

Professor Eric Barendt

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A New Standards Code for the Press

Code consultation

Deadline for responses: 5pm on Thursday 29 September 2016

The logo for IMPRESS, consisting of the word "IMPRESS" in a bold, black, sans-serif font. The text is centered between two thick, solid black horizontal bars, one above and one below the text.

IMPRESS: The Independent Monitor for the Press CIC is the first truly independent regulator of the press in the United Kingdom. We exist to promote the freedom of the press and to encourage high standards in news reporting. As part of this commitment, IMPRESS is developing a new standards code for the press.

A standards code should embody the ethical standards expected of publishers, while not unduly infringing their capacity to investigate and report on important stories in the public interest. The code should be responsive to the challenges facing the media, as well as to calls from the public for hard-hitting, investigative journalism that upholds ethical standards.

The IMPRESS Standards Code is currently in draft form. The draft code sets out the standards we expect IMPRESS publishers to follow in newsgathering and in publishing information whether in the form of text, audio, photographic or other visual content. We expect our publishers to ensure that anyone contributing to their publications follows the same standards.

After the publication of a new standards code, IMPRESS will also issue accompanying guidance. The code will be regularly reviewed.

Code consultation process

The task of developing and consulting on a new IMPRESS Standards Code is the responsibility of the IMPRESS Code Committee (the Committee). While the code is the ultimate responsibility of the IMPRESS Board, the Committee is responsible for advising the Board on the code, and for drafting guidance on the code.

Committee members are **Maire Messenger-Davies** (Chair of the Committee), **Iain Christie**, Mary Fitzgerald, **Jonathan Heawood (CEO of IMPRESS)**, Martin Hickman, Emma Jones, Walter Merricks (Chair of IMPRESS), Gavin Phillipson, Lorna Woods, and Paul Wragg.

In his report into the 'Culture, Ethics and Practices of the Press', Lord Justice Leveson recommended that 'a regulatory body should consider engaging in an early thorough review of the Code (on which the public should be engaged and consulted) with the aim of developing a clearer statement of the standards expected of editors and journalists' (Leveson Report, Recommendation 36). Leveson considered that this would 'command the confidence of both the public and the industry' (Leveson Report, Part K, Chapter 7, [4.22]).

With this in mind, the Committee has undertaken a wide-ranging consultation process to develop this draft code. This has involved several stages and is ongoing.

First, the Committee oversaw comparative research of over fifty press codes from around the world. This research identified several common principles, including accuracy, protecting the right to privacy, protecting the rights of children and the distinction between fact and comment.

Second, the Committee engaged the independent research agency Britain Thinks to conduct workshops and an online survey with members of the public. Britain Thinks facilitated public workshops in London and Glasgow where participants were asked to spontaneously identify the ethical standards they believed should guide the development of a new standards code. The most common principles they identified were privacy, non-discrimination, accuracy, balance, and the protection of children.

Britain Thinks also conducted an online survey of 2,104 members of the public. The survey results confirmed the importance of the same ethical standards that the earlier workshops had identified.

Third, the Committee and IMPRESS staff conducted a series of expert roundtables with IMPRESS publishers and members of civil society including special interest groups. Additionally, the Committee are consulting with academics, journalists, other regulators, civil society organisations, journalism students, other countries' press councils, and other stakeholders on specific areas in the draft code.

These phases of the consultation have informed the draft standards code which we invite you to respond to by **5pm on Thursday 29th September**.

The Code Committee will review the submissions we receive and update the draft standards code where appropriate. The IMPRESS Board will then review, finalise and adopt the new Code.

IMPRESS draft standards code

The IMPRESS draft Standards Code contains a preamble, a public interest exception and ten clauses. The clauses have been arranged alphabetically. All clauses are of equal value.

Preamble

This section explains the purpose of the code and the obligations of publishers to uphold and enforce the code as set out in the IMPRESS Regulatory Scheme.

All publishers regulated by IMPRESS agree to abide by the following rules, which together constitute the IMPRESS Standards Code.

This Code is intended to be:

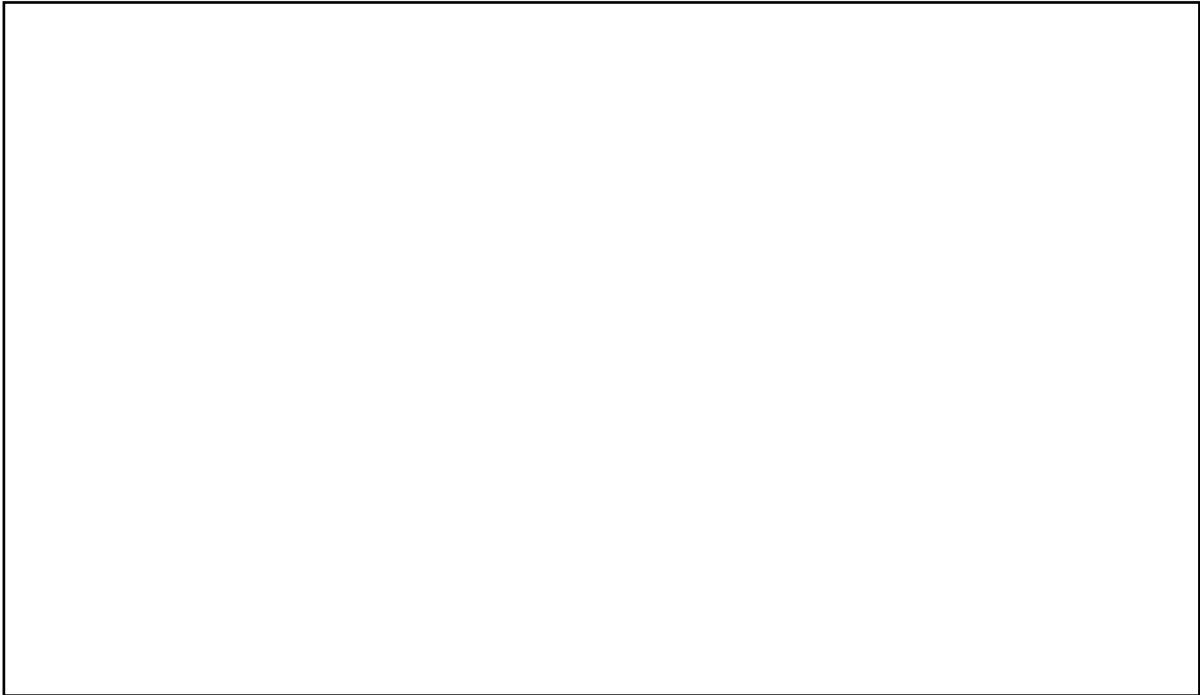
- A practical working tool which enables journalists, editors and publishers to do their jobs;
- Easily understood by the public; and
- Enforceable through regulation.

