Editors' Code of Practice Committee

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RESPONSE TO CONSULTATION PAPER, MAKING SURE CRIME DOESN'T PAY

February 2007

The Editors' Code of Practice Committee, comprising senior editors from Britain's national and regional newspapers and magazines, writes, reviews and revises the Code, which sets the benchmark for the UK system of press self-regulation administered by the Press Complaints Commission.

The Committee is aware that the UK press industry has elsewhere made its own submissions to the consultation and, while it fully supports those, has therefore confined its response to the effect the proposals might have on the Code of Practice and the self-regulatory system.

1. Introduction

THE Editors' Code of Practice has, since 1990, pioneered voluntary constraints on payments to criminals that cannot be justified in the public interest. As will be seen below, it provides a framework that is both more comprehensive and more effective than the legal alternatives envisaged by the consultation paper. The Editors' Code Committee welcomes the fact that the positive benefits of self-regulation in this area are, indeed, acknowledged in the document.

However, the committee is deeply alarmed by the parallel assertion that for media organisations already covered by self-regulatory regimes "*any additional burdens resulting from these proposals should not be significant*."[1] That is simply not the case. It would be extremely difficult, if not impossible, for the current voluntary regime to operate effectively in this area if there was also a supervening legal sanction. The very strong danger is that the self-regulatory system would be seriously undermined and its more comprehensive benefits lost.

2. The Code's rules

As the consultation paper accepts, controlling payments to criminals who exploit their crime raises extremely difficult, and sometimes conflicting, issues. On the one hand, allowing the criminal to profit from his or her crime - with its consequential distress for victims – is broadly unacceptable. On the other, the public's right to know and the criminal's human rights must be considered.

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[1] Executive summary, P1

The Code has always set out to strike a proper, commonsense balance between these conflicting issues. Since its inception in 1990, the Code has banned payments to criminals, or their associates, unless the material to be gained ought to be published in the public interest, and could not be obtained by other means. The current rules, set out in Clause 16, as revised in 2004 and subject to any public interest exception, state:

i. *Payment or offers of payment for stories, pictures or information which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.*

ii. *Editors invoking the public interest to justify payments or offers of payment would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.*

More comprehensive constraints: As it is a voluntary code, rather than a statutory measure to outlaw otherwise lawful activity, it places obligations on journalists that would not be acceptable in a legal context. This allows for much more comprehensive constraints than are envisaged – or possible to achieve - in the consultation paper's proposed options of criminal or civil law sanctions. For example, the Code covers:

- *Offers of payments* as well as actual payments to criminals;
- *Confessed criminals* as well as those convicted, thus covering revelations which might somehow have escaped the law;
- *Information which seeks to glorify or glamorise crime in general,* whereas the legal remedies proposed would catch only the particular crime perpetrated by the criminal being paid;
- *Payments to associates* – including not just family, but friends and colleagues;
- *"Good faith" payments,* where editors who genuinely believed a payment was necessary in the public interest, were subsequently proved wrong. It places a burden on the editor to demonstrate that there was good reason to believe the public interest was being served – but at the same time ensures that any subsequent publication would be disallowed if no information in the public interest emerged.

Such elements can be caught within the Code only because it is a voluntary obligation, not one imposed by law, which would often affect other legal rights (including those affecting freedom of expression contained in the Human Rights Act).

The public interest exceptions: The Code also allows for exceptions where the payment was in the public interest, which includes – but is not confined to – detecting or exposing crime or serious impropriety; protecting public health and safety; and preventing the public from being misled by an action or statement of an individual or organisation. This is a crucial element in deciding whether payments to criminals can be justified.

Although the consultation paper supports the inclusion of a public interest defence within any legal framework, it suggests that it could *create uncertainty and make any new measure unenforceable*.[2] It is true that legal interpretations of the public interest tend to afford little in the way of consistency, certainty, or breadth. Evidence of recent applications for injunctions is that judges tend to take a very narrow view of public interest, often limiting it to the exposure of criminality, rather than the broader area of throwing light on public policy.

> *However, it is essential that any prohibition – legal or voluntary – on payments to criminals should include provision for an exception where payment was necessary to obtain information that was genuinely in the public interest.*

The self-regulatory regime, being non-legalistic and based on commonsense principles, already reduces the possibility of uncertainty by giving guidance for editors and potential complainants in a practical way that cannot be replicated in law. The Press Complaints Commission in 2003 issued guidelines on the sort of cases least likely to breach the rule on payments to criminals.

Least-likely offenders included:

- Book serialisations, which were already in the public domain.
- Cases where no direct payment was made to a criminal or associate, i.e. where payment was made to a charity.
- Payments where publication was in the public interest.
- Articles that made significant new information available to the public.

Most likely offenders included:

- Articles glorifying crime – no complaint about such an article had been rejected.
- Payments for kiss-and-tell stories about romance or sex.
- Payments for irrelevant gossip, which intruded on the privacy of others.

The Code, while more comprehensive than alternative legislation, and while providing more guidance on the public interest exceptions, has an important additional safeguard that is not available outside a voluntary system.

