

## **The Emperor's New Clothes – IPSO's New Version of the Editors' Code of Practice**

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On January 1<sup>st</sup> 2016, the transition from the PCC<sup>1</sup> to IPSO<sup>2</sup> was made word with the introduction of the new Editors' Code of Practice ("the Code"), the result of the work of the new Code of Practice Committee, which as part of the post-Leveson era saw an increase in the number of lay members. The Code sits uncomfortably as a cross between a statement of the spirit of press reporting and also as quasi-legislative authority, relied on by the Courts in cases of defamation, data protection and privacy amongst others<sup>3</sup>. With the publication of the new Code, is this a brave new world of regulation or simply "plus ça change"?

### Introduction

The first iteration of the Code was published in 1991 to coincide with the formation of the PCC. It has gone through several drafts over the years to reflect changing standards in the UK Press, and also to reflect the impact of complaints, concerns and changes in law. From 2004, the Code was considered annually and tinkered with.

The Code has been a mixture of a statement of ethical standards to be adhered to and also the basis for complaints to and adjudications by the PCC (and subsequently by IPSO). The Code was always said to be adhered to both in letter and in spirit. Previously, the Code had been supported by guidance from the PCC as well as from decisions on complaints published by the PCC. The new Code is supported by neither.

In recent years, judicial attention has focussed on the Code as a basis for looking at the balance between freedom of expression and the right to private life. For example, in *Murray*<sup>4</sup>, the Court of Appeal was influenced in their interpretation of the Code in finding an expectation of privacy for the son of JK Rowling. For the purpose of s12 of the Human Rights Act 1998, the Code has been held to be a "relevant privacy code"<sup>5</sup>. Although not specifically referred to in *Jameel*<sup>6</sup>, the concept of editorial decision making and responsible journalism referred to by the House of Lords in redefining the "Reynolds Privilege" defence clearly had its roots in the Code and its adherence.

However, with the problems in the standards and ethics of the press that led to the Leveson Inquiry, the subsequent dismantling of the PCC, the formation of independent press regulators and the much trumpeted rebalancing of Code of Practice Committee (10 editors to 5 lay members, 2 ex-officio), it might have been expected that the new version of the Code might have seen some major revisions. Those hoping for a new dawn will be severely disappointed.

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<sup>1</sup> Press Complaints Commission

<sup>2</sup> The Independent Press Standards Organisation

<sup>3</sup> See for example mentioned in passing in *Tim Yeo v Times Newspapers Limited* [2015] EWHC 3375 (QB)

<sup>4</sup> *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446, [2009] Ch. 481

<sup>5</sup> See for example *Re A (A Child) (Application for Reporting Restrictions)* [2011] EWHC 1764 (Fam); [2012] 1 F.L.R. 239

<sup>6</sup> *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 A.C. 359

In Part K of the Leveson Report<sup>7</sup>, Leveson at paras 4.18 – 4.24 commented specifically on the Code and the responsibility for amending it.

“The Code will be the document that articulates the nature of the boundaries between journalism, its subjects and its readers. As such it is essential that it fully reflects the interests of all three<sup>8</sup>.”

Leveson also recommended that there was a public consultation on the Code. At recommendation 36 in the Executive Summary, he stated: “A regulatory body should consider engaging in an early thorough review of the Code (on which the public should be engaged and consulted) with the aim of developing a clearer statement of the standards expected of editors and journalists.”

The Code of Practice Committee held a consultation, the results of which were not promulgated, and in which the National Union of Journalists refused to participate. This consultation was held before the lay members were appointed to the Committee and was, according to the minutes of the two meetings of the committee in early 2014<sup>9</sup>, “discussed broadly”. In the first meeting to discuss the new Code, Paul Dacre, chair of the Committee, was reported to have summarised that the Code had “largely escaped criticism in the Leveson Report”<sup>10</sup>. This can be seen as significant gloss on recommendation 36. The Code was agreed at a meeting in September 2015, at which one of the three lay members was not present. The minutes do not make it clear as to what discussions there were and which (if any) amendments were not incorporated.

## Overview

The introduction to the Code makes it clear that IPSO, as Regulator, is charged with enforcing the Code, which is enshrined in a contractual agreement between IPSO and newspaper, magazine and electronic news publishers. As Leveson concluded “(i)t is abundantly clear from the evidence before the Inquiry that the PCC was not a regulator as that term is commonly understood”<sup>11</sup>, this introduction shows a change of focus from primarily complaints handling to actually setting standards. IPSO is charged with monitoring and maintaining press standards.

