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The *Human Rights Bill [HL]*, Bill 119 of 1997-98: privacy and the press

The Human Rights Bill has passed through its Lords stages (it was introduced as HL Bill 38 on 23 October) and is due to have its Commons second reading debate on Monday 16 February. It seeks to give effect in domestic UK law to the rights contained in the European Convention on Human Rights. This paper discusses the possible effect on the press of the incorporation of articles 8 and 10 which declare the rights to private life and freedom of expression.

Companion Papers deal with the form and policy of the Bill (RP 98/24), its possible application to religious organisations and churches, (RP 98/26) and some constitutional issues (RP 98/27).

Jane Fiddick

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Summary

While the common law is uncertain as far as a right to privacy is concerned, various provisions have been used to defend what for convenience is called privacy, but in reality involves several areas of the law. The problem of restraining excesses in press behaviour and protecting the rights of individuals, particularly those with a public *persona*, has been the subject of considerable activity and debate over the last 50 years, but specific legislation has been rejected in favour of self-regulation. There has been some controversy over the question whether the Press Complaints Committee (PCC) is a public authority and therefore comes within the remit of the Human Rights Bill, (HL) 1997-98. Lord Wakeham, Chairman of the PCC, in debates on the Human Rights Bill in the House of Lords, particularly championed the cause of the PCC and the need for self regulation to continue free from interference from the courts. He also protested strongly against the possibility of a judge-made development of the common law to provide a "back-door" privacy law. The Government's response has been that there is no intention to introduce a privacy law, that the common law was poised to develop a right to privacy, regardless of the incorporation of the Human Rights Convention and that not enough account has been taken of the balancing effect of article 10 (freedom of expression) on article 8 (right to privacy). There have, over the years, been initiatives to control the activities of the press, both statutory and by amendment of the PCC's code.

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I Privacy at Common Law

Despite the statement in the White paper *Rights Brought Home*[1] that "when the United Kingdom ratified the Convention the view was taken that the rights and freedoms which the Convention guarantees were already, in substance, fully protected in British law", it is now by no means certain that a general right to privacy exists in UK law, and there are conflicting views about whether such a right could be developed at common law. The Younger Committee, which reported in July 1992[2] concluded that there was no need for a statutory right of privacy. The report of the Committee on Privacy and Related Matters[3] accepted the finding of the Court of Appeal in *Kaye v. Robertson and Sport Newspapers Ltd*[4] that the right to privacy had been so long disregarded by the common law that only Parliament could provide a remedy:[5]

There had been some suggestion that the civil law might evolve in relation to privacy and that the English and Scottish courts might develop a tort of infringement of privacy as has been done in the United States of America and France. A common law right to privacy could possibly develop in Scotland, where there is a more general concept of *culpa* [wrongful behaviour] compared with the more narrowly-drawn English torts. But in its judgment on 16 March 1990 *in Kaye v. Robertson and Sport Newspapers Ltd* the Court of Appeal clearly ruled out the development of such a tort in English law. Any remedy of this kind would now have to be provided by statute. This was made explicit by Lord Justice Glidewell who said:

> "It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals".

Lord Justice Leggatt went further, as follows:

> "We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature".

Earlier, in *Malone v Metropolitan Police Commissioner*[6] the Vice-Chancellor Sir Robert Megarry stated that:[7]

> it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J. once said, they do so only interstitially, and with molecular rather than molar motions…. Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the

1 Cm 3782, October 1997
2 Cmnd 5012
3 Calcutt Committee; Cm 1102, June 1990
4 The actor Gordon Kaye was seriously injured in an accident to his car. As he lay unconscious in hospital, a journalist and photographer gained access to the ward and photographs were taken. Because it was suggested that he had given permission for an interview, the court was able to grant an injunction for malicious falsehood, but all three judges deplored the absence of a remedy
5 loc.cit. p.46
6 [1979] 1 Ch. 344
7 loc.cit 372F

> appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right.

This case involved a plaintiff who at his trial on a number of charges for the handling of stolen property, learned that his telephone had been tapped and unsuccessfully issued a writ against the police. He then submitted a complaint to the European Commission of Human Rights that the action constituted an infringement of Articles 8 and 13 - the "right to have an effective remedy before a national authority". The Commission and the Court held unanimously that these Articles had been breached, and in response the *Interception of Communications Act* was passed in 1985.

Other cases have, however, suggested that the development of a tort of invasion of privacy is within the interpretative reach of the courts. In *A-G v. Guardian Newspapers Ltd (No. 2)*, Lord Keith of Kinkel considered the law of confidentiality, the extent to which an obligation of confidence arose out of particular relationships, and whether detriment to the confider of confidential information [was] an essential ingredient of his cause of action in seeking to restrain by injunction a breach of confidence:[8]

> The Crown's case on all the issues which arise invokes the law about confidentiality. So it is convenient to start by considering the nature and scope of that law. The law has long recognised that an obligation of confidence can arise out of particular relationships. Examples are the relationships of doctor and patient, priest and penitent, solicitor and client, banker and customer. The obligation may be imposed by an express or implied term in a contract but it may also exist independently of any contract on the basis of an independent equitable principle of confidence: see *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413. It is worthy of some examination whether or not detriment to the confider of confidential information is an essential ingredient of his cause of action in seeking to restrain by injunction a breach of confidence. Presumably that may be so as regards an action for damages in respect of a past breach of confidence. If the confider has suffered no detriment thereby he can hardly be in a position to recover compensatory damages. However, the true view may be that he would be entitled to nominal damages. Most of the cases have arisen in circumstances where there has been a threatened or actual breach of confidence by an employee or ex-employee of the plaintiff, or where information about the plaintiff's business affairs has been given in confidence to someone who has proceeded to exploit it for his own benefit: an example of the latter type of case is *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923. In such cases the detriment to the confider is clear. In other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy. Thus in, *Margaret, Duchess of Argyll v Duke of Argyll* [1965] 1 All ER 611, [1967] Ch 3o2 an injunction was granted against the revelation of marital confidences. The right to personal privacy is clearly one which the law should in this field seek to protect.

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8 [1988] 3 All ER at 639

The case of *Morris v. Beardmore* was described by the *Times* of March 7 1995 in an article headed "Decision that was filed under F for forget it" as a "newly discovered privacy ruling", alleging that it had been inadequately indexed in the law reports and therefore undiscovered. In 1980, the House of Lords considered an appeal by Mr Beardmore who had been driving a car which collided with another car and who subsequently went home. The police later went to his house, to which they were admitted by his son, to discuss the accident and to take a breath test. He indicated that he wished them to leave. He appealed to the House of Lords against the decision of the Divisional Court who had allowed an appeal by the police against the Walsall Magistrates' decision in 1978. The House of Lords allowed his appeal and in so doing Lords Edmund-Davies, Keith of Kinkel and Scarman in particular made reference to invasions of personal privacy. Lord Scarman stated that the appeal was concerned not with trespass to land, but exclusively with the suspect's right to the privacy of his home and that[9]

> In formulating my reasons for allowing the appeal and restoring the decision of the magistrates, who acted with excellent judgment in dismissing the charges, I have deliberately used an adjective which has an unfamiliar ring in the ears of common lawyers. I have described the right of privacy as 'fundamental'. I do so for two reasons. First, it is apt to describe the importance attached by the common law to the privacy of the home. it is still true, as was said by Lord Camden CJ in *Entick v Carrington (1*765) 19 State Tr 1029 at 1066, cf [I558-1774] All ER Rep 41 at 45:
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> > 'No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... if he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.'
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> Second, the right enjoys the protection of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th November 1950, TS 7I (I953); Cmd 8969), which the United Kingdom has ratified and under which the United Kingdom permits to those within its jurisdiction the individual right of petition: see arts 8 and 25

The author of the *Times* article, Antony Whitaker, Legal Manager of Times Newspapers, was in no doubt that this ruling was in direct conflict with the finding of the Court of Appeal in the Kaye case and commented "Now that this gem and germ of potential legal development has been spotlighted, the profession can think again. Sir David Calcutt, and the British press, can add to the arguments against the introduction of a statutory law of privacy the fact that it already exists at common law".

This was not the view of the House of Lords Select Committee on a Bill of Rights, which reported in 1978 and found that:[10]

> Even on the most unfavourable view of the extent to which United Kingdom law at present falls short of the standards of the Convention there are no more than a few marginal situations where the incorporation of a Bill of Rights might bestow a remedy where present law does not do so. They have mainly related to privacy and the conduct of the prison services. As to privacy, this has already been the subject of a thorough investigation by the Younger

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9 [1980] 2 All ER 753 at 763

10 1977-78 HL Paper 176

> Committee, which made various suggestions for reform but came down against a general law of privacy. As to the conduct of the prison services, there has been one case so far, the *Golder* case, where a complaint has succeeded, and where the matter was dealt with by a change in the relevant regulations. The Committee are aware that there are several other cases now before the Commission but cannot properly comment on these.

The recent report[11] of the decision of the Commission of Human Rights in the *Spencer* case makes no mention of the rights to privacy upheld in *Beardmore*, but first in the list of relevant case law is the statement "There is no law of privacy, as such, in England and Wales".[12] The complaints by Earl and Countess Spencer were that the UK had failed to protect their rights to private life and to provide legal remedies under articles 8 and 13 of the Convention. The Commission rejected the application as inadmissible because the applicants had failed "to comply with the exhaustion of domestic remedies requirement under Article 26 of the Convention". The Commission considered that "the parties' submissions indicate that the remedy of breach of confidence (against the newspapers and their sources) was available to the applicants and that the applicants have not demonstrated that it was insufficient or ineffective in the circumstances of the cases" (p.19).

It is the common law of breach of confidence which has been seen to be the most likely to develop by way of case law into a law of privacy. In the case of *Malone v. Metropolitan Police Commissioner*[13] Sir Robert Megarry, Vice Chancellor, said that "the right of confidentiality is an equitable right which is still in the course of development."[14] The Calcutt Committee Report stated that:[15]

> 8.7 On the evidence before us, it would appear that actions for breach of confidence can be brought in order to obtain a remedy for certain intrusions into individual privacy. To that extent the state of the law of breach of confidence falls within our terms of reference. We have noted the argument that the common law is unsatisfactory because it throws up differences of view and inconsistencies, for example about the extent to which it protects sexual relationships. However, the law of confidence, including the definition of the public interest, will continue developing and clarifying itself in response to cases as they arise. We are not persuaded that the creation of a statutory tort at the present stage of the law's development would bring about a significant increase in the protection of individual privacy against unjustified intrusions by the press, especially as most of the serious infringements of privacy drawn to our attention involve no relationship or duty of confidence.

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11 28851/95 and 28852/95
12 *Kaye v. Robertson* [1991] FSR 62, Glidewell LJ at p.66
13 See above, p.
14 [1979] Cm 344
15 Cm 1102, June 1990, p.33

The judgment of Lord Goff in the *Spycatcher* case marked a significant development in the defining of circumstances in which a duty of confidence arises. Lord Goff said:[16]

> I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties-often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers-where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public-a point to which I shall refer in a moment. I have however deliberately avoided the fundamental question whether, contract apart, the duty lies simply "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained" .

In the consideration of the applications by Earl and Countess Spencer, the Commission of Human Rights found that they had not demonstrated that the remedy of breach of confidence was insufficient or ineffective "the domestic courts having extended and developed certain relevant principles through their casework".

The Spycatcher case also had an influence on Scots law of breach of confidence. The consultation paper on infringement of privacy issued by the Lord Chancellor's Department and the Scottish Office in July 1993 records that it was not clear how the courts would develop the delict of breach of confidence, but that it had been recognised as such:[17]

> Following the Spycatcher litigation in England, where it was held that an obligation of confidence might arise independently of any contract or property on the basis of an equitable principle of confidence, the Court of Session considered in *Lord Advocate v. Scotsman Publications Ltd* " (the 'Cavendish case") that a similar obligation arose under Scots law. As the Lord Justice Clerk (Ross) stated:"
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> > 'For my part, I am of opinion that under the law of Scotland the person to whom the duty of confidence was owed would have a right to protect confidentiality against third parties who had received information with the knowledge that it had originally been communicated in confidence."
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> As Lord Keith put it in the House of Lords in that case:
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> > "The Judges of the Court of Session, having considered such authorities upon the law of confidentiality as existed in the Scottish corpus juris, came to the conclusion that Scots law in this field was the same as that of England, in particular as respects the

[16] Attorney General v. Guardian Newspapers (No. 2) [1990] AC 109 at 281

[17] loc. cit. p.60

> circumstances under which a person coming into possession of confidential information knowing it to be such, but not having received it directly from the original confider, himself comes under an obligation of confidence. That conclusion was, in my opinion, undoubtedly correct. While the juridical basis may differ to some extent in the two jurisdictions, the substance of the law in both of them is the same..."

In the case of *Hellewell v. Chief Constable of Derbyshire*, Mr Justice Laws went even further in his view of what constituted breach of confidence. The case concerned photographs taken of a person charged with theft and with several previous convictions. Local shopkeepers had asked the police to supply copies of the photographs of individuals known to be causing trouble, for use by their staff to reduce shoplifting. One of the photographs was of the plaintiff, so he sought an injunction restraining the Chief Constable from disclosing his photograph to the public. The claim was struck out because it was held that the Chief Constable was bound to succeed in establishing a public interest defence. In his judgment, which was obiter and has therefore persuasive, rather than binding, authority, Mr Justice Laws said:[18]

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.

Contributions to the debates in the Human Rights Bill have reflected the diversity of views on whether and to what extent a right to privacy exists. On 3 November 1997, in the second reading debate, Lord Lester of Herne Hill spoke of "the development of a right of privacy already inherent in the common law".[19] Lord Simon of Glaisdale, however, said:[20]

> although one might not have gathered it from the speech of my noble and learned friend on the Woolsack, the Bill nevertheless introduces into English law for the first time a right to privacy. I say "for the first time", but it was in fact adumbrated many years ago. In 1351, in the famous statute which inaugurated the justice of the peace, it was made an offence to eavesdrop. At that time literally listening under the eaves of your neighbour's house was considered an infringement of his privacy. Unfortunately we lost that tradition in our law, and today we have far more grotesque invasions of privacy: electronic eavesdropping, long distance photo lenses, and so on.

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[18] [1995] 1 WLR 804 at 807
[19] HL Deb. 582, c.1242
[20] ibid, c.1259

In committee on 24 November 1997, the Lord Chancellor referred to the certainty that, regardless of incorporation, a common law protection of privacy would be developed:

"the judges are pen-poised, regardless of incorporation of the convention, to develop a right to privacy to be protected by the common law. This is not me saying so: they have said so. It must be emphasised that the judges are free to develop the common law in their own independent judicial sphere".[21]

He regarded the development of such a law as likely to be improved by the requirement to take into account not only Article 8 but also Article 10 which guarantees freedom of expression. In a speech to the third Clifford Chance Conference on 28 November 1997, he referred to all the other areas of law which can impinge on the concept of privacy and the advantage of the framework provided by the Convention:

> The Lord Chancellor also addressed the issue of privacy. "I would not agree with any proposition that the court, as public authorities, will be obliged to fashion a law on privacy because of the terms of the Bill.
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> "The courts may not act as legislators and grant new remedies for infringement of Convention rights unless the common law itself enables them to develop new rights or remedies. I believe that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right to privacy. I say this because members of the higher judiciary have already themselves said so.
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> "My view is that any privacy law developed by the judges will be a better law after incorporation of the convention because the judges will have to balance and have regard to Articles 10 and 8 - giving Article 10 its due high value."

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[21] HL Deb. 583, c.704

II Statutory protection of privacy in the UK

There are laws of nuisance, breach of confidence, trespass, libel, copyright and others which can be used to protect the individual against those wrongs which are characterised as affronts to his or her private life. There is specific statutory protection, however, against invasions of privacy by the broadcast media. The Broadcasting Standards Commission (BSC) is charged under Part V of the *Broadcasting Act 1996* with drawing up a code relating to avoidance of unwarranted infringement of privacy in, or in connection with the obtaining of material included in "programmes (S.107). It has also the duty under S.110 to consider and adjudicate on complaints about unwarranted infringement of privacy. The BSC was formed by the merging under the 1996 Act of the former Broadcasting Complaints Commission (BCC) and the Broadcasting Standards Council. The BCC was first set up by the *Broadcasting Act 1981* to adjudicate on complaints of unjust or unfair treatment and invasions of privacy, while the Council was set up in 1988 to entertain complaints about bad taste and indecency in programmes.

The sanction available to the BSC is the power under S.119 to direct a broadcaster to publish a summary of the complaint and the BSC's findings on the complaint.

The BSC has issued a Code on Fairness and Privacy which is to be effective from 1 January 1998. Under S.107 of the 1996 Act, each broadcasting or regulatory body, including the BBC, and the Welsh Authority have to reflect the BSC's code in drawing up their own. The 1988 code sets it provisions in the context of a general statement:

General

14. The line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, the Commission will therefore address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted?

