vital component in the media freedom debate which is the public. The public, our audiences, hold the media, like politicians, in low regard and cannot be relied

upon to support all media freedoms. To them the privacy debate is not an open and shut case. They do not always accept the thin end of the wedge argument, and are often suspicious of the po-faced 'public interest' justification for stories about the sexual shenanigans of celebrities. And the renewed attacks on self-regulation as provided by the Press Complaints Commission find widespread, if sometimes ill-informed support.

So where are we? The society, mainly through its Parliamentary and Legal Committee, works continuously to monitor developments and to seek to exert influence where it is needed to defend media freedom. Phil Harding, a former chair of the P&L committee, quoted, in his annual report for 2000, John Philpot Curran writing in 1798 that "the condition upon which God hath given liberty to man is eternal vigilance." More recently the current chair, Robin Esser, said in his 2007 report: "Just when you thought it might be safe to relax, up pops another threat to the freedom of the media which stands at the heart of modern democracy – and is such a pain to those who rule over us."

Threats to media freedom do not go away. What follows is an audit of the current situation, of the state we are in. It summarises developments in a range of areas affecting the public's right to know. We intend to produce such a review on a regular basis.

Executive summary

Two prime ministers, Tony Blair and Gordon Brown, over the three terms of Labour government, have claimed commitment to media freedom. Blair, before his first election victory in 1997, suggested Freedom of Information legislation was of the utmost constitutional importance. It was less so when he was in office; other priorities, FoI reservations and government secrecy proved more important than open government.

One of Gordon Brown's first major speeches when he became prime minister in 2007 was about liberty. He seemed to get off to a good start, rescinding plans to limit media coverage of coroners' courts, but the threat of orders to allow material to be withheld from inquests and then publication banned, remains. He also dumped plans to increase the cost of FoI applications and set out his vision of the importance of media freedom to his liberty agenda.

"There is a case," said Brown, "for applying our enduring ideas of liberty to ensure that the laws governing the press in this country fully respect freedom of speech. The key is to achieve the right balance between freedom of the press, the protection of individual privacy, and public safety and security - and I now believe there is more we can do to ensure that freedom of expression and legitimate journalism are protected.

"We agree with the Select Committee on Culture that a free press is the hallmark of our democracy, that there is no case for statutory regulation of the press, that self-regulation of the press should be maintained and that it is for the publishers themselves to demonstrate by their decisions that they can sustain and bolster public confidence in the way information is gathered and used.

"But for our part - and to make sure that in pursuing essential policy objectives like combating terrorism and tackling hate crime any new measures do not curb legitimate liberties to speak and be heard - Jack Straw, the Secretary of State for Justice, will investigate the idea of a freedom of expression audit for future legislation."

Jack Straw is presumably still investigating, since there has been no 'freedom of expression audit', which is surprising because it was Straw, when Home Secretary, who said he would implement the Newspaper Society proposal for a freedom of expression audit.

Gordon Brown has had much on his mind, but libel and opening up the family courts to the media have fallen victim to running out of Parliamentary time - 13 years. Over that timescale FoI is barely out of nappies, the ability to jail a journalist for a data protection crime is not only on the statute book but its implementation is again under consideration.

And the tension between privacy and freedom of expression remains not only unresolved but left to the judges. Libel costs favour the very rich, who are encouraged to gamble (with lawyers running the casino), and overseas litigants who could never bring a case except in Britain. The very rich, corporately and personally, can seek and obtain super injunctions which are so secret they cannot be mentioned by the media.

There remains room for much progress – a 45 per cent free press?

Ten questions to ask Parliamentary candidates

- 1. Are freedom of expression and free and independent media vital to a free and democratic society?**
- 2. Should that principle be enshrined in any new Bill of Rights or other constitutional legislation?**
- 3. Do you accept that the media played an important democratic role in revealing the problems of Parliamentary expenses which will, in the long term, improve respect for politicians?**
- 4. Should the media be encouraged to investigate wrongdoing rather than be hindered in its work?**
- 5. Should there be root and branch reform of the laws of libel which have remained largely unchanged for more than a century?**
- 6. Should lawyers in no-win-no-fee cases be allowed to double their fees and in effect make 130 per cent profits?**
- 7. Should government and organisations acting on behalf of the public and spending public money be required, through the strengthening of the Freedom of Information Act, to be open about their work, releasing information to the media and the public unless there is an extremely good reason for keeping it confidential?**
- 8. Should the media be encouraged and allowed by law to properly report family courts in order to promote public confidence in the judicial system?**
- 9. Should government, recognising the public interest in vibrant, free and independent media, find ways of freeing media organisations from unnecessary bureaucratic controls and economic pressures that threaten their viability?**
- 10. Should regulation of the press remain independent of government and the law and should regulation of broadcasting be relaxed to reflect the expansion of channels and global competition from digital media?**