Publishers will be held directly responsible for compliance with this Code, which applies to all content and newsgathering activities for which publishers are responsible under the terms of their Regulatory Scheme Agreement with IMPRESS, regardless of the medium or platform of publication. All references here to publishers apply equally to anyone acting under a publisher's authority. All references here to journalists apply equally to anyone acting in a journalistic capacity.

This Code is distinct from the law and publishers are separately responsible for ensuring that they comply with the law.

Question 5: What, if any, changes would you recommend IMPRESS make to this clause?

This seems fine to me, though I wonder whether you would consider adding some sentence like that in the PCC Code, and I think still in the IPSO Code, that the Code is to be followed in the spirit as well as the letter.



Public interest

This exception aims to recognise that there may be circumstances where a particular method of news gathering or item of content, which would otherwise breach one or more clauses of the code, is justified. This exception is intended to protect hard-hitting, investigative journalism where a publisher can demonstrate a clear and important reason for undertaking specific conduct or publishing a news story. Our public consultations and polling show that the public recognise a public interest justification in stories that, for example, expose corruption or wrongdoing, and which hold the government to account. The exception relates to specific clauses in the code. These are identified where relevant.

The Code Committee is particularly interested in hearing your views on the non-exhaustive list of public interest factors and the procedural steps a publisher must engage in to justify a public interest exception.

PUBLIC INTEREST

In certain circumstances, there may be a public interest justification for a particular method of newsgathering or for publication of an item of content which might otherwise breach the Code. A public interest means that the public has a legitimate stake in a story because of the contribution it makes to a matter of importance to society. Such interests include, but are not limited to, the following:

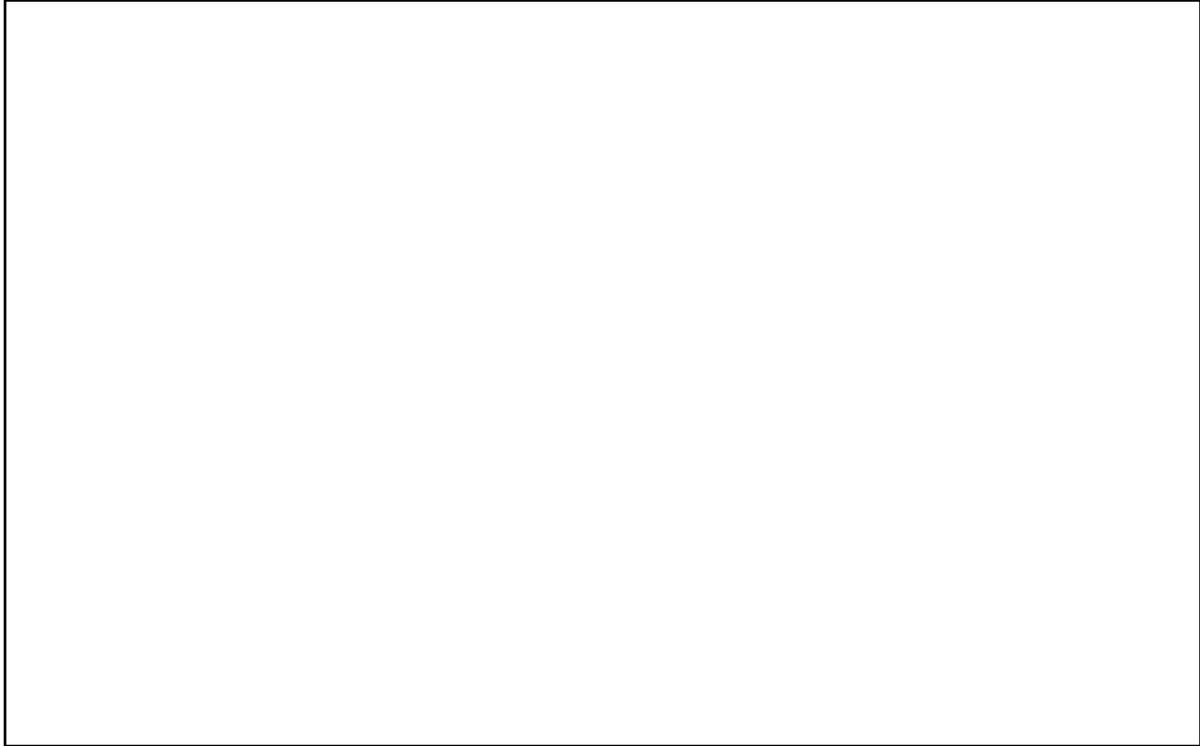
- a. The revelation or discussion of matters such as serious impropriety, incompetence or unethical behaviour that affects the public;
- b. Putting the record straight where an individual or organisation has misled the public on a matter of public importance;
- c. Revealing that a person or organisation may be failing to comply with any legal obligation they have;
- d. The proper administration of government;
- e. Open, fair and effective justice;
- f. Public health and safety;
- g. National security;
- h. The prevention and detection of crime and fraud; and
- i. The discussion or analysis of artistic or cultural works.