An infringement of privacy has to be justified by an overriding public interest in disclosure of the information. This would include revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office. Moreover, the means of obtaining the information must be proportionate to the matter under investigation.

The Independent Television Commission, (ITC) also issued a new general programme code in January 1998. Under the *Broadcasting Acts 1990* and *1991*, the main instruments of the ITC's regulation of its licensees are the ITC codes and conditions in each licence which may be enforced by sanctions. Unlike its predecessor, the IBA, the ITC is not the broadcaster and since the 1990 Act no longer previews programmes or requires advance schedule information. Decisions on whether codes and licence conditions have been infringed are made after the

programmes have been transmitted - there is no "prior restraint". Observance of the programme code is a condition of holding a licence and in the case of serious breaches of the codes or licence conditions, the ITC has a range of sanctions at its disposal. It may issue a formal warning, require on-screen apologies, forbid a repeat, impose fines or - in extreme circumstances - revoke a company's licence.

It is thought that the *Protection from Harassment Act 1997* may provide protection from the more intrusive behaviour of journalists or photographers even though it was generally known as the "Stalking Bill". It creates two offences: putting the victim in fear of violence and causing harassment or distress. By S.1, a person must not pursue a course of conduct

(a) which amounts to harassment of another
(b) which he knows or ought to know amounts to harassment of another

There is a defence under S.1(3) which might protect journalists, that in the particular circumstances the conduct was reasonable, but this would depend on how it was done. The Act also enables victims to seek the civil remedies of injunction and damages, but this part of the Act is not yet in force.

III Some definitions of privacy

The 1993 consultation paper on privacy made the point that it is necessary to have an understanding of what privacy is before launching into legal definitions: "Privacy is not only the concern of Parliament and lawyers, but of psychologists, sociologists, political scientists and indeed every individual".[22] Individual needs or desires for privacy vary and the paper endorsed the view of the Younger Report that "privacy is a basic need, essential to the development and maintenance both of a free society and of a mature and stable personality".[23] However, it also pointed to what it called the darker side of privacy: "Privacy can be used as a cloak to conceal undesirable activities: it may be easier to hide physical and sexual abuse which takes place out of sight in the home, than crimes of violence in public".

The consultation Paper quotes the definition of the Concise Oxford Dictionary, which describes privacy as "the state of being private and undisturbed… a person's right to this… freedom from intrusion or public attention… avoidance of publicity". These concepts correspond to the two essential constituents of privacy defined by the Younger report. The first is the state of seclusion, which may be infringed by physical intrusion, while the second

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[22] Lord Chancellor's Department; Scottish Office: Infringement of privacy, July 1993, p.8
[23] Cmnd 5012, July 1972, para. 113

is concerned with personal information which is infringed by the acquisition or publication of such information.

Raymond Wacks[24] endorses a definition of privacy as "limited accessibility" with three related but independent components: secrecy, anonymity and solitude. A loss of privacy occurs when others obtain information about an individual, pay attention to him, or gain access to him.

The complexity of the subject is indicated by a definition from J Velu, quoted in *Human Rights in Europe* by A H Robertson and J G Merrills, 3rd ed, 1993 p.128, which identifies the following elements:

1. Protection of the individual's physical mental inviolability and a person's moral and intellectual freedom.
2. Protection against attacks on a individual's honour or reputation and assimilated torts.
3. Protection of an individual's name, identity or likeness against unauthorised use.
4. Protection of the individual against being spied on, watched or harassed.
5. Protection against disclosure of information covered by the duty of professional secrecy.

Article 8(2) of the convention provides that there should be no interference *by a public authority* with the exercise of the right to privacy. However, many of the dangers to privacy stem from the actions of private persons and organisations, such as media. In the *Spencer* case, the Commission recalled that the obligation to secure the effective exercise of convention rights might involve possible obligations on a state and that these obligations may involve the adoption of measures even in the sphere of relations between individuals. This was held in *X and Y v. Netherlands* 1985, a case where the mentally handicapped applicant Miss Y had been sexually assaulted, but could not initiate proceedings against her assailant. She alleged that this failure of local law amounted to a failure to secure respect for her private life.

This view that the right to private life involves the protection of personal relationships is reflected in the Commission's own wide-ranging definition:[25]

> For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live as far as one wishes, protected from publicity.... In the opinion of the Commission however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's own personality.

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[24] Personal Information, Privacy and the Law, 1998, p.15-16

[25] Quoted in The European Convention on Human Rights by Francis G Jacobs and Robin White, 1996, p.173

IV The Human Rights Bill [HL] 1997-98

For detailed general discussion of the Bill's provisions, please see Research Papers 98/24 and 98/27. Clause 1 sets out the convention rights which are given effect by the Bill, and these include Article 8 and Article 10, the protections for privacy and freedom of expression.

A. Articles 8 and 10 (taken from Schedule 1 to the Human Rights Bill (HL) 1997-98)

Article 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

B. The Press Complaints Commission

Clause 6 of the Bill provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. A 'public authority' includes a court or tribunal and "any person certain of whose functions are functions of a public nature". On 3 November 1997, on second reading, the Lord Chancellor, Lord Irvine of Lairg, explained:[26]

[26] HL Deb. 582, c.1232

> Clause 6 is designed to apply not only to obvious public authorities such as government departments and the police, but also to bodies which are public in certain respects but not others. Organisations of this kind will be liable under clause 6 of the Bill for any of their acts, unless the act is of a private nature. Finally, Clause 6 does not impose a liability on organisations which have no public functions at all.

Further examples were given by Lord Williams of Mostyn, winding up the second reading debate:[27]

> The noble and learned Lord, Lord Simon of Glaisdale, asked what would or would not be a public body. He rightly conjectured that we would anticipate the BBC being a public authority and that Channel 4 might well be a public authority, but that other commercial organisations, such as private television stations, might well not be public authorities. I stress that that is a matter for the courts to decide as the jurisprudence develops. Some authorities plainly exercise wholly public functions; others do not. There is no difficulty here.

He went on to say that, subject to the cautious proviso that this would be a matter for the courts to determine, it was the Government's belief that a newspaper was not a public authority. The status is important because of the provision of clauses 7 and 8 which specify what may be done if a public authority has infringed convention rights. Clause 7 provides that a person can bring proceedings against a public authority who has acted, or proposes to act, in a way which is incompatible with a convention right, or rely on such rights in any legal proceedings, provided he is or would be a victim of the unlawful act.[28]

Clause 8 allows a court or tribunal to grant such relief or remedy as it considers appropriate where it finds an authority to have acted unlawfully. Clause 8(4) requires a court to take into account the principles applied by the Court of Human Rights in determining whether to award compensation or the amount of such an award. Lord Irvine explained the scope of the two clauses:[29]

> If people believe that their convention rights have been infringed by a public authority, what can they do about it? Under Clause 7 they will be able to rely on convention points in any legal proceedings involving a public authority; for example as part of a defence to criminal or civil proceedings, or when acting as plaintiff in civil proceedings, or in seeking judicial review, or on appeal. They will also be able to bring proceedings against public authorities purely on convention grounds even if no other cause of action is open to them.
>
> If a court or tribunal finds that a public authority has acted in a way which is incompatible with the convention, what can it do about it? Under Clause 8 it may provide whatever remedy is available to it and which seems just and appropriate. That might include awarding damages against the public authority. We have concluded that if a court is considering an award of damages for an act which is incompatible with the convention, then it

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[27] ibid. c.1309

[28] Similarly, complaints to the Broadcasting Standards Commission of unjust or unfair treatment have to be made by a person directly concerned; unlike proceedings for judicial review, where third parties may act for those affected provided they have sufficient interest in the case

[29] ibid. c.1232

should have regard to the principles applied by the European Court of Human Rights. Our aim is that people should receive damages equivalent to what they would have obtained had they taken their case to Strasbourg.

The Notes on Clauses explain that awards made in Strasbourg tend to range from £5,000 to £15,000 and "do not follow automatically upon the finding of a violation".

It has been suggested that individual newspapers and channel 3 television companies, for example, are not public authorities and would not, therefore be subject to proceedings in the courts for infringements of convention rights. In the case of broadcasters, whether public authorities or not, unwarranted invasions of privacy are subject to the jurisdiction of the Broadcasting Standards Commission, a statutory body which does exercise a public function and whose findings on any particular case would, presumably, be subject to proceedings under clause 7.