Barriers to media freedom

Freedom of Information

On the face of it the Freedom of Information Act should represent a major advance in media freedom. Tony Blair called it the ‘cornerstone of constitutional reform’ but sadly delayed the introduction of the vital building block for nearly eight years after he was elected. There is no doubt that it has been helpful in forcing national and local government and many public bodies out of their obsessive secrecy, and produced much media disclosure of facts and figures informing decisions affecting the public which they have a right to know. But for all the proud boasts of Blair there has been a marked lack of enthusiasm for disclosure from those forced to disclose. Too much procrastination. Too many attempts to delay or deny provision of information reasonably requested. Too many excuses of cost and time. Too many spurious excuses for not revealing.

Paul Dacre, editor-in-chief of the Daily Mail group, in his Society of Editors Lecture in 2008, recalled a dinner he had attended with Prime Minister Gordon Brown, at which he had drawn attention to the deep concern in the newspaper industry over the number of very serious threats to its freedoms it was facing. First was that the Freedom of Information Act – one of the few legislative bills to benefit the media – was in danger of being neutered by plans to deny FoI requests on grounds of cost. The society’s Parliamentary and Legal Committee, in its 2007 report, remarked: “No sooner do we see a Freedom of Information Act on the statute book than the very government that brought it in advanced proposals for severe restrictions and a Parliamentary exemption which would effectively remove its teeth.” It was forced to think again. Just this year four new bodies have been added to those to whom the FoI act applies: the Association of Chief Police Officers (ACPO), the Financial Ombudsman Service (FOS), the Universities and Colleges Admissions Service (UCAS) and Academy Trusts – the bodies responsible for Academy Schools

Too often FoI still seems, in the eyes of politicians and civil servants, something that should be fought rather than a welcome component of open government. But pressure has been maintained, reminding public bodies of the clear benefits in terms of public confidence and understanding. The recognition, with a special British Press Award, for that tireless FoI campaigner Heather Brooke – who fought for years for the disclosure of MPs’ expenses – was well deserved. Maurice Frankel, director of the Campaign for Freedom of Information is another who has played a crucial role.

Such major stories as the expenses scandal rightly dominate the headlines, but all over the country journalists are constantly irritating local authorities with their FoI requests and unearthing information seldom to the credit of the bodies forced to reveal it.

A selection of stories, national and local, published in February 2010 illustrates the positive impact of FoI:

[Regulator slammed over GCSE marking](#) - Press Association 28/02/10

“GCSE science pupils may have missed out on top grades after the exam regulator made a late change to marking boundaries to avoid a row over grade inflation, it has emerged. Documents released under the Freedom of Information Act reveal that last summer Ofqual, the independent body set up by Schools Secretary Ed Balls, was given predictions of a big jump in science results. On August 10, just two days before the grades were finalised, Ofqual chief executive Isabel Nisbet wrote to exam board officials saying the increases would be ‘difficult for the regulators to justify and for all of us to defend’. It was agreed that the

independent awarding bodies that set and mark papers should ‘change their grade boundaries in order to improve the national position’.”

University buildings 'unfit for purpose', database reveals - Building Design 16/02/10

“University buildings across the country were condemned as ‘unfit for purpose’ or ‘at serious risk of major failure’ in a secret database obtained by the Guardian newspaper. The database was compiled two years ago by the Higher Education Funding Council for England to allow universities to compare the quality of their estates with their rivals. The Guardian, which revealed its findings today, spent two years fighting for access to the report using Freedom of Information legislation.”