Where a publisher identifies a public interest justification for a particular method of newsgathering or for publication of an item of content, they should, when undertaking an action that might otherwise breach the Code, make a contemporaneous note, which:

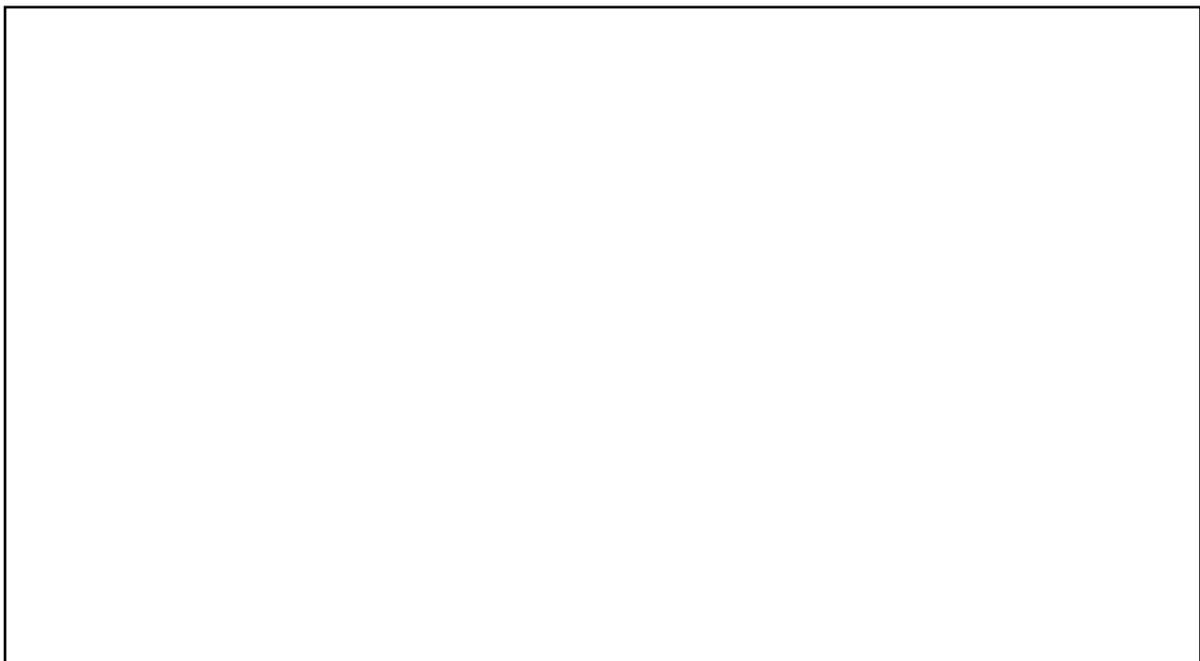
- i. Establishes their reason for believing that the action is in the public interest;
- ii. Demonstrates that relevant code-compliant measures have been considered before authorising the action;
- iii. Explains their view that the action is likely to achieve the desired outcome; and
- iv. Explains their view that any likely harm caused by the act does not outweigh the public interest in the action.

Where a public interest exception may apply, this is identified in the relevant clause.

b would not cover the facts of Campbell v MGN, where the claimant had not misled the public on a matter of *public importance*. But she might be caught under the last of the factors, e, relevant to determining whether a claimant has a reasonable expectation of privacy: cl 7, e. Does this apparent contradiction matter?



Question 7: What recommendations would you make for guidance to this clause?



Clause 1: Accuracy

This clause aims to ensure a commitment to accuracy and truthfulness in news reporting. The public ranked accuracy as the most important ethical standard that should guide publishers. The public also ranked the principle of balance highly. In broadcasting, balance generally refers to a requirement of impartiality. By balance in relation to the print media, the public were in favour of a standard that ensures a publisher does not mislead through distorting or misrepresenting facts. This was reflected in public workshops where members of the public articulated a desire for honesty in the way news stories are published. Clause 1.4 aims to strike a balance between protecting the media's right to be partisan, while requiring that a publisher not misrepresent or distort facts.

The reference to correcting any 'significant inaccuracy' with 'due prominence' in clause 1.2 means that only serious inaccuracies must be corrected. This threshold bars trivial claims of inaccuracy. 'Due prominence' requires that the placement and size of a correction be proportionate to the placement and size of the original news article and the potential harm caused by the inaccuracy.

10. ACCURACY

- 10.1. Publishers must take all reasonable steps to ensure accuracy.
- 10.2. Publishers must correct any significant inaccuracy with due prominence at the earliest opportunity.
- 10.3. Publishers must always distinguish clearly between statements of fact, conjecture and opinion.
- 10.4. Whilst free to be partisan, publishers must not misrepresent or distort the facts.

Question 8: What, if any, changes would you recommend IMPRESS make to this clause?

You might consider extending the obligation in cl 1.2 to the correction of misleading or distorted information, as under the old PCC Code.

Should there be a right to, or fair opportunity for, a reply to what the complainant considers to be an inaccurate or distorted account?



Question 9: What recommendations would you make for guidance to this clause?

It would be helpful to provide examples of 'significant' as opposed to 'trivial' inaccuracies, and of the kind of misrepresentations and distortions which might infringe cl. 1.4



Clause 2: Attribution

This clause aims to protect people's intellectual property by ensuring that publishers do not plagiarise material. This could occur where a publisher fails to credit the creator of material. This is particularly important given the ease with which content can be taken, and shared, from social media. A requirement not to plagiarise news content is common in press codes around the world.

9. ATTRIBUTION

- 9.1. Publishers must take all reasonable steps to identify and credit the originator of any third party content.
- 9.2. Publishers must correct any failure to credit the originator of any third party content with due prominence at the earliest opportunity.

Question 10: What, if any, changes would you recommend IMPRESS make to this clause?

A general question on this clause. How does it relate to the obligation to protect the confidentiality of sources who are a type of third party, ;and how does it apply when material on social media is communicated anonymously? There are or may be obvious answers to these questions, but they should perhaps be provided.

Question 11: What recommendations would you make for guidance to this clause?

Clause 3: Children

This clause aims to protect children from exploitation or distress caused by their interaction with the media. The Code Committee aimed to achieve this by requiring either parental consent or the assent of the child to interview or photograph a child under the age of 16. This is qualified by the paramount consideration of a child's safety and wellbeing. The public survey showed that the public ranked the protection of children highly amongst ethical journalistic standards.

At the same time, the clause aims to respect children's capacity to assent to interviews or photographs where they are not harmful to a child's interests.