The question arose, therefore, whether the Press Complaints Commission (PCC) was to be considered a public authority under the Bill, and therefore subject to proceedings in the courts if, for example, it failed to uphold a convention right to privacy or freedom of expression. The PCC is certainly thought, like other similar regulatory but not statutory bodies, to be subject to judicial review:[30]

The *Datafin* case has now been followed in a number of other cases. While the decision has not yet been endorsed authoritatively by the House of Lords, it is suggested that the approach of focusing on the activities of the body and not only on the source of its authority is helpful. For this reason it is suggested that the Press Complaints Commission, which replaces the Press Council, and the Voluntary Licensing Authority set up by the Medical Research Council and the Royal College of Obstetricians in relation to fertilisation treatment may well be regarded as bodies which are performing public functions and therefore subject to judicial review.

In an article in the *Times*, 18 November 1997, David Pannick QC discussed whether the courts, as public authorities, would grant injunctions to prevent newspapers from publishing true information which the subject wished to keep secret. In the second reading debate of 3 November 1997, the Lord Chancellor had stated his view of how the courts would apply convention rights:[31]

I want, however, to address directly the concerns of the press about how the courts will deal with Article 10 (freedom of expression, a central part of which is freedom of the press) and Article 8 (privacy) once the convention is incorporated. I am a strong upholder of the freedom of the press; and I am a member of a Government who, as a whole, give the highest value to upholding the freedom of the press. The European Court has in terms declared that Article 10,

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30 De Smith, Woolf and Jowell: Judicial review of administrative action, 1995 p.182

31 ibid. cc 1229-30

"constitutes one of the essential foundations of a democratic society".

The Court is hostile to any attempt to restrict press freedom when the complainant is a public figure. Our highest courts have said the same. In 1990 the noble and learned Lord, Lord Bridge, said:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship".

In 1990 the noble and learned Lord, Lord Goff, declared that in the field of freedom of speech there was no difference in principle between English law and Article 10. In 1993 the noble and learned Lord, Lord Keith, stated uncompromisingly:

> "It is of the highest--I emphasise--the highest--public importance that ... any Governmental body should be open to uninhibited public criticism".

The European Court in 1991 in *Sunday Times v. The UK (No 2)*--the Spycatcher case--declared:

> "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned for news is a perishable commodity and to delay its publication even for a short period--and I emphasise 'even for a short period'--may well deprive it of all its value and interests".

I agree with that and so, I believe, does every British judge.

I say as strongly as I can to the press: "I understand your concerns, but let me assure you that press freedom will be in safe hands with our British judges and with the judges of the European Court". I add this, "You know that, regardless of incorporation, the judges are very likely to develop a common law right of privacy themselves. What I say is that any law of privacy will be a better law after incorporation, because the judges will have to balance Article 10 and Article 8, giving Article 10 its due high value".

More practically, I do not envisage the press going down to late Friday or Saturday privacy injunctions, disruptive of publishing timetables, if the press has solid grounds for maintaining that there is a public interest in publishing.

David Pannick's view was that the courts would in fact leave the determination of whether convention rights had been infringed to the PCC, which he described as a public authority:

> The Bill requires a 'public authority' to comply with the Convention. A newspaper is not a 'public authority', but the term is defined to include the courts, so judges must protect the rights of litigants under the Convention. However, the Convention does not require domestic law to establish a right to privacy. In *Winer v United Kingdom* in 1986, the European Commission of Human Rights concluded that because of the competing right to freedom of expression, it did 'not consider that the absence of an actionable right to privacy under English law shows a lack of respect for the applicant's private life'.
> Our courts will also conclude that, in any event, it is consistent with the Convention for the law to allow the balance between free speech and personal prviacy to be determined by public authorities such as the Press Complaints Commission (PCC).
> …The courts should, and I think will, recognise that other than in the most extreme circumstances, it is consistent with the Convention to leave these difficult questions of judgment to the relevant specialist body. It is true that the PCC cannot grant complainants an

injunction to stop publication. But then the courts themselves will not grant injunctions to stop libels that the publisher intends to justify.

On 24 November, Lord Wakeham, chairman of the PCC, moved a series of amendments with the object of removing the Commission from the ambit of the Bill, having that morning received a letter from the Lord Chancellor confirming that he accepted the opinion of counsel supplied to him by Lord Wakeham, that the PCC is a public authority. Lord Irvine later quoted from his letter:[32]

> "I have been giving further thought to whether the Press Complaints Commission (PCC) is a 'public authority' under the Human Rights Bill.
>
> The authorities which [counsel] cites are not, as I said, precisely in point because they are judicial review cases. But I do agree that they show a disposition on the part of the Courts to regard the PCC as a 'public authority'. On reconsideration, therefore, of the relevant provision of the Bill: is the PCC a 'person certain of whose functions are functions of a public nature'? (Clause 6 (3)(c)). I now tend to think that ... the press might well be held to be a 'function of a public nature', so that the PCC would be a 'public authority' under the Human Rights Act.
>
> I do, however, think that, for the reasons I gave when we met, this possibility is an opportunity, not a burden, for the PCC. The opportunity is that the courts would look to the PCC as the pre-eminently appropriate public authority to deliver effective self-regulation, fairly balancing Articles 8 and 10. The Courts, therefore, would only themselves intervene if self-regulation did not adequately secure compliance with the Convention.
>
> I repeat that when the press has solid grounds, in the public interest, for publication, even where an individual's privacy is invaded, it will not go down to interim injunctions; in just the same way as it does not go down to injunctions, in libel cases, when it says that it will justify.
>
> I look forward to the debate in Committee on Monday".

Lord Wakeham, in moving his amendments, referred to previous advice on the matter:[33]

> I had intended to pose a rhetorical question about whether the PCC was a public authority in terms of the Bill in order to demonstrate that uncertainty existed on this point. As the noble and learned Lord the Lord Chancellor knows, there was until recently legal opinion from a most distinguished quarter that the PCC was not within the terms of the Bill. However, an article in The Times last week by David Pannick QC asserted, in stark contrast, that the PCC is caught by the definition. In addition, during the Second Reading debate the noble Lord, Lord Williams of Mostyn, suggested that this was a matter for the courts to determine.

It was later reported in the *Guardian*, 1 December 1997,[34] that the Lord Chancellor had advised ministers that the PCC would be exempt from the provisions of the Bill:

> Whitehall sources have told the Guardian that Lord Irvine was involved in a lively argument with Mr Smith, who warned him that the new law could damage press freedom and interfere with the commission's judgments.

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32 HL Deb. 583, c.784
33 ibid c.773
34 "Irvine admits mistake on privacy law"

> Officials say the Lord Chancellor shot the minister's arguments down, on the grounds that the Culture Secretary was a layman and he was an experienced lawyer. Only three weeks ago Lord Irvine told senior newspaper executives that there was no question of the press complaints body being affected by the law.
>
> Whitehall is now reported to be holding urgent discussions on whether the Government should amend the bill specifically to exempt the PCC.

Lord Irvine's comments on the report were set out on the same day in a press notice from the Lord Chancellor's Department:

> "It is possible that the Press Complaints Commission (the PCC) will be held to be a 'public authority' under the Human Rights Bill when it becomes law. I had earlier thought that it probably would not, but an Opinion given to the PCC by David Pannick QC persuaded me that it probably will be.
>
> "But, if so, this is good news for the press, because the courts will regard the PCC as the primary body to provide effective protection to people who suffer from press abuses. Provided, therefore, that self regulation is strong and effective the courts will not intervene with injunctions.
>
> "I agree with David Pannick QC that 'other than in the most extreme circumstances it is consistent with the Convention to leave these difficult questions of judgment to the relevant specialist body'.
>
> "So I and the PCC's own lawyer agree that the PCC has nothing to fear.
>
> "I have said time and time again that the courts will develop a law of privacy regardless of incorporation of the European Convention on Human Rights. "The senior judiciary have themselves said so, but it will be a better privacy law because of incorporation in the Convention. This is because the courts will have to balance Article 10 (freedom of speech and of the press) and Article 8 (privacy), giving to freedom of the press its due high value.
>
> "The press will not go down to injunctions whenever there are solid grounds in the public interest for publishing.
>
> "Mr David Pannick QC agrees with me on this too. So I and Mr Pannick, the PCC's own eminent QC, agree. We have both been telling the press exactly the same thing."

Lord Wakeham, however, was not convinced by reassurances that the courts would leave it to the PCC to determine questions involving convention rights:[35]

> If the PCC's adjudications on matters of privacy could be subject to subsequent action by the courts, my task of seeking to resolve differences, to obtain a public apology where appropriate or, if necessary, to deliver a reprimand to an erring editor would no longer be a practical proposition because the courts would be able to intervene after our work had finished. That would ensure that from day one the newspapers' approach to a complaint of invasion of privacy would be highly cautious and legalistic. The courts may also be able to award monetary compensation. My chances of making self-regulation work for the benefit of ordinary people, and without cost to them, would be minimal.