Cops swell DNA database by 56k in three years - Daily Gazette 01/02/10

“Essex Police have taken DNA samples from more than 56,000 people in three years, newly released figures show. The force collected DNA from 17,592 last year, down from 18,432 in 2008 and the 20,015 samples taken in 2007. The figures only emerged after new Chief Constable Jim Barker-McCardle overturned a decision to block a Freedom of Information Act request. Essex Police was one of three forces in England and Wales that refused to answer the request, leading to Mr Barker-McCardle apologising last month. He said that while staff had been right to refuse the request because of the number of hours it would take to respond, the sensitivity of the subject meant he would like the information to be released.”

In another move towards more openness, the government approved proposals during the Parliamentary wash-up to reduce the 30-year rule covering the release of public records to 20 years. A review committee chaired by Paul Dacre had recommended a reduction to 15 years. The government dropped a proposal to exempt cabinet papers from the rule but created a new exemption for the monarch, heir to the throne and second in line to the throne. Information about any of them could not be released until five years after their death.

The introduction to the government’s announcement that it was supporting a new 20-year-rule contained this statement (refreshing in the light of some of its earlier attempts to limit the scope of FoI):

“This Government is committed to openness and transparency in public affairs as enhancing good governance. Since the Freedom of Information Act came into force on 1 January 2005, the right to access information has become a cornerstone of our democracy. When the public can access as much public information as possible society benefits from a wider range of contributions to public debate; public authorities are held to account by those they serve; and the way Government has handled recent events can be analysed better.”

Court reporting: Restrictions on reporting

Repeated attempts are made by lawyers to restrict the media from reporting certain court proceedings, and these have often led to judges making orders forbidding coverage but the threat remains of directions to exclude press and public from inquests and to allow names and other material to be withheld from inquests and then publication banned.

Many of these cases occur in provincial crown courts and magistrates’ courts where justice should be ‘seen to be done’. It is often through the brave efforts of reporters in court – many of them young and vulnerable to the intimidating atmosphere of a courtroom – that these reporting restrictions have been challenged. It requires the confidence brought by knowledge of media law and the support of legal advisors to the newspaper or broadcast organisation represented. Regular reporting of these successful challenges has so far been the most effective form of campaigning against these restrictions on media freedom.

Greater openness has been achieved by the Society of Editors and the Newspaper Society as a result of work with the Judicial Studies Board over the last decade. It has been encouraged by Lord Judge, now the Lord Chief Justice, and led to the publication of joint Society of Editors, Newspaper Society and Judicial Studies Board guidelines on reporting restrictions for the judiciary, magistrates and media alike. In an introduction to these guidelines, available on the website of the Society of Editors, Newspaper Society and Judicial Studies Board, Lord Judge wrote: “A new edition of the guidance was required, not least because (it) would have a beneficial impact generally on the open operation of the criminal justice system, principles which can bear endless repetition. Our objective was to ensure that those with a professional interest in the making of orders restricting reports of legal proceedings should have access to a modern, practical guide.” This has reduced the number of orders restricting publication of court proceedings and more importantly changed the culture of the courtroom, giving more confidence to reporters to speak up in court rather than delay while an expensive QC was called in. A ‘stop and think’ checklist of points to consider before making a reporting restriction was also designed and included in Bench Books. This checklist includes another example of successful co-operation: in the Instructions to Prosecution Advocates, the Director of Public Prosecutions has highlighted the role of the prosecution in respect of safeguarding open justice, including opposing reporting restriction applications, where appropriate.

Successive DPPs have also encouraged greater openness through a protocol negotiated by the society and other media organisations on the release of information from the courts. This has resulted in broadcast and online media providing details to the public just hours after juries have heard them. Still better, the DPP, the Crown Prosecution Service, the police and the courts recognise the resulting benefits of greater public confidence in the judicial process.

Examples of successful challenges were provided by the Press Association’s legal editor Mike Dodd, who has been personally responsible for many.