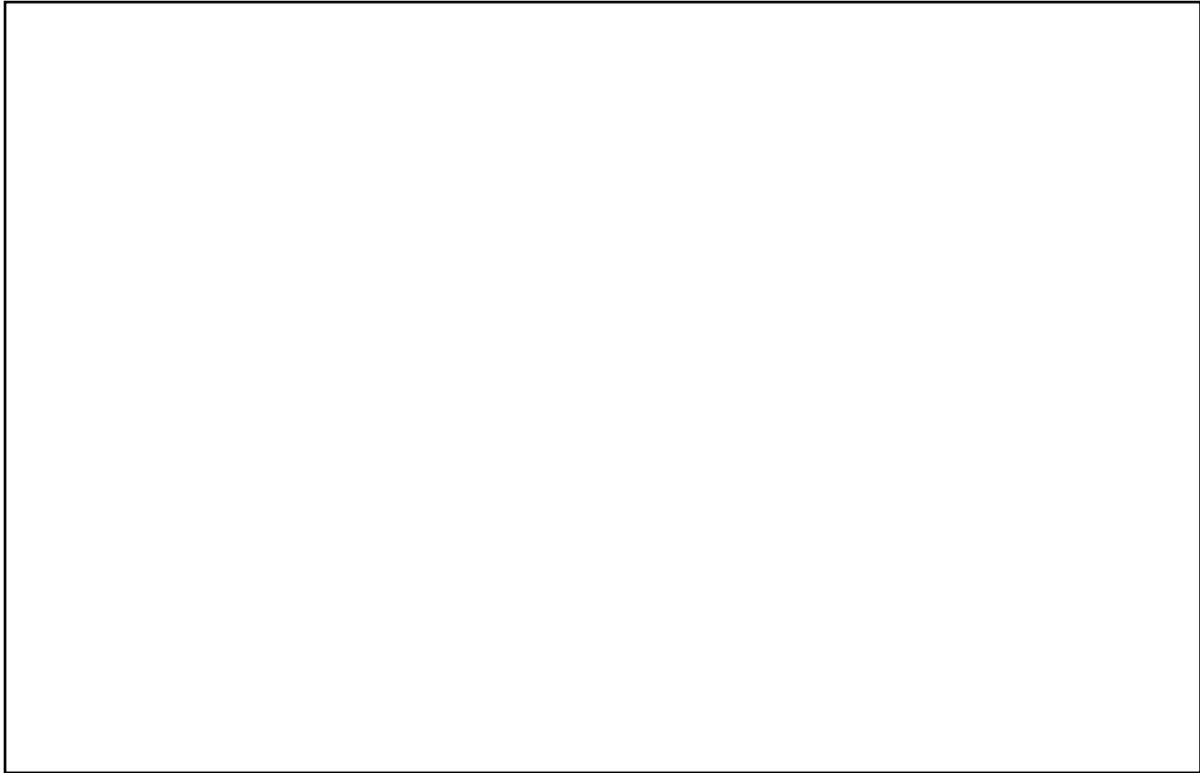
The clause defines a child as someone under the age of 16. This is consistent with the laws in the United Kingdom which, for many matters, recognise consent at 16 years of age. Clause 3.3 obliges publishers to seriously consider requests for archived stories to be anonymised where the person making the request was a child at the time of the story and now regrets their identification in that story. This gives individuals some form of protection from embarrassing or distressing stories that were published when they lacked capacity to give informed consent.

8. CHILDREN

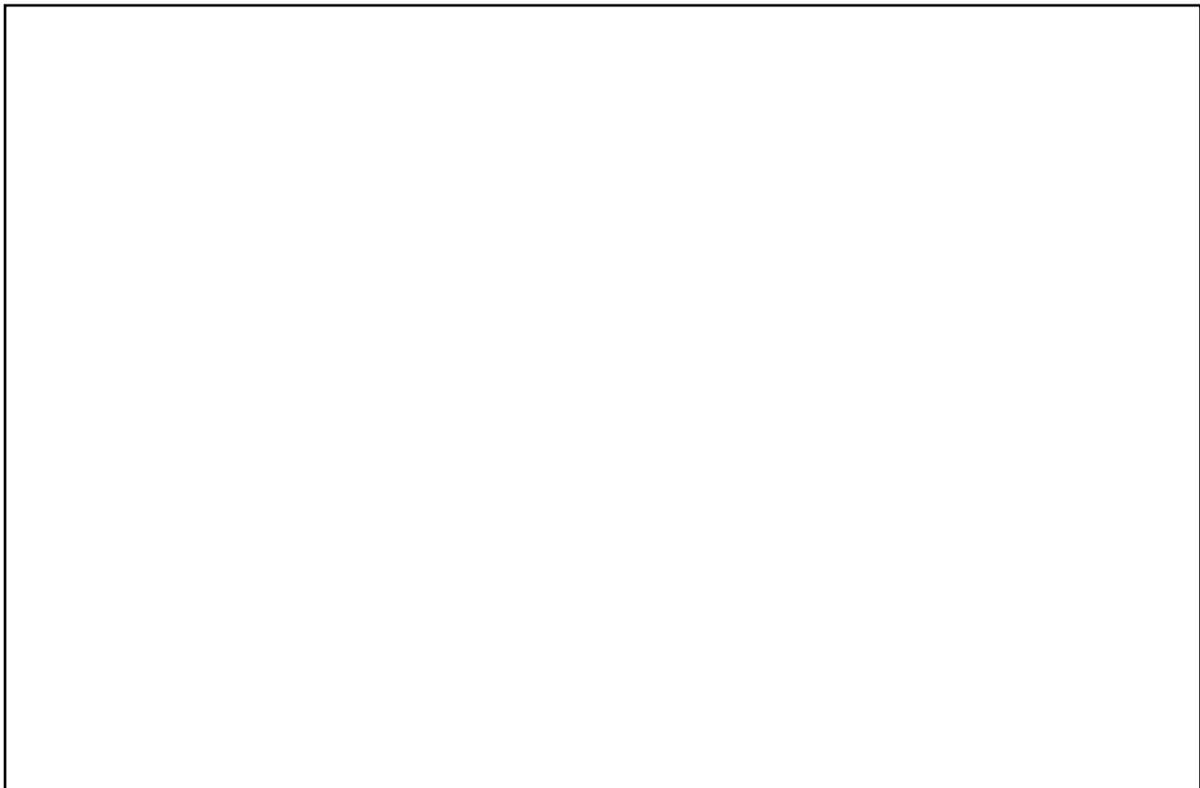
- 8.1. Publishers must only interview, photograph, or otherwise record the words or actions of, a child under the age of 16 years with the assent of the child or a responsible adult and where this is not detrimental to the safety and wellbeing of the child.
- 8.2. Publishers must not identify a child under the age of 16 years without the assent of the child or a responsible adult, unless this is relevant to the story and not detrimental to the safety and wellbeing of the child.
- 8.3. Publishers must give reasonable consideration to the request of a person who was previously identified as a child under the age of 16 years in a news story and who now wishes their identity to be concealed.

Question 12: What, if any, changes would you recommend IMPRESS make to this clause?

Clause 3.1 needs to be redrafted, as I have done with the insertion of the commas, so as to make it clear that the prohibition applies to the taking of photos, whether or not they relate to the words or actions of the child. The taking of a photo without assent, as in the Murray (JK Rowling) case would certainly breach the Code



Question 13: What recommendations would you make for guidance to this clause?



Clause 4: Discrimination

This clause aims to protect individuals whose personal characteristics may make them vulnerable to discrimination. The clause also aims to prevent publications that incite hatred against a group based on the group’s characteristics. There was comprehensive support in our public consultations for a discrimination clause to protect minorities and others from discriminatory reporting.

Clause 4.1 aims to protect individuals from being referred to in a negative way on the basis of their personal characteristics like race or gender. Clause 4.2 aims to prevent publishers from including irrelevant references to a person’s characteristics in a news story. Clause 4.3 aims to prevent the publication of news stories that incite hatred on the basis of certain characteristics. Each of the three clauses refers to protected characteristics listed in the *Equalities Act 2010*.

7. DISCRIMINATION

- 7.1.** Publishers must not refer pejoratively to a person on the basis of that person’s age, disability, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion or belief, sex or sexual orientation or another characteristic which makes that person vulnerable to discrimination.
- 7.2.** Publishers must not refer to a person’s disability, gender reassignment or identity, pregnancy, race, religion or belief or sexual orientation unless this characteristic is relevant to the story.
- 7.3.** Publishers must not incite hatred against any group on the basis of that group’s age, disability, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion or belief, sex or sexual orientation.

Question 14: What, if any, changes would you recommend IMPRESS make to this clause?

Some questions on this clause: is it right to cover 'belief' as such? Does it cover all ethical and political beliefs? That would affect a lot of political reporting! It might be better to limit the scope of the last phrase in 4.1 to cover only *unlawful* discrimination. Are there good reasons for omitting 'age' and 'marital or civil partnership status' from clause 4.2? Cl 4.3 goes further than existing criminal law bans on hate speech: should it go even further and cover incitement to hatred of immigrants, refugees, and other groups, who are sometimes targeted by parts of the press?

Question 15: What recommendations would you make for guidance to this clause?

It would be helpful to give examples of non-relevant references to disability, etc proscribed under clause 4.2

Clause 5: Harassment

This clause aims to protect individuals from harassment and intimidation by journalists. The public are strongly in favour of a clause that prohibits forms of harassment by journalists.

The clause provides a general prohibition against intimidation as the Code Committee considers that there can be no circumstances where it will be justified to intimidate another person in the interests of newsgathering. The clause also requires publishers to ensure journalists do not engage in persistent and repeated attempts to contact and pursue a person. This sub-clause is subject to a public interest exception.

6. HARASSMENT

6.1. Publishers must ensure that journalists do not engage in intimidation.

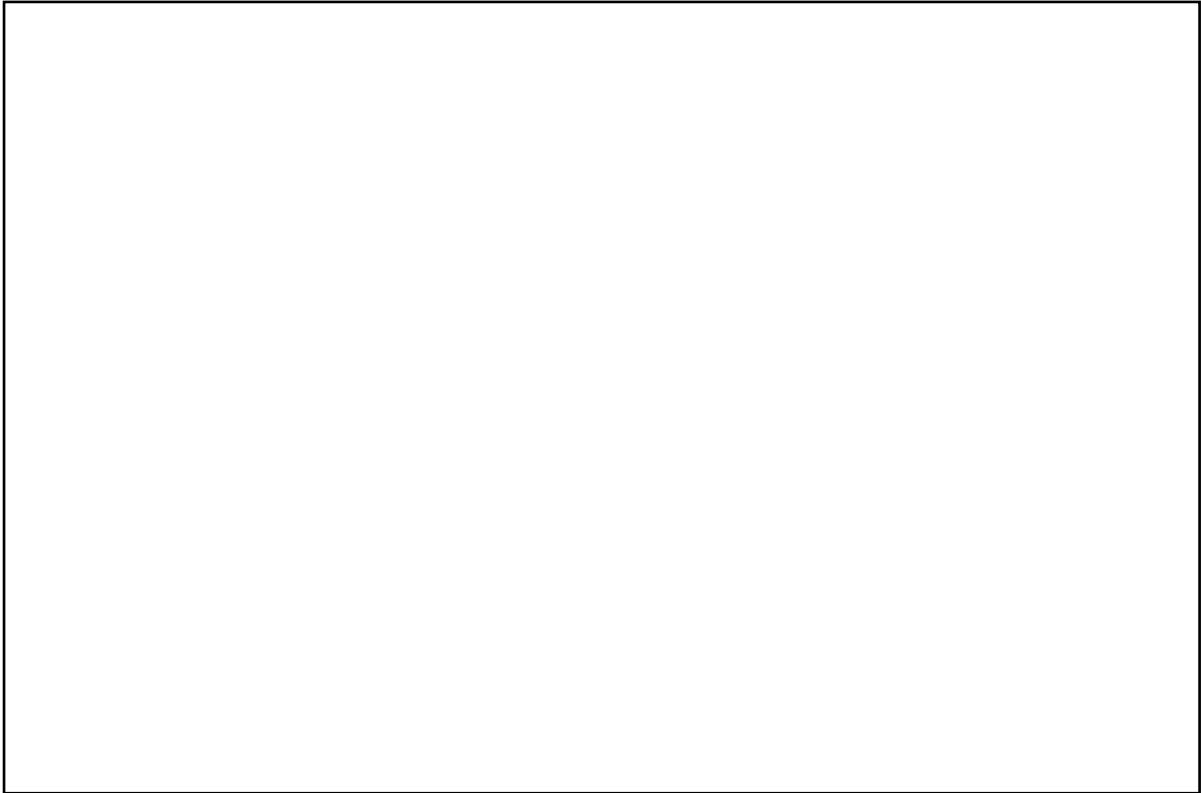
6.2. Except where justified by the public interest, publishers must ensure that journalists:

- a. Do not engage in deception or harassment.
- b. Always identify themselves as journalists and provide the name of their publication when making contact.
- c. Comply immediately with any reasonable request to desist from contacting, following or photographing a person.

Question 16: What, if any, changes would you recommend IMPRESS make to this clause?

There is sometimes a fine line between intimidation and harassment. Examples in the guidelines might clarify the distinction a little, but inevitably it will be a matter for judgment in individual cases. In what circumstances, is it in the public interest for journalists to engage in deception or harassment?

Question 17: What recommendations would you make for guidance to this clause?

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Clause 6: Justice

This clause aims to protect the principle of a fair trial. The public were concerned by examples of news stories that implied a person's criminal guilt prior to conviction. The public were also concerned about the need to protect the identity of children involved in criminal proceedings.

This clause aims to reflect these principles and concerns, while not burdening the principle of open justice. This means that journalists should be able to report on court proceedings except where not permitted by law. This clause does not attempt to recast the law of contempt of court. It is the responsibility of publishers to be aware of their legal responsibilities in this area. The clause protects particular classes of persons such as children in criminal proceedings and victims in sexual assault cases. The clause also prohibits the payment of witnesses and defendants in criminal trials and prohibits bribing public officials for information, except where permitted by law.

5. JUSTICE

5.1. Publishers must take the greatest care not to prejudice any criminal investigations or legal proceedings, except as permitted by law.

5.2. Publishers must protect the identity of victims of sexual assault and children under 18 years of age who are or have been involved in criminal proceedings.

5.3. Publishers must not make payments to witnesses or defendants in criminal proceedings, except as permitted by law.

5.4. Publishers must not pay public officials for information, except as permitted by law.

Question 18: What, if any, changes would you recommend IMPRESS make to this clause?

Should cl 6.3 be extended to cover offers of payment, as well as actual payments, and should it cover payments, or offers, to persons who might be witnesses, though they are not actually called? The scope of the equivalent provision in the old PCC Code – clause 15 – gave rise to some complex adjudications. The scope of clause 6.3 should be clarified in the guidance.



Question 19: What recommendations would you make for guidance to this clause?



Clause 7: Privacy

This clause aims to protect a person's privacy. A person may have a right to privacy about matters involving their private and family life, home and communications. The public were very concerned about intrusive press conduct and news stories. At the same time, the public recognised that in some circumstances, the public interest in a story may override a person's right to privacy. The Code Committee aims to achieve this balance by including a public interest exception.

The term 'reasonable expectation of privacy' is used in privacy law in the United Kingdom to explain the circumstances that give rise to a person's right to privacy. Whether a person has a reasonable expectation of privacy will be specific to the circumstances of a particular news story. For this reason, the Code Committee has developed a non-exhaustive list of indicative factors that may give rise to a reasonable expectation of privacy. The Code Committee is particularly interested in hearing your views on the list of non-exhaustive factors.

4. PRIVACY

4.1. Except where justified by the public interest, publishers must respect people's reasonable expectation of privacy, which may be determined by factors which include but are not limited to the following:

- a.** The nature of the information concerned, such as whether it relates to intimate, family, health or medical matters or personal finances;
- b.** The nature of the place concerned, such as a home, school or hospital;
- c.** How the information concerned was held or communicated, such as in private correspondence or a personal diary;
- d.** The relevant attributes of the person, such as their age, occupation or public profile; and
- e.** Whether the person had voluntarily courted publicity on a relevant aspect of their private life.

4.2. Except where justified by the public interest, publishers must:

- a.** Not use covert means to gain or record information.
- b.** Respect privacy settings when reporting on social media content.
- c.** Take all reasonable steps not to exacerbate grief or distress through intrusive newsgathering or reporting.

Question 20: What, if any, changes would you recommend IMPRESS make to this clause?

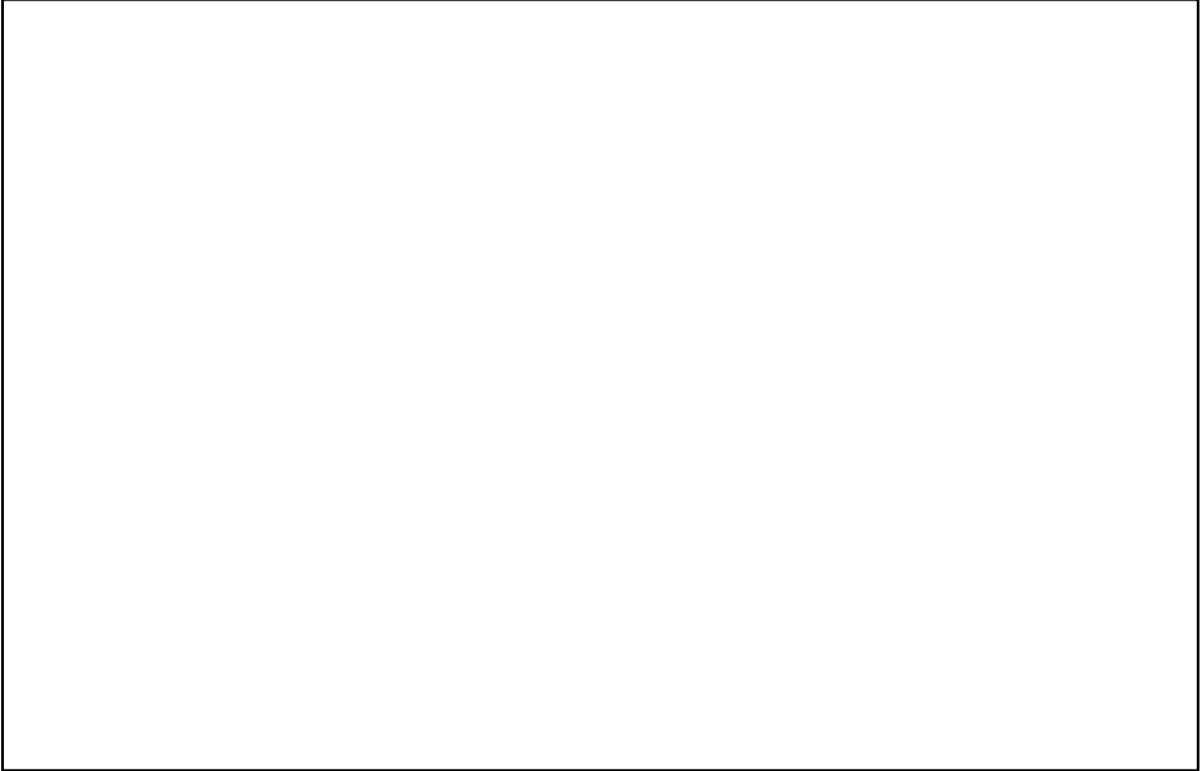
As I have argued before- first in an essay in *Comparative Defamation and Privacy Law* (ed A Kenyon, CUP, 2016) and recently in a short article to be published in the *Journal of Media Law*, the 'reasonable expectation of privacy' is a problematic concept as it enables tribunals to consider factors at the first stage of a privacy case – whether the claimant's privacy rights are in issue – which should be considered at the second stage – when those rights are balanced against freedom of speech, or the public interest. This point is nicely illustrated by factors d and e here which make relevant arguments in determining the existence of a privacy interest which are really more pertinent to the public interest questions. There is indeed a possible overlap between factor e here and factor b in the determination of the Public Interest. Factor e here is far too broad in any case: why should it count against, say, a complainant that he or she has discussed some aspect of their private life in an earlier interview with a magazine whose coverage they respect, if a tabloid discusses that same aspect in perhaps more lurid detail?

I think clause 7.2 should be extended to proscribe the use of 'covert means to gain or record information, or to take a photograph'. I would also favour a new clause 7,2,d: to proscribe taking photographs of people in private places without their consent, with guidance provided on what is a private place.

More generally the privacy clause is an important provision which should be set out earlier in the Code, probably as clause 2 after the provision on accuracy.



Question 21: What recommendations would you make for guidance to this clause?



Clause 8: Sources

This clause aims to encourage the publication of news stories that are based on reliable and credible sources. As one way to achieve this, the clause aims to protect sources where confidentiality has been agreed to and not waived. As the responsibility is on a publisher to protect sources, this clause protects journalists from pressure exerted by publishers to name sources. The clause also prevents the fabrication of sources.

3. SOURCES

3.1. Publishers must take care to protect sources where confidentiality has been agreed to and not waived by the source.

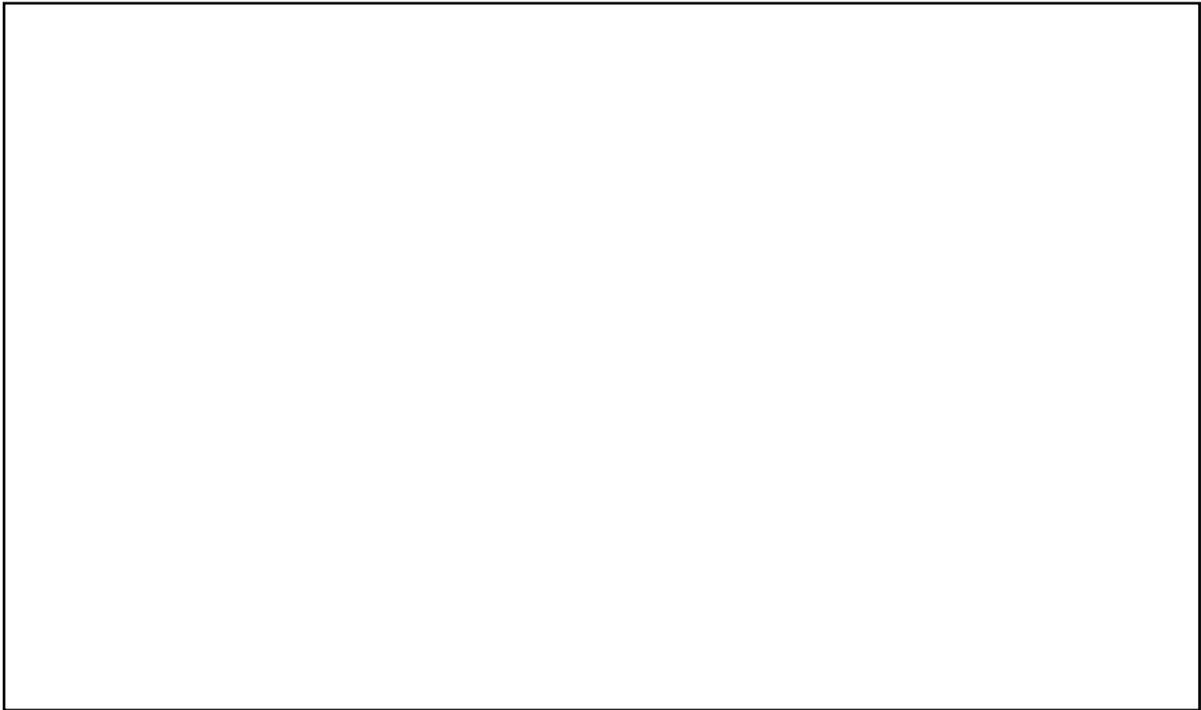
3.2. Publishers must ensure that journalists do not fabricate sources.

Question 22: What, if any, changes would you recommend IMPRESS make to this clause?

The aim of this provision is laudable, but I am skeptical whether as drafted it is enough to achieve it. The clause should be strengthened by provisions requiring journalists and editors to be as transparent as possible in their use of confidential sources by providing readers with some information about who the source is, by checking a source's story with another independent source and by discouraging reliance on a single source. I have discussed this issue in my recent book, *Anonymous Speech* (Hart, 2016) at pp 115-118. More controversially I think it may sometimes be right to name a source, despite a promise of confidentiality, when it is clear that the source has been dishonest or manipulated the journalist: see my book, p 118-119

Clause 8.2 is fine.

Question 23: What recommendations would you make for guidance to this clause?

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Clause 9: Suicide

This clause aims to prevent the reporting of suicide or self-harm that glamorises those acts and which provides excessive detail to the extent that the act could be imitated.

2. SUICIDE

2.1. When reporting on suicide or self-harm, publishers must not provide excessive details of the method used or speculate on the motives.

I agree with this clause.

Question 24: What, if any, changes would you recommend IMPRESS make to this clause?

Empty response box for Question 24.