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[35] ibid c.773

Lord Lester of Herne Hill opposed the amendments:[36]

> Perhaps I may now turn to the thrust of the amendment of the noble Lord, Lord Wakeham, and with it the amendment tabled in the name of the official Opposition which seeks to exclude altogether from the scope of the duty to comply with convention rights the press and the broadcasting media. What is therefore contemplated by the amendment of the noble Lord, Lord Wakeham, and those standing in the name of the Opposition is that the press and broadcasting media should be able to enjoy the benefit of the right to free speech guaranteed by Article 10 but that they should not be under any legal obligation to respect the right to personal privacy guaranteed by Article 8.
>
> Among other things, those amendments fly in the face of the Broadcasting Act 1996 sponsored by Mr. Major's government, Section 107 of which imposed a duty on the Broadcasting Standards Commission to draw up a code giving guidance as to the principles to be observed and the practices to be followed by the broadcasting media in connection with the avoidance of the unwarranted infringement of privacy.

Both he and the Lord Chancellor advocated a "beefed-up PCC" (c.785), with the power to order the payment of compensation.

Further concern arose when in the *New Statesman* of 6 February 1993 the Lord Chancellor was reported to have advocated not only a power for the PCC to impose fines, but also that it should adopt a mechanism for prior restraint:[37]

> At the same time, Irvine is keeping up pressure on the Press Complaints Commission to accompany the Human Rights Bill with new procedures to fine (up to a top limit of £10,000) newspapers that breach the PCC's own privacy guidelines, and to introduce a mechanism for "prior restraint' of newspapers that are shown to be on the point of breaching someone's privacy without justification in the public interest.
>
> I ask him how these proposals would have worked in the case of Robin Cook and his secretary, Gaynor Regan, and he replies: "Robin Cook is a public figure. On the other hand, I'm not aware that he has ever lectured anyone about moral values."
>
> So would he have expected the PCC to order the *News of the World* not to reveal the story of the minister and his mistress? "I would hope that that would be the view that the PCC would form in a case like that, yes."
>
> Really? "What public interest is there in disclosing that?' he asks.
>
> Whether a court would grant Cook an injunction (acting under the new Human Rights Act) is, he says, another matter. "I think the courts' predisposition would be against granting an injunction in favour of any public figure, but the press would have to be able to invoke some kind of public interest served by the story."

Up to this point, discussion on this aspect of the Bill had mainly centred on the extent to which the courts would grant interlocutory injunctions, with reassurances from the Lord Chancellor - see above p.17 and comments like that of Lord Lester, drawing on the jurisprudence of the Court of Human Rights:[38]

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[36] ibid c.775-6
[37] loc cit p.25
[38] 24.11.97 HL Deb. 583, c.777

> As regards the threat of interlocutory injunctions to restrain publications of infringements of personal privacy, our courts will surely take account of the Strasbourg case law emphasising that prior restraints on publication are a draconian interference with free speech requiring a compelling justification based on strict necessity. Where there is a reasonable prospect of there being a genuine public interest defence, no sensible judge would grant an interlocutory injunction preventing publication and thereby creating a breach by the courts of Article 10 of the convention.

This view is not, however, shared by the constitutional lawyer Sir William Wade. At a conference held by the Centre for Public Law at Cambridge University, he delivered a paper which was reported in the *Times*, 19 January 1997 and warned that people would use the courts rather than the PCC to pursue grievances:

> Sir William said: "The PCC can neither issue injunctions nor award compensation. Nor can a number of other bodies to which similar arguments apply, such as the Broadcasting Standards Commission and the Advertising Standards Authority".
>
> Sir William's paper questioned whether - if a newspaper committed "an outrageous invasion of privacy" - the European Court of Human Rights would accept a complaint to the PCC as the "effective remedy before a national authority- as required under the convention.
>
> "If the victim went to the court in England and asserted his Article Eight right to respect for privacy he could be awarded damages for the outrage and perhaps an injunction to prohibit its repetition,- he said.
>
> "The court's armament is so manifestly superior to the PCC's that the victim may naturally prefer to the court for legal remedies.
>
> "Only if the PCC can itself offer equally effective remedies by bringing pressure to bear on the offending newspaper is it likely to satisfy the European Court.- This seemed far from being the case at present, Sir William said.

However, the suggestion that the PCC should have the power to prevent publication aroused considerable opposition, from the press, Lord Wakeham and, reportedly, the Lord Chancellor's Cabinet colleagues. On 6 February 1997, the *Times* commented:

> If Lord Irvine's proposals were to become law, the PCC could not survive under the strain of its new obligations. Newspapers which freely submit to its rulings, and offer prompt apologies or corrections to wronged individuals, would no longer voluntarily cooperate with a body which had the power to censor. Many investigations into the abuse of power have begun with an intrusion into privacy which would have been difficult to justify initially under the terms outlined by Lord Irvine. The early inquiries into Jonathan Aitken's activities as a Minister, which ended in his disgrace, would never have been published if the system Lord Irvine advocates had been operating.
>
> Not only could the powerful evade scrutiny if Lord Irvine had his way; ordinary citizens could lose a valuable channel of redress if the PCC became a public authority with new powers and editors withdrew cooperation, preferring to take their chances in the courts. loose without the money to go to law would be denied a body which acts informally and effectively on their behalf. No one stands to benefit from such a proposal, apart from the senior lawyers whose rewards Lord Irvine has promised to reduce.

The Guardian, on the same day, accepted the reality that if people could seek redress for an actual infringement of privacy, they would also seek remedies if they anticipated such an infringement, but warned of the danger to self-regulation if new powers were given to the PCC:

> Lord Irvine's proposition, for which he has been roundly abused on all sides, is that a press which is so attached to the notion of self-regulation must see to it that self-regulation works. The more effective the PCC can show itself to be, the less cause judges will have to meddle in the press's affairs. That, of course, means that the PCC must reconcile itself to becoming a different sort of animal. It must convince the courts that it offers effective remedies for breaches of privacy. It must consider whether it should have the right to fine offending newspapers. [Broadcasters have long lived with this threat. The ITC once fined Granada TV£500,000. That has not stopped it from being at the cutting edge of investigative journalism.]
>
> More contentiously, the PCC must consider whether it could effectively handle cases of people seeking prior restraint. ECHR case law is helpful in making clear that ex-parte injunctions are a draconian interference with free speech requiring strict scrutiny. If the PCC could devise a mechanism for dealing with privacy applications in advance of publication it would have to simultaneously make it clear that it could only grant applications in the most extreme cases where no conceivable public interest was served by publication. Lord Wakeham - and many respected journalists - find it difficult to conceive of a voluntary self-regulatory body such as the PCC re-inventing itself in such a quasi-judicial form. There are inevitably concerns about whether the PCC could remain quite so light on its feet, so cheap and such a refreshingly lawyer-free zone. There are hints that the big newspaper groups would rather close the PCC down than play ball on these terms. But what would that achieve, except the end of self-regulation and a world in which the lawyers decide everything? A bit of calm reflection is called for on all sides.

It was subsequently reported[39] that consideration was being given to amending the Bill to protect investigative journalism, possibly by exempting the PCC from the provisions of the Bill or by exempting all "voluntary organisations".

On 5 February, Lord Wakeham wrote to Chris Smith, Secretary of State for Culture Media and Sport, welcoming the assurance he had been given that the questions of prior restraint and financial compensation were still under active consideration. He stated that press censorship of this sort was unacceptable in a democratic society and that the power of prior restraint was one which the newspaper industry would never give the PCC. He made three main points:

- that the system would be used only by public figures who had prior information that they were being investigated and who had something to hide

- that it would be difficult if not impossible in a short time to assess whether there was any public interest justification - "Many stories - and we can all think of high profile examples - have begun with what appeared to be an intrusion into privacy; many of them have finished up exposing matters of corruption or hypocrisy that it was in the public interest to expose".

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[39] *Financial Times*, 9.2.97

- that censorship would bring newspapers into conflict with Government. Referring to the recent injunction about the Home Secretary's son, he said that "In the technological age in which we live, press censorship of the sort proposed is bluntly impractical and out of date, as well as undesirable.

He regarded the question of fines as one for the newspaper industry, but feared that it would turn the PCC into a "quasi legal system" which would no longer meet the needs of ordinary people.