- The decision by Mr Justice McFarlane in December 2009 to reject a request by a woman seeking a divorce that the entire case should be held in private with the media excluded because she did not want to face the “scurrilous allegations” she claimed her husband would make. She would drop the divorce rather than face the publicity, she claimed. The woman was represented by a QC, and the media by Dodd who argued that it was contrary to the principle of open justice, that such hearings were normally held in public, and that they were already covered by reporting restrictions.
- The case of Damian Pearl, a teenager banned from driving who took a car, drove the wrong way down a dual carriageway and caused a young man and his pregnant girlfriend in an oncoming car to swerve and crash into a pursuing police car. The young woman lost the baby she was carrying. PA helped persuade the Youth Court to lift the automatic anonymity on Pearl, but his family took the case to Judicial Review, claiming the magistrates were wrong. The High Court agreed that the youth could be named.
- The case in which lawyers for a local authority claimed – wrongly – that an injunction they had obtained from the High Court Family Division meant that the media could not name a father accused of murdering his wife in reports of his trial at the Old Bailey. Dodd challenged the claim and alerted the national press to the difficulties the authority was causing. The President of the Family Division ruled that the local authority’s view was incorrect.

Court reporting: Family Courts

After many years of lobbying and campaigning by the Times and the Society of Editors and Newspaper Society, the Justice Secretary, Jack Straw, decided to allow the media into the Family Courts. The 'Baby P' case and other high profile cases, including some where parents were challenging the courts' decision to put their children into care had caused huge public concern over the role and behaviour of social services and other public bodies. Media access to the courts was a step towards greater openness in all courts, Straw said. It was critical that the public had trust in the system, and that required an understanding of how it worked. At the same time the privacy of children and families involved in family court cases had to be protected so they were not identified or stigmatised by their community of friends. Media access to the courts began in April 2009, but existing reporting restrictions applying to the family courts remain in place.

Little changed. Reporting continues to be restricted by statute or banned by judges. Mr Justice McFarlane, a high court judge in the family division, said that journalists who were now able to attend family courts were able to become informed so that they could discuss how the system worked in a more informed way. The reporting would be about system, not about substance. Very few journalists took advantage of their new right to attend family courts because their ability to report them was so constrained.

This year there have been further attempts at reform, contained in legislation to allow greater freedom to report family courts, whilst preserving anonymity of those involved. But resistance to the reforms promoted by Jack Straw faced further widespread opposition from judges, charities, local authorities and the children's courts service, who were against the right to report the contents of important documents and evidence from psychiatrists and other expert witnesses. Opponents successfully resisted any suggestion that media reports should be able to identify professionals involved in a case, such as social workers or local authority officials. There has never been any intention to alter restrictions preserving the anonymity of children and their families. These restrictions are similar to those studiously observed by the media in rape cases.

The reforming intentions of the Justice Secretary were thwarted. He was forced to delay many of his proposed reforms, at the expense of greater transparency and public scrutiny of cases which had resulted in tragic consequences. Straw accepted a two stage approach so that he could get the Children, Schools and Families Bill into law. In the event, the calling of the General Election intervened, and in the bargaining over which bills would get through on the last two days of the old Parliament it was a weakened bill with clauses affecting coverage of the family courts which made the statute book.

Court reporting: Super injunctions

The threat to investigative journalism posed by the use of so-called 'super injunctions' has gained considerable publicity in recent months. Subjects of investigations have always sought injunctions to delay or prevent publication of material they wish to keep out of the public domain, and the media has been able to publish the existence of such injunctions. The super injunction goes a step further, in that it bans any public mention of the fact that the injunction exists or who sought it. They are not new, having been used in the past primarily in family cases. The super injunction is a gag on the media granted by lawyers. Chelsea footballer John Terry got one to try to prevent News of the World publication of details of his non-footballing activities but it was overturned in the High Court by Mr Justice Tugendhat. Tom Crone, the News of the World's legal manager described the Tugendhat decision as "a breath of fresh air and commonsense coming out of the privacy courts".

More significant in terms of investigative journalism was the Trafigura and the Guardian case. The Guardian was prevented from publication of its information by a super injunction, and from mentioning its existence. The lawyers who gained the super injunction, then tried to use it to prevent reporting of a Commons question on the case. This leaked through the medium of Twitter and the balloon went up. Lord Judge, the Lord Chief Justice, joined in the furore, saying that it was a “fundamental principle” that MPs should be able to speak freely in Parliament. Stressing that he was expressing a personal view, the judge said that he simply could not envisage that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament, or that any judge would intentionally formulate an injunction which would purport to have that effect.