The spirit of the Code: The Preamble to the Code, which is integral to it and essential in establishing its philosophy and authority, states:

> *It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.*

The voluntary commitment to follow the spirit of the Code is vital to its success: it prevents editors from resorting to technical defences, or trying to exploit perceived loopholes.

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[2] P13, para 62

The same obligation would not be available within an imposed statutory criminal or civil law regime. This is particularly important when legislating in an area, which as the consultation paper accepts, raises "some extraordinarily difficult issues" and as such would be likely to face constant challenge.

> *These benefits of the Code are real and important and unique to the voluntary self-regulatory system; they could not be replicated successfully within a statutory framework. Moreover – and equally important in the context of the consultation paper's proposals – neither could they co-exist effectively within a dual system combining legal and voluntary constraints.*

3. The dangers of legal remedies

The introduction of criminal or civil law remedies on payments to criminals would alter not just the legal landscape but also the self-regulatory environment. Legislating to criminalise or impose sanctions on an otherwise legal activity, in an area where no such constraints exist, would inevitably expose editors to the dual risk of double jeopardy and self-incrimination.

Fulfilling their obligation to co-operate fully with the non-legalistic PCC in the resolution of complaints could lead to editors facing subsequent criminal or civil law penalties if their evidence was later used in court against them. Confronted with such a choice, they would inevitably be less likely (on strong legal advice) to co-operate with the PCC and – given the legal implications – the Commission would not be able to insist upon it. It would have to back away.

The PCC's credibility and effectiveness in such matters would be seriously diminished and the Code's greater breadth, certainty, simplicity, speed and authority jeopardised. The process of self-regulation would have been critically subverted in an important area of its remit.

In its place would be a legal regime whose combination of greater complexity and less certainty would have a chilling effect on journalism that was in the public interest.

Greater complexity: Criminalising payments would create a legal minefield. The consultation document quite understandably refers to the need to avoid distress to the victims of crime and their families, but also accepts at the outset[3] that society as a whole might be the victim. The opinion of society, therefore, is an important consideration.

Only two substantive cases are cited in the consultation and it is significant that in each the public view would be different. In one, Gitta Sereny and Mary Bell, the victims might have public sympathy. In the other, Tony Martin, public sympathy was entirely with the "criminal". Indeed this case encapsulates all the problems of such a law, which might prevent someone who many believe has been a victim of a miscarriage of justice from raising funds to fight his case.

How would this law apply to individuals such as Jeffrey Archer and Jonathan Aitken, who have served their sentences, expressed their remorse and now work as writers, making the

[3] Executive summary, P1

lessons of their experience available to others? And how would the law deal with people such as Howard Marks and Nick Leeson, who now make a living from public speaking?

If a Cabinet Minister were ever convicted of selling peerages, would this law mean he could never write his memoirs on this point and therefore deny history his account of a pivotal period in office? Or would somehow the payment for the memoirs include an express calculation to cover the cash-for-honours reference, which would then be deducted as a percentage from the final memoir fee? It would be absurd and impossible to police.

While the Editors' Code covers payments to criminals for stories glorifying crime in general, the proposed law would prohibit an individual only from writing about the crime for which he has been convicted. This would throw up further absurdities. A latter-day Al Capone would be prohibited from writing about tax evasion, but could profit as much as he liked from a book about the St Valentine's Day Massacre.

All this adds up to a system that would be both Byzantine and anomalous, inviting constant legal challenge from those who could afford it, while inhibiting the public interest activities of those who could not. Small regional newspapers, for example, supporting campaigns against miscarriages of justice, might find themselves in breach of the law by raising cash to fund the convicted person's legal fight for justice. A vital role of a free press would be threatened.

> *It would be doubtful if such a price would be worth paying, even if there were a mountain of pending prosecutions for payments to criminals that were not in the public interest. But, as the consultation paper tacitly recognises, such cases are few. In those circumstances to introduce unwarranted legislation would be grossly disproportionate, having a chilling effect on freedom of expression, while offering little comfort or solace to victims of crime or their relatives.*

4. Conclusion

The consultation paper offers four options; Criminal law sanctions; civil law sanctions; extended self-regulation; and doing nothing. The first two should be ruled out for the reasons stated above: as unwarranted by events, disproportionate, and for their detrimental effect on press freedom and on the current system of self-regulation in this area. At the same time, no case has been made for extending self-regulation into books and films, either on the basis of past experience or public demand.

Meanwhile, the current form of press self-regulation is, as the consultation paper suggests, an effective form of control. It works. It is faster, more comprehensive, more certain, less chilling and less open to constant challenge than imposed statutory controls.

The Code Committee would suggest that this is indeed a case where doing nothing is not simply the easiest solution, but the most effective. The genuine benefits of existing self-regulatory controls should not be sacrificed on the altar of extended legal jurisdiction in exchange for illusory gains.

Finally, one of the strengths of self-regulation is its flexibility. It can be amended rapidly to meet altered circumstances, including changes in public attitudes, and is open to constant review. In that vein, the committee would be willing to continue a dialogue as part of this current consultation.