However, the Code at first sight looks very similar to the previous version with a preamble, 16 headed clauses and a definition of the Public Interest. Handily, it still comes printable on one page of paper, hopefully to be tacked up in physical and virtual newsrooms up and down the land.

A closer look reveals that the Code’s introduction is referred to as “Preamble” now; that the Clause previously entitled “Opportunity To Reply” has gone, whilst a new headed clause entitled “Reporting Suicide” has taken its place. All other clauses have the same headings as the previous version (effective from 8<sup>th</sup> September 2014). If Leveson were to have been the pre-cursor to a root and branch re-evaluation of press standards, the Code of Practice Committee has firmly put paid to that aspiration.

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<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270943/0780\\_iv.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270943/0780_iv.pdf)

<sup>8</sup> At para 4.23

<sup>9</sup> <http://www.editorcode.org.uk/downloads/minutes/code-committee-minutes-may-2014.pdf>

<sup>10</sup> <http://www.editorcode.org.uk/downloads/minutes/final-minutes-may-2015.pdf>

<sup>11</sup> [http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780\\_iv.pdf](http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_iv.pdf) part J, chapter 4 para 5.2

## Preamble

The Code preamble changes emphasis initially slightly. Whereas before the Code proclaimed “(a)ll members of the press have a duty to maintain the highest professional standards”, the new preamble sets out:-

“(t)he Code – including this preamble and the public interest exceptions below – sets the framework for the highest professional standards that members of the press subscribing to the Independent Press Standards Organisation have undertaken to maintain”.

With IPSO operating on an opt-in basis, alternative Regulator IMPRESS seeking a Royal Charter, and certain news outlets<sup>12</sup> opting to regulate themselves, this represents a watering down of the reach of the Code. With judicial backing having been given to the Code previously, it remains open for there to be alternative standards applying in cases involving non-IPSO publications, who may maintain adherence to a previous version of the Code or to any alternative put forward by IMPRESS or the publications themselves.

The preamble also removes the word “ethical” in connection to these standards, leaving the adjective “professional” to cover this aspect of media regulation and self-regulation. This could be interpreted as a rejection to the Leveson focus (at Part F para 2.8 of the Report) which sought to look into “foster(ing) a free press which has integrity as well as ethical standards: indeed, the highest ethical and professional standards.” An express rejection of ethical standards must be seen as retrograde and deliberate.

The preamble isn’t so shy when coming to set out its view of freedom of expression, when looking at interpretation of the Code and balancing the rights of the individual and the rights of freedom of expression. The preamble nails it colours to the mast, referring to the right as “the *fundamental*<sup>13</sup> right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain”. It is often the satirical and the shocking that attract the greatest number of complaints – IPSO received over 250 complaints about a Steve Bell cartoon in The Guardian, a newspaper not regulated by IPSO, whilst the newspaper itself received over 300 complaints. This represents a significant gloss on Article 10 of Schedule 1 of the Human Rights Act 1998 and it is hard to see how a freedom at large to shock, be satirical and entertain can be said to be so fundamental that it presumably justifies outweighing the rights of the individual’s reputation. This is in conflict with the approach of the Courts in misuse of private information cases, where the Court conducts an “ultimate balancing test”<sup>14</sup> between the rights under Articles 10 and 8 of Schedule 1 of the Human Rights Act 1998.

The status of the Code remains unclear. For those opting in to IPSO, the spirit and the letter of the Code is to be adhered to. For IPSO, this would seem to suggest that the Code represents a statement of outcomes and also a set of rules to be followed. As IPSO can depart from previous PCC guidance and previous decisions, there is no surprise that there is a state of uncertainty for Editors. For those

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<sup>12</sup> Notably the Guardian and Observer, Financial Times, Evening Standard and Independent titles

<sup>13</sup> Emphasis added by author

<sup>14</sup> See for example in Re. S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593

who have chosen to remain outside IPSO, does the Code represent a current statement of standards generally? It is hardly surprising the Code shows so little fundamental change.

### Opportunity to Reply

In the previous version of the Code, Clause 2 set out an opportunity to reply, post-publication. In the new version, the opportunity to reply has been moved from having the importance of a Clause by itself and been allocated sub-Clause 1(iii) in the Clause headed “Accuracy”. In itself this may seem insignificant, but it may be indicative as to how IPSO sees the “right of reply” or lack thereof.