The injunction was lifted but we need to maintain vigilance and campaigning with the aim of securing the principle of no prior restraint that is fundamental to media freedom.

Democratic deficit

One of the most significant threats to media freedom, to the public’s right to know, is not the result of legislation or regulation but of recession and economic decline. The crisis of advertising and circulation decline in the print media particularly, of advertising and audience decline in commercial broadcasting and of enforced cuts in the BBC, all contribute to what has been called the democratic deficit. The regional and local press has experienced this worst with newspaper closures and reductions in editorial staffs as a consequence of declining revenues. Justice cannot be seen to be done if the press benches in courts are empty. Scrutiny of local government does not exist when town hall press benches are empty.

This democratic deficit is now widely recognised but there is little action, if that is possible, to redress it. There are suggestions of public funding for local media; the Press Association has initiated what it calls a Public Service Reporting Project where it would organise a pilot for court and council coverage with reports available freely to anyone who would wish to publish them; local websites and new free newspapers have emerged; new local broadcasting franchises are being set up and bid for. But the PA project is finding it hard to secure funding and the other projects are more discussed than implemented. Meanwhile local communities, towns and cities are under-reported and the public service role of the local and regional media, to hold those in power to account and to represent those over whom power is exercised, is left wanting.

Adding to the concern is the emergence of a number of council - funded newspapers, supported by council tax revenue and purporting to fill the gap left by traditional local newspaper coverage. MPs and editors have called for an investigation into these council newspapers which they say threaten the survival of independent local media and undermine democracy. The Culture, Media and Sport Select Committee said some town hall funded freesheets failed to make clear they were council publications and some showed evidence of political bias.

Committee chairman John Whittingdale said: "While it is important that local authorities communicate with their citizens, it is unacceptable that councils can set up publications in direct competition to local newspapers and that act as a vehicle for political propaganda." The Society of Editors, which helped bring the issue to the committee's attention, described such newspapers as an "insult to democracy". The papers misled the public by posing as independent media, and also damaged commercial counterparts by encroaching upon their advertising territory.

Plans for new broadcasting models for local and regional news, known as independently funded news consortiums (IFNCs), have been put on hold by the election. Three pilot schemes were being set up – in Scotland, Wales and the north-east of England, and

consortiums had been formed to tender for the pilot franchises. But the General Election has put a stop to progress, with contracts unable to be signed and the plans on hold until after the election. Labour would have to introduce new legislation. The Conservatives have said they see no benefit in the IFNC plan and have instead proposed the introduction of a series of city-based TV stations which would be privately funded with the aid of proposed relaxation of cross-media ownership. It seems unlikely that any initiative to combat the democratic deficit will be available in the near future.

Data Protection

Paul Dacre, in his 2008 Society of Editors lecture, represented the concerns of journalists in general and editors in particular over Section 55 of the Data Protection Act and the threat of up to two years in jail for those found to have contravened the act. Jail sentences were utterly disproportionate, said Dacre, and “the threat of prison would have a hugely damaging effect on investigative journalism”. The then information commissioner, Richard Thomas, and his successor, Christopher Graham, have both defended the ‘deterrent’ of jail sentences, which were called for by the Commons Culture, Media and Sport Select Committee in 2007.

The jail deterrent cannot be introduced unless there is clear new evidence of need. The Society of Editors has resisted this, saying that although there had been abuses, particularly by inquiry agents paid for by newspapers, there is no new evidence of a continuing problem in journalism. The threat would deter investigations in the public interest and there are adequate deterrents in the form of unlimited fines. There is also a wealth of existing legal sanctions including custodial sentences.

The society also continues to campaign for an enhanced public interest defence in the DPA that would protect journalists if they had a reasonable belief that such inquiry was in the public interest. This was promised as an urgent reform but has not been implemented.

Libel

Editors, publishers, senior judges, government, many politicians, even some libel lawyers, agree that action is needed on libel costs, particularly in the area of conditional fee agreements (CFAs), commonly known as ‘no win, no fee’. Campaigning groups like Index on Censorship, PEN, the writers group, Sense About Science, and the Society of Editors have fought for change, and they had a champion in the Justice Secretary Jack Straw. Sadly he was thwarted at the last hurdle by ill - informed Parliamentarians when he tried to introduce a reduction of CFA success fees just as Parliament was dissolved.

CFAs have allowed lawyers reaching such agreements to charge 100 per cent ‘success fees’ when they win cases on behalf of libel claimants. They are, of course, very selective of cases they are prepared to bring on the CFA basis. Jack Straw, in bringing to Parliament a statutory instrument reducing the maximum success fee allowed from 100 per cent of costs to 10 per cent (in line with the recommendation of the Commons Culture, Media and Sport Select Committee), said: “Reducing the success fees charged by lawyers in no win, no fee defamation cases will help level the playing field so that scientists, journalists and writers can continue to publish articles which are in the public interest without incurring such disproportionate legal bills. This is particularly important for ensuring open scientific exchange and protecting the future of our regional media, who have small budgets but play a large role in our democracy”.

Editors have provided detailed evidence that CFAs inhibit investigative journalism and deter publication of thoroughly researched stories where legal action may follow. They have led to Britain becoming the ‘libel capital of the world’ with, for example, a wealthy Saudi

businessman successfully suing in London an American academic whose book on funding terrorism had sold just 23 copies in Britain.

The new Parliament will face a growing campaign for root and branch reform of libel laws – to which all three major parties say they are committed - and changes in the costs regime recommended by Lord Justice Jackson. The campaign has attracted wide cross - party support because this is not an issue for the media alone. Scientific and academic debate is also being stifled. The problem is that the chilling effect of high CFA fees and the 130 per cent profits earned by claimant lawyers exists now. Action is overdue and cannot await the inevitable long drawn out debates on libel reform and the Jackson report when the new Parliament gathers. But it will have to.

Human Rights Act and privacy

The embedding of the European Convention on Human Rights into UK law through the Human Rights Act has caused great concern to journalists and editors as it has fallen to judges to interpret the conflicting clauses of the act which cover, on the one hand, the right to freedom of expression and, on the other, the right to privacy. While government has, over the years, resisted legislating in the area of privacy, the passing of the human rights law meant, in the view of some, back door legislation by judges.

This was another theme of the Mail's editor Paul Dacre in his 2008 Society of Editors lecture. Dacre, as have many senior journalists worried about privacy law encroachment through the courts, focused on Mr Justice David Eady, who hears many of these controversial cases. The most notorious of recent times was the case brought against the News of the World by Max Mosley, the former head of motor racing's governing body. The newspaper had exposed his participation in a paid-for orgy, alleging Nazi undertones. In his judgment Mr Justice Eady said there was no evidence to support claims that the incident 'was intended to be an enactment of Nazi behaviour or adoption of any of its attitudes. Nor was it in fact.' Eady found for Mosley on grounds of privacy.

But the concern is not over. Mosley is taking the battle to the European Court of Human Rights asking for a legal instruction to the media to give prior warning if they intend to publish private information. This could be a further disincentive to journalistic investigation. While it is of course good practice for journalists to seek comment in advance of publication too often it would lead to injunctions that would in effect scupper legitimate inquiry in the public interest.

The case for a privacy law is that what consenting adults do in private is their own business and their privacy is invaded if newspapers report their behaviour. Some newspapers regularly report 'private' behaviour, usually in the area of public figures and their marital transgressions or drug taking, usually arguing that the 'public interest' justification is that the well-known public figure is a 'role model', or in the case of politicians that the activity is inconsistent with their public pronouncements. The case against is the 'thin end of the wedge' argument, that if public figures can claim privacy over their private morality it inhibits investigation of financial corruption and other serious issues.

Some members of the public express their distaste for the more salacious content of Britain's best selling newspapers, even speaking up for privacy law, while failing to recognise the implicit contradiction in that position. What should be less contentious is the media's argument that if there is to be privacy law then it should be debated publicly and passed in Parliament, not operated on an ad hoc basis by judges through another Act of Parliament which was never intended to deal with the privacy issue. Some recent judgements have clouded the issue.

PCC

The Press Complaints Commission, the self-regulatory body set up by the newspaper industry to provide fast and free mediation between complainants against the press and the publishers of material allegedly infringing the editors' code of practice, has always had its critics. The critics are probably noisier now than they have ever been, and include politicians, the public, media commentators and, indeed, some editors. The PCC is accused variously of favouring the newspaper industry, which funds it, of supporting the 'establishment', particularly the Royal family, of not being proactive in the sense of investigating possible breaches of the code, and of being out of tune with a public which is largely critical of press standards.

