

Inquests, inquiries and investigations in the media How to handle press attention

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Carrot or stick?

2 possible approaches worth considering:

(1) Steps which might invite greater media cooperation (carrots)

- Tactical benefits of being seen to be transparent / open
- Keeping the media updated
- Access to documents / evidence?
- The dangers of deadlines

(2) Measures to enforce compliance (sticks)

- Legal threats
- The regulatory regime

Inherent tension in many inquiries and investigations between:

- (1) The sensitivity of the subject matter (or particular aspects of it);
- (2) The impact of disclosure on those involved or under scrutiny;
- (3) The public interest in exposing past mistakes and learning lessons;
- (4) The ambition of any public inquiry or publicly-announced investigation to enhance / restore public confidence.

The role of the media in respect of these different imperatives is complex and often contradictory

Dealing with anonymity / confidentiality

Good reasons to consider withholding information include:

- (1) The uncontroversial – national security, public interest immunity, legal privilege
- (2) The clear-cut – the avoidance of prejudice to current or future criminal proceedings
- (3) The harmful – vulnerable individuals, information which could give rise to the risk of harm
- (4) The evaluative:
 - (a) Personal or sensitive private information
 - (b) Confidential information
 - (c) Commercially / operationally sensitive information
 - (d) Information which might disrupt or hamper the inquiry / investigation process if disclosed

The latter issue will often arise acutely when decisions are made over whether to name those subject of criticism

- Instinct may be to tread cautiously (often for good reason)
- However, this will frequently clash with the media's interest in reporting events
- See e.g. Lord Rodger in ***In re Guardian News and Media Ltd* [2010] UKSC 1:**

“What's in a name? ‘A lot’, the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. [...] A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

Non-exhaustive guidelines:

(1) In all cases, the decision-maker needs to carry out a fact-sensitive proportionality assessment, weighing:

(a) The public interest in identifying those implicate, including in terms of:

- (i) the need for the inquiry effectively to fulfil its purpose
- (ii) the rights of others to know who was culpable
- (ii) public concern in fully understanding the events under scrutiny

(b) Against any risk of harm which identification may cause to the legitimate interests of others

In many instances, this will involve the decision-maker drawing a line between the competing rights under Article 8 and Article 10 of the ECHR – If so, see Lord Steyn’s “four propositions” in **Re S (A Child) [2005] 1 AC**:

“First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

- (2) Public bodies and public-facing organisations must expect and tolerate greater scrutiny than private entities
- (3) Individuals occupying senior roles face a greater expectation of being named
- (4) There are practical advantages in leaning in favour of transparency, particularly where an inquiry addresses matter of high public concern or controversy:
 - (a) It prevents misinformed speculation in the media, with potentially harmful consequences for others
 - (b) It lessens the risk of destructive (and potentially counterproductive) witch-hunts
- (5) Conversely, there may be significant legal complications which act against such an approach, including:
 - (a) The risk of an inquiry or investigation facing Article 8-based claims where those named face significant damage from press intrusion and the consequential public exposure
 - (b) Potential liability in defamation for reputational damage caused by the ensuing media coverage

(6) Practical steps to consider if a decision to name is reached:

(a) Prior assessment of the risks posed by potential legal complaints

- Pre-publication advice?
- Defamation
 - Truth?
 - Qualified privilege?
 - Section 4 of the Defamation Act 2013?
- Salmon letters and rights of reply

(b) Measures to protect those named against a media firestorm

- Notification
- Legal advice
- Lines against inquiry

Enforcing compliance – legal options 11KBW

(1) Reporting restrictions

- e.g. Sections 18 and 19 Inquiries Act 2005
- Inherent jurisdiction – e.g. ***Re LM (A Child) (Reporting Restrictions: Coroner's Inquest) [2008] 1 FLR 1360***

(2) Interim non-disclosure orders

- ***Practice Direction (HC: Interim non-disclosure orders) [2012] 1 WLR 1003***
- Numerous pitfalls, including importance of giving proper notice to media
 - See e.g. ***Re AB (Application for reporting restrictions: Inquest) [2019] EWHC 1668 (QB)***

(3) Personal causes of action:

(a) Misuse of private information / breach of confidence

(b) Data protection

(c) Defamation

The Independent Press Standards Organisation (IPSO)

- *“The independent regulator for the newspaper and magazine industry in the UK” – IPSO website*
- *“The newspaper industry marking its own homework” – Hugh Grant, July 2018*

Nonetheless, IPSO’s **Editors’ Code of Conduct** is a potentially useful tool to influence press behaviour:

- (1) Widely acknowledged by responsible journalists
- (2) Standards set and agreed by the industry itself (building on the former PCC Code)
- (3) Several provisions of direct relevance to reporting on inquiries and investigations:
 - Clause 2: privacy
 - Clause 3: harassment
 - Clause 4: intrusion into shock and grief
 - Clause 5: reporting suicide
 - Clauses 6 and 7: children

Enforcing compliance –the regulators

The Office of Communications (OFCOM)

The national regulator of licensed broadcasters in the UK:

- Maintains programming standards (including news programming) across the TV and radio spectrum
- Entertains complaints from directly affected parties
- Sets and applies **The Broadcasting Code**:
 - Section 5: Due impartiality and due accuracy
 - Section 7: Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes:
 - 7.11 If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond
 - 7.13 Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner
 - Section 8: Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted