

Response to the consultation on Reform of the Human Rights Act 1998

The Society of Editors welcomes the opportunity to respond to the Ministry of Justice's consultation on Reform of the Human Rights Act 1998 and we thank the Secretary of State for writing to the Society to encourage its response. We were also grateful for the invitation to attend the England and Wales roundtable with Lord Wolfson on Friday 4 March 2022 which proved a valuable opportunity to discuss the proposals in more detail.

The Society has been involved in discussions with the government on a proposed Bill of Rights since 2015 when its late Executive Director Bob Satchwell attended meetings with the then Parliamentary Under Secretary of State Dominic Raab MP to discuss the government's proposals for such a bill. As the Minister may recall, the Society welcomed the government's recognition of the need for enhanced protections for journalists however we stressed that the Society's support for any future Bill of Rights would depend upon the detail and any such protections being straightforward and uncompromising.

In the years that have now lapsed since those early discussions, the urgent need for additional protections for journalists has become more apparent. As the consultation recognises, freedom of expression is a unique and precious liberty on which the UK has historically placed significant emphasis however in recent years we have seen this liberty significantly undermined by judges increasingly prioritising personal privacy over the public's right to know.

Alongside a worrying trend in Strasbourg case law, the recent landmark judgment in the Supreme Court's *ZXC v Bloomberg* ruling means that an individual's right to privacy can now legally take precedent over public interest journalism. The Society has warned that the ruling will have far-reaching implications for the British media and that there is a real risk that legitimate public interest journalism will go unreported as a result. The impact of the ruling is already apparent in attempts made last month by West Midlands Police to ban reporters from a hearing involving the journalist and former MP Chris Mullin who is resisting an application for an order to disclose his sources. The decision cited by West Midlands Police to move for the hearing to be held in private was in line with the recent Bloomberg ruling and to protect the privacy of a suspect whose name may be mentioned in court despite not having been charged. The Society hopes that the grave implications of the *ZXC* ruling will be analysed by the government when considering how best to strengthen current protections for freedom of expression.

In framing our response to this consultation, the Society has consulted with Associated Newspapers Limited (ANL) and we support the detailed proposals outlined in its separate joint submission with Times Newspapers Limited, News Group Newspapers Limited and Telegraph Media Group.

1. Privacy and Freedom of Expression

While the Society recognises the need for privacy rights in society and that freedom of expression is not an absolute right, we have seen s.12(4) of the Human Rights Act 1998 significantly weakened over the years by the emerging development of the tort of misuse of private information. This has been witnessed most recently in the UK Supreme Court's ruling in *ZXC v Bloomberg*.

As outlined in ANL's detailed response to this consultation, the courts have directly applied Strasbourg's expansive approach to Article 8, and in doing so, journalistic activity has been subjected to a proportionality assessment whereby no 'particular regard' is now given to freedom of expression. Given this failure by the courts, it is now necessary to introduce specific provisions to strengthen the protections for freedom of expression.

The Society supports the proposals outlined by ANL for the introduction of an actual or likely serious harm threshold in misuse of private information cases and a defence of "reasonable belief that publication was in the public interest." In addition to this, it is necessary to limit the factors that can be considered in demonstrating harm most importantly by ruling out damage to reputation which is already properly protected in the law of defamation.

Courts should only be directed to grant relief impinging upon freedom of expression if the claimant satisfies the court that "the actual or threatened misuse has or is likely to cause serious harm to a core aspect of the claimant's private life" and that their "right to privacy clearly outweighs the defendant's right to freedom of expression."

The courts must also be given specific direction on how to approach questions surrounding the public interest and journalistic activity. Alongside consideration of the extent to which information is already in the public domain or has been disseminated by the claimant, judges must also give due regard to the importance of editorial discretion and editorial judgment as to where the public interest lies. Directing judges to have specific regard to editorial discretion and editorial judgement would, alongside recognition of the importance of the public interest in maintaining a free and engaging media in and of itself, go some way to re-dressing the current imbalance between the competing rights.

2. Injunctions

The Society supports the introduction of a higher threshold for interim relief to restrain publication before trial than is currently achieved through s.12(3) of the Human Rights Act.

As highlighted in ANL's response, often the threat of an interim injunction is enough to stifle reporting of a public interest story and this has a chilling effect on the public's right to know. There is an urgent need for the introduction of a provision whereby interim relief is only granted - in the presence of the respondent or their representative – in cases where a claimant satisfies the court that the respondent has no real prospect of defending the claim.

3. Journalists' sources

The protection of journalists' sources is one of the most fundamental and important principles of journalism and provides the foundations for press freedom. The Society has been deeply concerned by recent cases and legislative proposals that threaten this important principle. Alongside attempts to broaden the scope of the Official Secrets Act to criminalise journalists who receive documents from whistle-blowers and to make punishing whistle-blowers easier, the Society has warned of the "[grave threat to press freedom](#)" by the use of the Terrorism Act by West Midlands Police in pursuit of documents that could identify journalist and former MP Chris Mullin's sources.

At present, protections for journalists' sources are set out in s.10 of the Contempt of Court Act 1981 however the direction that alongside national security and the prevention of disorder or crime, courts can order disclosure "in the interests of justice" means that the private interests of individuals can be used to justify an order. The Society supports the proposal for source protection as outlined by ANL whereby the private interests of litigants is not a measure for justifying orders and specific guidance is given to courts on how to balance disclosure against this important right. When considering disclosure, courts should consider (a) the extent to which the information provided by the source relates to issues of public interest; (b) the impact of disclosure on the journalistic source and the journalist; (c) the potential adverse effect which such relief may have on journalistic sources more generally and (d) any delay by the party seeking disclosure.

4. Data protection

Alongside the provisions detailed above, the Society supports the introduction of necessary provisions to strengthen journalistic exemptions under the Data Protection Act 2018. The government cannot proclaim to want to strengthen freedom of expression without addressing the significant burden that current UKGDPR rules place upon the media.

As outlined in ANL's response, the rights of data subjects are increasingly being used by the wealthy as a means of reputation management and we are also seeing data protection claims used against the media as bolt-ons in defamation and misuse of private information cases. The additional costs burden that these unnecessary claims place upon news outlets also has a chilling effect on the public's right to know.

By amending the Data Protection Act 2018, to include provisions exempting a "Recognised News Publisher" (as defined under clause 40 in the draft Online Safety Bill) from the processing of personal data for the purposes of journalism, this would bring the exemption closer to that seen in other European countries such as Germany and Norway. The introduction of such an exemption would vastly reduce the current burden that has been placed on publishers by data protection law.

In conclusion to our response, journalists in the UK take their roles and responsibilities extremely seriously and the majority of the British press are regulated by the Independent Press Standards Organisation. As part of this regulation, news media organisations and their journalists agree to abide by professional codes of contact – not least the Editors' Code of Practice. The Code sets the framework for the highest professional standards that journalists undertake to maintain and balances the rights of the individual with the public's right to know. Journalists endeavour to adhere to these high standards on a daily basis and they recognise their responsibility to be fair and accurate. With this in mind, it should always be for others to prove that their right of privacy trumps the right to freedom of expression when considering how best to balance these competing rights.

If you feel that it would be helpful to have any further meetings with representatives of the Society to discuss the consultation and our response in more detail, please do not hesitate to contact me and I would be happy to facilitate this.

Yours sincerely,



Dawn Alford
Executive Director
Society of Editors