Later on 5 February, in the third reading debate, Lord Wakeham again returned to the argument that unless exempted, the PCC could be required by the Courts to seek "effective remedies", including powers of prior restraint and the imposition of fines. He emphasised the need to continue the PCC's protection for the ordinary citizen[40,41]

> Self-regulation is not perfect--and it probably never will be--but it has achieved far more than any of those who set it up in the first place probably ever expected. It has provided a swift dispute resolution procedure which works only because of the voluntary commitment of editors and the amicable way in which the commission's work is conducted. And its code--the first ever set of rules for all journalists--has also gradually raised standards among all newspapers. They are standards of accuracy and speed of correction; respect for individual privacy; safeguards for the vulnerable, such as children or those in hospital; and protection from harassment. At the heart of my concerns is the fear that the way in which the Government are incorporating the convention will change the nature of the system--and not for the better…..
>
> But if the courts are able to interfere in the way that I have just described, and they will be under a duty to do so, newspapers will have an entirely different system on their hands. The PCC will not be able to resolve disputes because it will no longer work on an amicable and friendly basis. Indeed, how could it when many, particularly the rich and those set on gold-digging, would use it as a first stop on the route to court?
>
> My concern in those circumstances is this: why should the newspaper industry continue to support the PCC? It will be part of a legal system only because the PCC exists. And in turn, the PCC will be unable to carry out the function that it was originally intended to do: to administer a code and to resolve disputes in a non-legalistic way. Therefore, we shall be of no use to ordinary people, for whom we were set up, and no use to the newspaper industry which would simply be opened up to new types of legal action because of our existence.

The Lord Chancellor sought to rebut the argument that enhanced powers would be destructive of the PCC:[42]

> The noble Lord, Lord Wakeham, commented on the idea of the Press Complaints Commission awarding compensation; not fining newspapers, I emphasise--"fine" is an abuse of language--but awarding compensation to individuals who have been wronged in terms of

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40 HC Deb. 585 c.831
41 ibid c.832
42 ibid. c.840-41

the PCC's own code but who at present have no entitlement to compensation under that code. He was opposed to the PCC having a power to award compensation. In our view, if the PCC had a power to award compensation against a newspaper for unjustifiably invading someone's privacy--unjustifiably because the newspaper is serving no public interest in doing so--that individual is more likely to seek a resolution from the PCC than if no such power is available. So a power to award compensation would reduce the likelihood of an aggrieved person seeking redress from the courts. To the extent that a person might go to court because he is not satisfied with the remedy he has been given, or because he does not think the PCC is capable of giving a sufficient remedy, then the existence of a power on the part of the PCC to award compensation would, for the reasons the noble Lord, Lord Lester, gave, be highly relevant to the court's discretionary considerations.

He maintained that if the PCC developed and strengthened its code, injunctions would rarely be granted, but the only mention of prior restraint was in his quotation, already used on second reading, of the comments by the European Court in the *Spycatcher* case on the importance of freedom of expression.

C. A law of privacy by the back door?

The second of Lord Wakeham's concerns about the Human Rights Bill is that it would allow the Courts to develop a law of privacy, even though the Government has repeatedly stated that there is no intention to provide for a statutory right. There are commentators who advocate the introduction of legislation, rather than the development of common law, to provide a right to privacy: Geoffrey Robertson QC, Eric Barendt (Goodman Professor of Media Law at University College, London), Gerald Kaufman MP and the *Guardian* newspaper have all made the case for the creation of such a right to be subject to Parliamentary scrutiny. When the question was put to the Home Secretary on 22 December 1977 by Richard Ottaway, Mr Straw answered:[43]

Mr. Straw: We do not accept that there is a case for general legislation on privacy. Whether the judges develop what the hon. Gentleman describes as judge-made law on privacy is a matter for them and it would arise whether or not the European convention were incorporated and whether that particular form of incorporation were accepted. I know that the hon. Gentleman supports incorporation because he voted for a Bill in favour of incorporation that came before the House in 1987. As to the code, our guess - it can only be a guess - is that in adjudicating between breaches of articles 8 and 10 of the convention, the courts will properly be bound to take into account the extent to which newspapers have complied with the Press Complaints Commission code.

The results of a Guardian/ICM opinion poll published in the *Guardian* on 12 November 1997 revealed that almost 90% of respondents were in favour of a privacy law. 55% believed that celebrities should have some protection, while 42% did not. However, 53% did not feel that politicians should be protected from media investigation into their private lives.

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[43] HC Deb. 303, c.639

It was reported on 8 October[44] that the Lord Chief Justice, Lord Bingham, had said at a press conference that a privacy law would develop through individual cases before the courts - "My current belief is that there will be no need for legislation. The courts have to be seen as an arm of the state for this purpose…. there will be a clear duty on the courts to protect privacy and my experience is that, over time, they will develop the law". He added that incorporation of the convention would also increase protection for freedom of expression.

On 2 November 1997, the day before the second reading of the Human Rights Bill, the *Mail on Sunday* printed an article by Lord Wakeham: "This back door privacy law is a threat to all our freedoms"; in which he described privacy law as neither necessary or desirable because it would be available only to the "very rich and those with something to cover up". On second reading, Lord Lester argued that the incorporation of Article 8 did not make the Bill a "villain's charter":[45]

> To turn to another important aspect, there has been misguided public pressure from the press for a media immunity from the effect of the Bill in relation to the protection of personal privacy. The chairman of the Press Complaints Commission, the noble Lord, Lord Wakeham, warned, in a somewhat uncharacteristically intemperate article in yesterday's *Mail on Sunday*, that this Bill could become a "villains' charter", because Article 8 of the convention contains an absolute right to respect for privacy, without any specific defence of public interest. That is simply not the case.
>
> The convention is clear in guaranteeing both the right to free speech, as the noble and learned Lord the Lord Chancellor has made clear, and the right to respect for personal privacy without making either right absolute. Article 8(2) makes a specific exception to respect for personal privacy where necessary to protect the rights and freedoms of others, including the right to free speech. I have had the privilege of representing various newspapers, broadcasters and book publishers in British courts and in the Strasbourg Court relying on Article 10 of the convention to vindicate their right to publish and their readers' right to receive information and opinions without unnecessary interference of restraint by the common law of statute. There is no stronger advocate of free speech and a free press.

He went on to say:[46]

> The noble Lord, Lord Wakeham, is also mistaken in suggesting that courts "could be forced to grant injunctions to those with something to hide simply because the right to respect for privacy in the Bill is absolute", although he weakens his argument by acknowledging in the same article that his fears are based on a possible future judicial misinterpretation of the convention. The right to privacy is not absolute. I am confident that our courts, obliged by Clause 2 to take account of Strasbourg jurisprudence, will not misinterpret the law and will not grant prior restraints through interim injunctions to restrain alleged infringements of personal privacy where the defendant seeks reasonably to rely upon a public interest defence, any more than the courts now do in cases of alleged libels.

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44 *Times*: "Bingham says privacy law will evolve in courts"
45 HC Deb. 582, c.1241
46 ibid. c.1242

However, the Lord Chancellor's view is that the Bill does not oblige the courts, as public authorities, to fashion a law on privacy, and that neither is there a requirement for the common law to remedy a failure by creating new protections:[47]

> In my opinion, the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation - say, privacy legislation - a convention right is left unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies. I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right to privacy. That was more or less what the noble and learned Lord, Lord Hoffmann, said in an important public lecture. They may have regard to the convention in developing the common law, as they do today and as the noble and learned Lord, Lord Wilberforce, says it is right that they should.
>
> The experience of continental countries shows that their cautious development of privacy law has been based on domestic law, case by case, although they have also had regard to the convention. I repeat my view that any privacy law developed by the judges will be a better law after incorporation of the convention because the judges will have to balance and have regard to Articles 10 and 8, giving Article 10 its due high value. What I have said is in accord with European jurisprudence. In *Winer v. United Kingdom* in 1986 the European Commission on Human Rights concluded that because of Article 10 it did not consider that the absence of an actionable right to privacy under English law was a lack of respect for the applicant's private life.

The Lord Chancellor has also frequently made the point that development of the common law to protect privacy was, in any case, always going to happen. It could be argued that the foundations for a law of privacy have already been laid[48] and that, as Patrick Milmo MP suggests in an article in *New Law Journal*, November 7 1997:

"It is to be anticipated that the courts will be reluctant to acknowledge that under existing law they are powerless to prevent or provide a remedy for unwarranted intrusion into a person's private life. More likely the HRA will be regarded as Parliamentary endorsement of the status of privacy as a basic human right and therefore as a spur to accelerate the development and extension of existing causes of action, particularly breach of confidence, so that they accomplish similar protection of that right as is accorded against Governmental action by the Convention".