Two small changes show the new Code waters down this opportunity for (post-publication) reply. First, the new code limits opportunities to reply to “significant inaccuracies” as opposed to all inaccuracies as previously, neither defining what a significant inaccuracy may be, nor who should define what makes an inaccuracy significant – Editor or complainant. Clause 1(ii) maintains an obligation on the Press to publish prompt corrections to significant inaccuracies post-publication.

The decision of the PCC in *Samir El-Atar v Evening Standard* (Report 72, 2005) illustrated when an inaccuracy was deemed insignificant by the Editor and therefore lay uncorrected, following a story linking a bookshop to selling allegedly extremist literature and DVDs. The consequences proved serious for those working in the bookshop. Having the determinant of significance as a potential issue again waters down the potential protection for the public.

The second change is that whereas the opportunity to reply “must” be given when reasonably called for in the previous version of the Code, in the new version it now only “should” be given. Far from there being any form of post-publication right of reply, the opportunity to reply now has extra hurdles for any complainant.

### Accuracy

Clause 1 of the Code remains concerned with Accuracy and remains largely unaltered. A welcome note in Clause 1(i) specifies that care should be taken to avoid inaccuracies, misleading or distorted information in “headlines not supported by the text”. Tabloid splashes and magazine coverlines make an impact on the casual reader, designed to hook them in to read the story. However, the PCC had previously censured papers for a number of stories where claims made in headlines did not bear out the content<sup>15</sup>. In *Charleston v News Group Newspapers Ltd*<sup>16</sup>, a defamation case, Lord Nicholls sounded a warning:-

“This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element in which is the lay-out of the article. Those who

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<sup>15</sup> Such as the Peaches Geldof story alleging she charged money to spend a night with her, which transpired was a claim that she charged to attend A-list parties, which in actuality was that she charge to DJ at such parties. (Report 78, 2009)

<sup>16</sup> [1995] 2 AC 65

print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article.”<sup>17</sup>

It is not easy to see where the line is between creating a witty and catchy headline and ensuring it is balanced out by the text, especially when judicial opinion towards giving copyright protection to the former has to some extent validated the practice<sup>18</sup>.

### Privacy

Despite, or perhaps because of, a long line of recent judicial decisions<sup>19</sup>, it seems strange that no opportunity has been taken to clarify an area that attracted the vast majority of the PCC complaints under the Code. Restrictions on using digital communications, such as phone-tapping or computer hacking which was at the heart of Leveson, remain in the Code (clause 10), but perhaps an opportunity was missed to identify to what extent the Press could rely on an individual’s own public disclosures of information as justifying an intrusion into a reasonable expectation of privacy. Should photographs and information uploaded to social media be used to justify such intrusions, even with the catch-all of public interest at stake? PCC decisions such as Mullen<sup>20</sup> and Goble<sup>21</sup> illustrate the difficulty of balancing context, the elusive nature of public interest, and privacy settings on social media.

### Harassment and Intrusion into Grief or Shock

Clause 3 (Harassment) remains the same as in the previous version whilst Clause 4 (Intrusion into Grief and Shock) retains what was previously Clause 5(i).

### Reporting Suicide

What was previously Clause 5(ii), now warrants its own Clause. The wording has been expanded to explain that care must be taken to “prevent simulative acts”, whilst an ameliorating factor has been brought in by adding “while taking into account the media’s right to report legal proceedings”.

The PCC earlier had acknowledged that the Code went beyond legal requirements to avoid copycat suicides in prohibiting the reporting of excessive details. It is hard to see how far the reference the right to report (in particular) inquests gives protection to editors, where that information could be used to describe a method for others to copy.

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<sup>17</sup> Ibid at 72C

<sup>18</sup> The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors [2011] EWCA Civ 890

<sup>19</sup> Such as Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22; Mosley v News Group Newspapers [2008] EWHC 1777 (QB)

<sup>20</sup> Mullen, Weir and Campbell v Sunday Scottish Express (Report 79, 2009)

<sup>21</sup> Goble v The People (Report 80, 2009)

## Children

Clauses 6 and 7 relate to reporting children, and also to children in sex cases. There is no change to the Code in these clauses and journalists are also restricted as to what they may report in respect of Court proceedings under s37 Children and Young Persons Act 1933 and also s25 of the Youth Justice and Criminal Evidence Act 1999.