The Commons Culture, Media and Sport Select Committee, in its recent wide ranging report, gave much consideration to the future of the PCC. Having praised the PCC for 'much good work both in preventing breaches of the code through dialogue with newspapers before stories are published and resolving complaints after publication', the committee's report criticised the PCC for its 'inability to impose any kind of penalty when a breach of the code does occur.' It believes the PCC should have the ability to impose a financial penalty. It also recommended that it should be renamed the Press Complaints and Standards Commission, to underline that as well as being a complaints handling body it had responsibility for upholding press standards generally. The PCC, said the committee, had some way to go in ensuring the public had confidence in the press.

The commons select committee paid special attention to the coverage of the McCann abduction and Bridgend suicide cases, as well as the Max Moseley criticism of the PCC. It recommended that the membership of the commission – now seven industry and ten lay members - should be 'rebalanced' to enhance its credibility. It called for a two thirds majority of lay members, and for the Editors' Code Committee, which is separate from the PCC, to contain lay members, one of whom should be chairman of the committee.

Most controversial was a suggestion that the PCC should be able to suspend publication of a newspaper. This was condemned by the Society of Editors as a form of censorship practised by totalitarian regimes which should have no place in a democracy where, as the select committee insisted, free and independent media had such an important role.

Under its new chair, Baroness Peta Buscombe, the PCC is carrying out an independent review of its governance, but there is little doubt that implementation of all the select committee's recommendations will encounter resistance from wide sections of the industry. There is a belief within the media that much has been achieved, against the odds, by the PCC in improving press standards, that expensive libel cases have been avoided through mediation, that the record of resolution of complaints is a good one, and that self-regulation has kept statutory regulation, particularly in the area of privacy, at bay. The PCC itself has sent a holding letter to the select committee, reserving detailed response until it receives the governance review later this year.

Freedom of the media scorecard

So, is the media getting freer or less free? Media freedom measure 1 to 10, where 1 represents moving backwards and 10 major freedom progress.

Freedom of information: significant progress, despite institutional foot-dragging and the government's failure to designate more organisations performing public functions to fall within its scope. 7

Court reporting restrictions: welcome change of culture; fewer restrictions; increasing number of media challenges, often successful. 8

Family courts: reforms made little difference. Media access a gain. Restrictions on what can be reported too severe. Accountability of experts still minimal. Further reforms lost to election. 2

Super injunctions: real obstacle to legitimate investigative reporting. 2

Democratic deficit: public watchdog role requires well resourced regional media, independent of the bodies scrutinised. Measures to ameliorate effect of recession, including controls to prevent undermining of independent press by council run 'newspapers', lost to election. 2

Data protection: the law still allows for jailing of journalists, even if it has not yet been brought into force. 1

Libel: great strength of feeling about CFAs but left so late in Parliament that reform fell, thanks to ill-informed or misguided MPs opposing change. Major parties say they will bring back reforms if they win the election. But how long will that take? 1

Human rights/Privacy: concern over judicial interpretation of Human Rights Act in freedom of expression versus privacy has not diminished. 2

PCC: independence from political interference remains important but there are signs that politicians are sending more signals of seeking change. They are not alone; the PCC is under attack, even from some stakeholders. Self-regulation must be defended but that may require modifications from the PCC and editors. Too much has been achieved to allow it to be undermined. 3

The Society of Editors was formed by a merger of the Guild of Editors and the Association of British Editors in April 1999.

It has more than 400 members made up of editors, managing editors, editorial directors, training editors, editors-in-chief and deputy editors in national, regional and local newspapers, magazines, radio, television and online media, media lawyers and academics in journalism education.

They are as different as the publications, programmes and websites they create and the communities and audiences they serve.

But they share the values that matter:

- The universal right to freedom of expression
- The importance of the vitality of the news media in a democratic society
- The promotion of press and broadcasting freedom and the public's right to know
- The commitment to high editorial standards

These values give the society the integrity and authority to influence debate on press and broadcasting freedom, ethics and the culture and business of news media.

**To keep up to date with the society's work visit our website
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