Peter Duffy QC, in a paper presented to an IBC conference on Defamation on 9 December 1997, stressed that in his view the media had no reason to fear that investigative journalism would suffer because of incorporation, because of the way in which Strasbourg has always upheld freedom of expression. Quoting the *Spycatcher* ruling, he said:

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[47] 24.11.97 - HL 583, c.785

[48] see above…..

Far from fearing incorporation of such principles, the responsible Media should welcome the incorporation into domestic law of such a resounding affirmation of the importance of press freedom in democratic society. It is noticeable that criticism of the Bill has been in general terms. No reference has been made to cases decided in Strasbourg where media freedom has been restricted inappropriately to protect the right to privacy. The good reason for this is that no such examples exist.

V A brief chronology of the press and privacy debate

It is now nearly fifty years since the first private Members Bill on privacy was introduced by Lord Mancroft in 1961, since when there have been several other such Bills and important official reports.

A detailed overview of all this activity is beyond the scope of this paper, but a most useful synopsis of the Younger report on privacy and comparative analysis of the Bills introduced by Lord Mancroft, 1961, Alex Lyon, 1967, Brian Walden, 1969, Bill Cash, 1987, John Browne, 1988, Lord Stoddart, 1989, is provided in Annexes to the Lord Chancellor's 1993 consultation paper on privacy. It also provides information on the law overseas.

This paper sought views on the creation of a civil remedy to the following effect:

- A natural person shall have a cause of action, in tort or delict, in respect of conduct which constitutes an infringement of his privacy, causing him substantial distress, provided such distress would also have been suffered by a person of ordinary sensibilities in the circumstances of the complainant.

- A natural person's privacy shall be taken to include matters appertaining to his health, personal communications, and family and personal relationships, and a right to be free from harassment and molestation.

- The following defences, at least, shall be available in such proceedings: consent, lawful authority, absolute or qualified privilege, and a public interest defence.

In response to the considerable support given to the private Members' Bills and public concern about intrusions into the private lives of individuals by certain sections of the press, the then Home Secretary Douglas Hurd announced in July 1989 the setting up of a committee under the chairmanship of Mr (now Sir) David Calcutt QC to consider what measures were needed to give further protection to individual privacy. The Committee on Privacy and Related Matters (Calcutt Committee) reported in December 1990. They recommended that a tort of infringement of Privacy should not be introduced, though it would be possible to frame one, and that the Press Council should be disbanded and replaced by a Press Complaints

Commission, which would be given one final chance to prove that self-regulation could be made to work. It was also proposed that there should be three new criminal offences of intrusion:-

The following acts should be criminal offences in England and Wales:

a. entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication;

b. placing a surveillance device on private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication; and

c. taking a photograph, or recording the voice, of an individual who is on private property, without his consent, with a view to its publication and with intent that he individual shall be identifiable.

The Home Secretary, then David Waddington, like his successor, accepted in principal the reaction of these offences, but further consideration identified several difficulties with the formulation recommended, and these were set out in the Home Office Recommendation to the National Heritage Committee for their fourth report of 1992-93:[49]

In implementation of the undertakings given when the Privacy Report was published, Sir David Calcutt was asked to review the situation at the conclusion of the first 18 months of operation of the new Press Complaints Commission. In this Review, published in January 1993[50] he identified five matters which caused him particular concern, including the Commission's handling of the serialisation of Andrew Morton's book *Diana* and of the story about David Mellor. He concluded that the PCC was not an effective regulator of the press and recommended the introduction of a statutory press complaints tribunal and that further consideration be given to the introduction of a new law of infringement of privacy to cover the work of the media.

A statement was made by the Secretary of State for National Heritage on 14 January 1993[51]. The Government again accepted in principle the case for new criminal offences to deal with physical intrusion and covert surveillance and that further consideration be given to the introduction of a new tort of infringement of privacy. However, there was reluctance to introduce a statutory regime for complaints. Mr Brooke said that note would need to be taken of Clive Soley's Freedom and Responsibility of the Press Bill 1992-93 and of the Report of the National Heritage Committee before conclusions were finally reached.

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[49] Privacy and Media Intrusion (1992-93 HC 294-III, p.269)
[50] Cm 2135
[51] HC Deb 216 c. 1067ff

The Soley Bill was not directly concerned with privacy. It proposed the creation of an Independent Press Authority to enforce a statutory right to the correction of factual inaccuracies in newspapers. The briefing notes for MPs on the Bill refute the criticism that it was "a privacy law by the back door":

> This bill is not a privacy measure and cannot be used as such, although if the IPA promotes a Code of Conduct agreed with the industry, there should be an improvement in ethical standards which would lead to greater respect for those suffering grief, ill-health etc.
>
> Privacy legislation should apply to the whole population, and has no place in a bill concerned solely with improving press standards and defending press freedom.
>
> Any attempt to introduce privacy laws should be resisted unless and until we also have freedom of information legislation in Britain.

The above is taken from the Report of Special Parliamentary Hearings on Freedom and Responsibility of the Press, December 1992. This was not an official Committee of the House, but consisted of Members of all three main parties under the Chairmanship of Patrick Cormack MP. The hearings consisted of evidence taking and discussion of the effect, particularly on ordinary people, of inaccurate reports about their private lives.

The National Heritage Committee started taking evidence in November 1992 on privacy and media intrusion, and their report was published in March 1993[52]. They recommended the introduction of protection of privacy legislation and that legal aid be available for any proceedings taken under it. The legislation would be in two parts: the first part listing civil offences which would lead to a tort of infringement of privacy; the second part specifying criminal offences resulting from unauthorised use of invasive surveillance devices etc, and harassment - basically as set out in the Calcutt Review. The Committee did not agree with the proposal for a statutory tribunal but recommended

- enactment of a criminal offence to prohibit harassment or besetting
- replacement of the Press Complaints Commission by a Press Commission, but still non-statutory, though with statutory authority to order payment of compensation and to impose fines
- the appointment of a statutory press ombudsman to investigate complaints submitted to the Press Commission where the outcome was not satisfactory to all of the parties

The Government's response to the National Heritage Committee's report, *Privacy and Media Intrusion*,[53] also set out their final view on the Calcutt proposals and the results of the 1993 consultation on the feasibility of a new tort, or delict, of infringement of privacy. The message was, basically, that the Government regarded self-regulation as the most practical way forward, and that the consultation had not generated the "clear support which the Government looks for when considering major measures of law reform.".

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[52] 1992-93 HC 294-I-III
[53] Cm 2918, July 1995

The Secretary of State for National Heritage, Mrs Bottomley, set out various ways in which the procedures and code of practice of the Press Complaints Commission should be tightened up. These included:

- payment of compensation by the PCC
- ✳ a clearer definition of privacy
- ✳ a clearer requirement for journalists not to remain on private property having been asked to leave
- clarification that journalists to not have any right to intrude into grief or shock unless it is with consent or in the public interest
- a direct and rapid line of communication between the Chairman and editors to warn them if it was anticipated that the Code was about to be breached, in order to head off abuses.

✳ indicates that this has been implemented, at least in part.

VI The Press Complaints Commission and its code

After the report of the Calcutt Committee in 1990, the newspaper industry was urged by the Government to seize the last chance to establish an effective non statutory system of regulation as the only hope of avoiding direct governmental intervention in the press. The industry set up a Press Standards Board of Finance (Pressbof) to raise a levy to finance the Commission. This had been recommended by Calcutt as a minimum demonstration of the industry's commitment to self-regulation.

The Press Complaints Commission (PCC) replaced the Press Council in January 1991 when it began the work of dealing with complaints about possible breaches of its Code, which touches on issues of inaccuracy, privacy, misrepresentation and harassment. The present chairman is Lord Wakeham, who replaced Lord McGregor of Durris in January 1995. There are 15 other members of whom 8 are not connected with the press. In 1966, the PCC dealt with 3,023 complaints. Almost 70% of the complaints related principally to accuracy in reporting, and the majority were resolved between the publisher and complainant without the need for adjudication. The PCC's Annual Report for 1996 comments on privacy complaints as follows:

Privacy
Although the proportion of privacy complaints received by the Commission has been rising slightly year on year - an indication that the public is aware of the PCC's role in this area, and has confidence in its ability to produce effective redress - privacy still accounts for only a very small proportion of the total number of complaints received. In 1996, only just over 1 in 8 of the complaints received by the Commission related to privacy.