Question 25: What recommendations would you make for guidance to this clause?

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Clause 10: Transparency

This clause aims to promote accountability and transparency in news reporting. The clause requires publishers to clearly identify where content has been paid for and is controlled by a third party such as an advertiser. The clause also requires publishers to declare ‘significant’ conflicts of interest and relationships with sponsors where a publisher receives an ‘unfair advantage’.

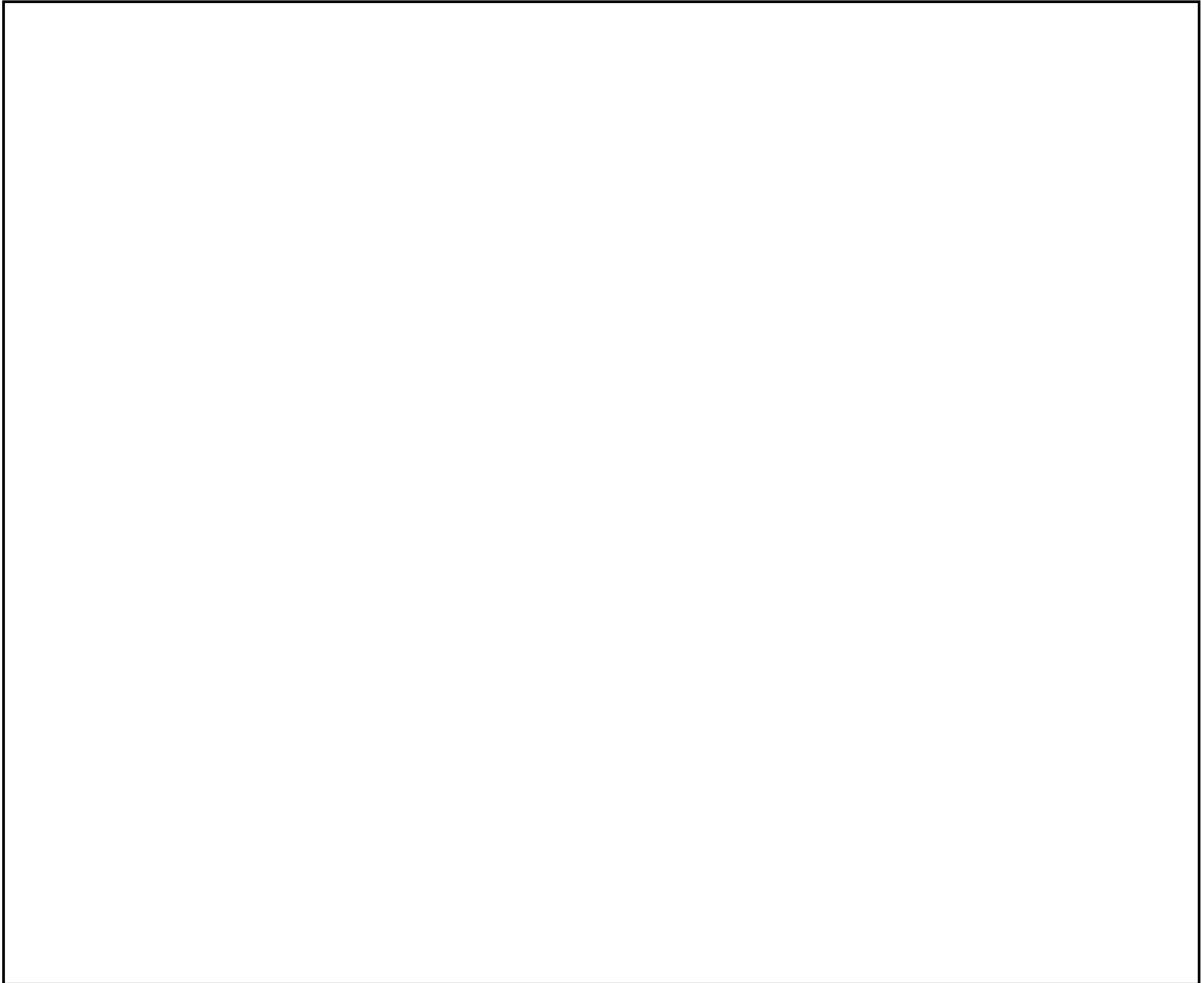
1. TRANSPARENCY

- 1.1. Publishers must make absolutely clear where content has been paid for financially or under a reciprocal arrangement and is controlled by a third party.
- 1.2. Publishers must take all reasonable steps to declare significant conflicts of interest and must not gain any unfair advantage from such conflicts.
- 1.3. Publishers must correct any failure to declare significant conflicts of interest with due prominence at the earliest opportunity.

Question 26: What, if any, changes would you recommend IMPRESS make to this clause?

This is a significant provision. As there was no precedent for it in the PCC Code, I have little to say on its scope or difficulties in its application. I would have thought Guidance should make clear if possible what a ‘significant conflict of interest’ amounts to: does it cover, for example, personal and political interests as well as financial interests which might prejudice a newspaper’s coverage of events?

Question 27: What recommendations would you make for guidance to this clause?

A large, empty rectangular box with a thin black border, intended for the user to provide their recommendations for guidance to the clause mentioned in the question above.

Question 28: Are there any other issues that you believe the IMPRESS Code Committee should include in its Standards Code? If so, please explain why these issues are important and how they could best be addressed in a standards code.

As mentioned earlier, I think the Code should contain a provision providing for, or even mandating, a right to reply to significant inaccuracies or distorted accounts of events involving an individual. These provisions provide effective redress for the persons concerned to protect their dignity and standing and also promote freedom of speech for those individuals. Rights of reply are provided in the press laws of France and in the German states.



Question 29: Do you agree that the IMPRESS draft Standards Code is a practical working tool which enables journalists, editors and publishers to do their jobs? (please select one of the following options)

strongly agree for the most part, though I have expressed reservations about clauses 7 and 8

agree

disagree

strongly disagree

Question 30: Do you agree that the IMPRESS draft Standards Code is easily understood? (please select one of the following options)

strongly agree with regard to most clauses

agree

disagree

strongly disagree

Question 31: Do you agree that the IMPRESS draft Standards Code is enforceable through regulation? (please select one of the following options)

strongly agree that is my view.

agree

disagree

strongly disagree