The clauses are subject to the exception for matters in the public interest. The PCC Codebook giving guidance had specified that the exception here was set at a very high standard. Again IPSO has missed the opportunity to explain that level of exception in the Code. The wording in the appendix on Public Interest exceptions remains the same:-

“In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.”

Stories of children of the rich and famous had long been adjudicated by the PCC as not being of exceptional public interest, just because of the fame of the parents. A case in point was that of a story concerning Euan Blair and his University applications<sup>22</sup>.

## Hospitals, Crime Reporting, Clandestine Devices and Victims of Sexual Assault

Similarly clauses 8 – 11 have emerged significantly unaltered. No changes have been made to the clauses on hospitals, reporting of crime and victims of sexual assault.

Given the prominence, as mentioned earlier, of clandestine phone hacking in the Leveson Inquiry, it is strange that the only change in clause 10 is to omit the word “private” before “information” in relation to clause 10(i):-

“ .... or by accessing digitally-held information without consent.”

Previously amendments had been made to reflect duties and obligations under the Data Protection Act s55. However, the clause remains unclear about newsgathering by long lens photography and drones. These are not “hidden cameras” in that sense, but subjects may be unaware that they are being photographed.

## Discrimination

Clause 12 of the Code sees specific reference made to not making prejudicial or pejorative comments about a person’s gender identity, splitting the term “gender” used previously into sex and gender identity. Clause 12(ii) also provides that details of an individual’s gender identity should not be referred to in a story unless “genuinely relevant” to the story. However, there is no definition as to what may be *genuinely relevant*. The PCC suggested that factual and non-pejorative reporting of

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<sup>22</sup> Blair v Daily Telegraph (Report 57, 2002)

discriminatory issues could be justified as genuinely relevant in relation to a story about parenting of same-sex couples<sup>23</sup>.

However, the Code does not link this with clause 2 concern privacy and right to private life. A reference to sexual orientation, for example, may be factual, but if that person has not made their sexual orientation public it should surely be a breach of clause 2 to refer to it, even in a non-discriminatory manner in any story. Yet the press is rife with speculation about the sexual orientation of many a celebrity.

#### Financial Journalism; Confidential Sources

There have been no changes to clauses 13 and 14. With regard to the latter, and with current consideration of legislation strengthening national security and anti-terrorism measures, this may have been a missed opportunity to bolster the importance of protecting a confidential source. With the removal of the word “ethical” in the preamble, this is now the only clause referring to morals and ethics of the Press.

#### Payments to Witnesses and Criminals

Clauses 15 and 16 remain unaltered. Given the focus in the Leveson Inquiry on paying sources for stories, together with Leveson’s tacit approval of the stance of newspapers which only paid sources where such matters were in the public interest<sup>24</sup>, it seems that the Code of Practice Committee has rejected this part of Leveson by not expanding this section of the Code to encompass unethical payments for sources. With the Code setting out “the framework for the highest professional standards”, this omission can be seen perhaps as a calculated snub.

#### The Public Interest

Just as the Code has been altered to expand the ambit of the “fundamental right to freedom of expression” in the preamble, so too has the exception of public interest been expanded in favour of the Press. Clauses 2, 3, 5 – 10, 15 (in part) and 16 are all specifically subject to the exception.

The Code now features expanded definitions and instances of what is considered as the public interest with an eye to spread a protective shield for the Press, and also, no doubt, in light of Lord Leveson’s comments on public interest:-

“I should note that many of the arguments made in respect of the rights or wrongs of the practices and ethics of the press can turn on one’s view of the amorphous concept of the public interest.

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<sup>23</sup> BBC Scotland v Scottish New of the World (Report 59/60, 2002)

<sup>24</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270941/0780\\_ii.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf) at para 10.44

Many otherwise unethical practices may be made ethical simply by virtue of the fact that they are justified, in the circumstances, in the public interest.”<sup>25</sup>

The definitions as to what constitutes the public interest is expanded at 1.i to “the threat of crime” in addition to “detecting and exposing crime” and then adds subsections 1.iv to 1.vii as follows:-

“iv. Disclosing a person or organisation’s failure or likely failure to comply with any obligation to which they are subject.

v. Disclosing a miscarriage of justice.

vi. Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

vii. Disclosing concealment, or likely concealment, of any of the above.”