However, the protection of personal privacy - balanced by the public's right to know - is central to the PCC's work. The Commission therefore continues to be especially vigilant in this area.

It also records that by the end of 1996 a commitment to observe the Code of Practice had been written into the contracts of employment of the majority of the senior editors in the UK. The PCC also operates a help line to help members of the public who fear that the Code of Practice is likely to be breached. The PCC does not intervene but offers advice on whether the anticipated infringement would be in breach of the code and provides contact points for the complainant.

Any publication which is censured by the PCC is required to print the adjudication in full and with due prominence. In a speech on 25 September 1997, Lord Wakeham said that he had never had cause to criticise a newspaper for failing to give an adjudication sufficient prominence, but that he would be looking to review the whole question of sanctions and in particular to move to a position where prominence of an adjudication was agreed between the editor and himself.

Some tightening up of the privacy code was undertaken in 1995, particularly in the definition of private property. After the death of the Princess of Wales, Lord Wakeham undertook an urgent review of the code of practice with special attention to harassment, children, privacy, public interest and intrusion with grief. In his speech of 25 September, Lord Wakeham proposed the introduction of a new "overriding" public interest threshold for harassment and for the protection of children.

The new code was ratified in November 1997 and changes include

- a definition of private places to include public or private property where there is reasonable expectation of privacy

- a requirement for editors not to use material from sources which do not comply with the code's harassment requirements; "persistent pursuit" added to the intimidation and harassment prohibited in seeking of information and pictures

- increased protection for children - though not, as first proposed, after they have left school; a requirement that where material about a child is published there must be justification other than the fame, notoriety or position of the parents or guardian; a ban on payments to minors for stories.

The 'overriding' public interest proposal was not agreed to and the code now requires that there be an 'exceptional' public interest as a defence in cases involving children. The sections on privacy and public interest from the new code are reproduced below:

*** 3 Privacy**

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.
Note - Private places are public or private property where there is a reasonable expectation of privacy.

The Public Interest
There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes:
(i) Detecting or exposing crime or a serious misdemeanour.

(ii) Protecting public health and safety.
(iii) Preventing the public from being misled by some statement or action of an individual or organisation.

2. In any case where the public interest is invoked, the Press Complaints Commission will require a full explanation by the editor demonstrating how the public interest was served.

3. In cases involving children editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child.

VII Data protection and the media

The *Data Protection Act 1984* introduced various safeguards which apply where information about individuals is processed and stored on computer. The 1984 Act does not make specific mention of the collection and use of personal information by the media. In other words the media, to the extent that they store and use computerised data, are subject to the same obligations that other data users are subject to under the Act.

It was assumed for a long time that information on people's personal lives held by the media for news purposes would not be covered by the Act in most cases either because it was held in manual cuttings systems or because the "word processor exemption" contained in section 1(8) applied. Nevertheless, information technology (and the media's use of it) has progressed somewhat since the 1984 Act was drafted. As the Data Protection Registrar has observed:[54]

> Commonly now, newspapers are produced with the aid of integrated computerised systems taking text from its origin with a journalist, through editing and production, to archiving of published newspapers. Those systems may typically be searched in numerous ways to obtain information about an individual. Indeed, we have now moved into the era of the electronic publication and distribution of newspapers.

This led Sir David Calcutt, in his review of the Press Complaints Commission published in January 1993, to suggest that the old assumptions about the applicability of the 1984 Act to the media were unwise:

> There is a good case for saying that… personal data held electronically by newspaper publishers is personal data for the purposes of the 1984 Act. Accordingly, the principles of that Act would apply to the press. In particular, section 22 of the 1984 Act provides that an individual who is the subject of personal data held by a data user and suffers damage by reason of the inaccuracy of that data shall be entitled to compensation from the data user for that damage and for any distress which the individual has suffered by reason of the inaccuracy.

By that time, work on the EU *Data Protection Directive*, with the intention of harmonising data protection legislation throughout the EU, was well underway. The Directive [95/45/EC] was adopted on 24 October 1995. Member states are required to bring their domestic legislation into line with the Directive by 24 October 1998.

There are a number of important differences between the Directive and the 1984 Act; for example, the Directive will apply to certain categories of manually held records as well as to automatically processed records (Article 3). The most important part of the *Data Protection Directive* for the media, however, is Article 9, which requires m ember states to provide

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[54] *Questions to Answer*: Data Protection and the EU Directive 95/46/EC. Papers from the Data Protection Registrar, April 1996, paras 6.2.3-4

exemptions from the data processing rules where information is held solely for the purposes of journalism or artistic or literary expression. Exemptions may be given only where they are "necessary to reconcile the right to privacy with the rules governing freedom of expression." The phrase "right to privacy" should be viewed in the limited context of the Directive: Article 1.1 states that member states must, in accordance with the Directive, "protect the fundamental rights and freedoms of natural persons,[55] and in particular their right to privacy with respect to the processing of personal data".

The March 1996 consultation paper on the Directive published by the previous Government makes clear that "where there is a need to provide exemptions in order to strike the balance between privacy and freedom of expression, member states must do so".[56] The green paper continues:

> The Directive is silent on how the balance between privacy and freedom of expression is to be struck. Clearly, a requirement for a case by case assessment to be made in advance by a third party would be impracticable, given the nature of journalism. It could also threaten the fundamental principle of journalistic independence. At the same time, it is clear that a blanket exemption for the press would not be compatible with the Directive

The *Data Protection Bill 1998* [HL Bill 61 of 1997-98], which received its Second Reading in the Lords on 2 February 1998, would implement the *Data Protection Directive* in the UK. Clause 31 represents an attempt to strike the balance referred to above. It gives exemption from certain provisions in the Bill in cases where:

(a) personal data are collected and used with a view to the publication of any journalistic, literary or artistic material;

(b) the journalist or publisher (etc) reasonably believes that, having regard in particular to the special importance of freedom of expression, publication would be in the public interest; and

(c) the journalist or publisher reasonably believes that compliance with the data protection provisions is incompatible with the purposes of journalism (or artistic or literary purposes).

The exemptions cover compliance with the data protection principles contained in Schedule 1 of the Bill.[57] There are additional exemptions covering subject access to personal data, the right to object to the storage and use of data and the power of the court to order correction (etc) of inaccurate data. Individuals who were aggrieved by information about them held by

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[55] ie. individuals as opposed to corporate bodies

[56] Consultation Paper on the EC Data Protection Directive (95/46/EC). Home Office, para 4.16

[57] except principle number seven which concerns the data user's obligation to keep the data securely

the media would be able to challenge the exemption in the courts if the three conditions above were not met.

Clause 31(3) of the Bill gives the Secretary of State power to designate relevant codes of practice (such as that of the Press Complaints Commission) for the purposes of helping the court to decide whether the belief that the public interest was being served was reasonable. On Second Reading the Parliamentary Under-Secretary of State at the Home Office, Lord Williams of Mostyn, said:[58]

> We have deliberately placed upon the face of the Bill, I believe for the first time in an Act of Parliament in this country, that the public interest is not the narrow question of whether this is a public interest story in itself but that it relates to the wider public interest, which is an infinitely subtle and more complicated concept. That is expressed elegantly in Article 10 of the European Convention on Human Rights as regards the transmission of views and opinions by the press and the necessary co-related right on behalf of the public to receive those expression of views and opinions.

Where an individual seeks from the Data Protection Commissioner an assessment of whether the Bill's provisions are being complied with by the media, the Commissioner has a special power under Clause 42 to seek information from the journalist or publisher, pre-publication, to check whether the key criteria are satisfied. There is a limited power under Clause 44 for the Commissioner to take enforcement action against the media, before or after publication, where she has determined that the key criteria have not been met.

Lord Williams stated [c443]:

> The Government believe that both privacy and freedom of expression are important rights and that the directive is not intended to alter the balance, which is a fine one and always should be, that currently exists between these rights and responsibilities. I believe that the Bill does strike the right note in that respect. It was not until after a good deal of consulation and discussion, and perhaps cross-fertilisation of ideas, that we came to our conclusion. However, I repeat that if there is reasonable room for improvement, our minds are not closed.

The Chairman of the Press Complaints Commission, Lord Wakeham, welcomed the media exemptions contained in the *Data Protection Bill* but contrasted these with the provisions of the *Human Rights Bill*: "I think that this piece of legislation is right and the Human Rights Bill is wrong in its consequences. It is my hope that the Government will now reflect on the lessons learnt during the consultation on the data protection directive." [c464].

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[58] HL Deb Vol 585, 2.2.98, c442