Section 1.iv is drafted in very broad terms, with “obligation” undefined. Whilst it would certainly be in the public interest to identify significant failure amongst those exercising public duties and functions, could it really be said that a private contractual obligation would be in the public interest? Disclosure of miscarriage of justice would, in the case of jury members, be of course subject to the provisions of the Contempt of Court Act 1981. It is interesting to note the use of the word “unethical” in section 1.vi in a Code that has otherwise been stripped of references to ethical behaviour.

Section 4 sets out the obligations on editors invoking the public interest. Editors need to demonstrate their decision making process when publishing an article using the public interest exception, being able to explain how “they reasonably believed publication ... would both serve, and be proportionate to, the public interest”. This is a subtle change from the previous wording which required the editor to demonstrate that publication was reasonably believed to be “in the public interest”. Is there any difference to serving the public interest and being in the public interest? In the *Miranda* case<sup>26</sup>, concerning proportionate use of counter-terrorism legislation to stop someone carrying information for a journalist, Laws LJ sounded a warning whilst discussing freedom of expression for the media:-

“Journalists have no such constitutional responsibility. They have, of course, a professional responsibility to take care so far as they are able to see that the public interest, including the security of the state and the lives of other people, is not endangered by what they publish. But that is not an adequate safeguard for lives and security, because of the “jigsaw” quality of intelligence information, and because the journalist will have his own take or focus on what serves the public interest, for which he is not answerable to the public through Parliament.”

The Code lacks guidance on what “serving the public interest” is. The public interest should not be for a particular group to define. The lengthening list of what might be seen as “get out of jail free” cards in the public interest exception allied to a rejection of “ethical behaviour” may give the public cause to worry. Is there not circularity that “raising or contributing to a matter of public debate” allows anything which has been in the press to become a matter of public debate? There is no

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<sup>25</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270941/0780\\_ii.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf) at para 2.9 Part F.

<sup>26</sup> *R (Miranda) v Secretary of State for the Home Department and another (Liberty and others intervening)* [2014] EWHC 255 (Admin) [2014] 1 W.L.R. 3140 at para 71



differentiation about the nature or importance of that public debate. Celebrity infidelity, climate change and debate about membership of the EU all fall into the same category. Redress via IPSO seems limited to seeing that an Editor has had a decision making process, leaving redress again through the Courts, an expensive and lengthy option. As was clear in the circumstances leading to the Leveson Inquiry, all too often a determination of the public interest was little more than an economic interest in selling newspapers in a shrinking market.

What is the public interest remains a difficult and elusive question. In the amendments made to the schedule in the Code, the conclusion must be that the press is to have greater opportunities to justify intrusion on this basis. Has this version of the Code really met Leveson's concerns in warnings at para 4.24 in Part K of his report<sup>27</sup>:

"The Code must set out a clear picture of how good journalism serves the public interest and the implications that has for journalistic behaviour. The Inquiry has heard that different editors have different views on what constitutes the public interest, and that may well be the case. The Code will have to take a sufficiently broad approach to encompass the different views and different perspectives of different types of journalism. However, the regulator, when applying the Code, will have to adopt a consistent interpretation of the public interest. If an editor can create his own definition of the public interest without any constraint then the standards will be meaningless. The regulator, alongside the Code, must provide guidance on the interpretation of the public interest that justifies what otherwise would constitute a breach of the Code and must do so in the context of the different provisions of the Code so that the greater the public interest, the easier it will be to justify what might otherwise be considered as contrary to standards of propriety."

## Conclusion

From the outset, the process has been one of minor amendment. The Code, the failings of which to prevent excesses so thoroughly documented in the Leveson Inquiry, has emerged unscathed. Leveson recommended a thorough review. There may have been a thorough review, but not a thorough revision. Most of the Code remains unaltered, whilst explicit references to ethical behaviour have been removed. Expansions of the definition of freedom of expression and the exception of the public interest clearly have benefits for the press rather than the public. Without a Codebook offering guidance, there is little to indicate how IPSO will interpret the Code. Work is said to be happening on a new Codebook, while a further review of the Code is due in Autumn 2016. It can only be hoped then that a future revision will go further in representing the rights of the public, who find themselves the subject of press inquiry. Anyone hoping that the Code would articulate a set of ethical standards post-Inquiry will be severely disappointed. IPSO may have replaced the PCC in part, but the Code shows that the new Emperor's clothes are no different to those of the old regime.

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<sup>27</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270943/0780\\_iv.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270943/0780_iv.pdf)