



# WHO PAYS THE PIPER...

A Response to

## ***Making Sure that Crime Doesn't Pay***

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### ***The MediaWise Trust***

***ADVICE, INFORMATION, RESEARCH AND TRAINING ON MEDIA ETHICS***

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## 1. The MediaWise Trust

- 1.01 MediaWise exists to
- provide free, confidential advice and assistance for members of the public affected by inaccurate, intrusive, or sensational media coverage;
  - deliver use-of-the-media training for the voluntary sector and members of the public;
  - devise and deliver training on ethical issues for media professionals;
  - conduct research and publish material about media law, policy and practice;
  - contribute to public debate about the role and impact of the mass media.
- 1.02 Originally called PressWise, the Trust was set up as a voluntary organisation in 1993 by 'victims of media abuse', supported by concerned journalists, media lawyers and Clive Soley MP, who had sought to establish an independent body to defend press freedom and adjudicate on complaints against the press with his Freedom and Responsibility of the Press. MediaWise however is concerned with ethical issues in all forms of mass media. On average the Trust now receives at least three enquiries from potential complainants each week, and a similar number of approaches from journalists, students and academics.
- 1.03 The Trust registered as a charity in 1999, and is funded by donations, grants and commissions. Our aims and objectives can be viewed at [www.mediawise.org.uk](http://www.mediawise.org.uk)
- 1.04 MediaWise operates on the principle that press freedom is a responsibility exercised by journalists and editors on behalf of the public. We consider that the most important role of journalists in a democracy is to inform the public about events, issues and opinions which might influence the decisions people take about their lives and the society in which they live. For that reason the Trust asserts the public's right to know when inaccurate information has been delivered by the mass media.
- 1.05 The Trust's president is Sir Louis Blom-Cooper QC, the last Chairman of the Press Council before it was replaced by the Press Complaints Commission (PCC) in 1991. Its current Trustees are
- Charles Fletcher MBE (Chair, Director Caledonia Media)
  - Fareena Alam (Managing Editor, *QNews*)
  - Bob Borzello (former journalist & publisher)
  - Glenn Del Medico (former legal advisor to BBC)
  - Prof. Roy Greenslade (columnist & former editor)
  - Jocelyn Hay CBE (founder, Voice of the Listener & Viewer)
  - Pat Healy (former Chair, NUJ Ethic Council)
  - Nicholas Jones (author, journalist & former BBC political correspondent)
  - Stephen Jukes (former head of Reuters Global News, now head of Bournemouth School of Journalism)
  - Jim Latham (Secretary, Broadcast Journalism Training Council)
  - Desiree Ntolo (Rabbi & PressWise co-founder of PressWise)
  - Amanda Williams (Treasurer)
- 1.06 Since 2006 MediaWise has been based at the University of the West of England in Bristol. Currently it has two part-time staff. The Trust's Director and voluntary Associate Directors, are experienced journalist and trainers who have worked in all sectors of the media. The Trust employs a network of working journalists to conduct research and deliver training.
- 1.07 MediaWise has devised and delivered a wide range of training packages for media professionals and non-governmental organisations in over 20 countries.

- 1.08 MediaWise regularly contributes to public debate via the media and events concerned with media ethics and regulation, and regularly distributes an electronic bulletin commenting on topical issues to over 2,000 media correspondents and journalism organisations worldwide.
- 1.09 It also organises opportunities for dialogue between media professionals and the public in the UK. These have included:
- Children's Rights vs. Press Freedom: Who wins? (Bath 2005)
  - Journalism & Public Trust (London, 2004)
  - Reporting Suicide (London, 2001)
  - Refugees, Asylum-seekers and the Media (London, 2001)
  - Access to the Information Society (Bristol, 1998)
  - Ethnic Minorities and the Media (London, 1997)
  - Child Exploitation and the Media (London, 1997)
- 1.11 Details about the full range of the Trust's activities can be obtained on our website: [www.mediawise.org.uk](http://www.mediawise.org.uk)

## 2. Background to this submission

- 2.01 MediaWise has made similar submissions on several previous occasions, primarily about payments to witnesses in criminal cases – to the National Heritage Select Committee in Autumn 1996, and response to consultations by the Lord Chancellor's Department in 1996 and latterly (CP 02/02) in March 2002. Similar issues were also touched upon in our submission to the Culture, Media & Sport Select Committee Inquiry into Privacy and Media Intrusion (*Stop the Rot!*, February 2003).
- 2.02 MediaWise is frequently contacted for advice about media coverage of crimes by both victims of crime and their relatives. We are also contacted by relatives of criminals, and occasionally by convicted criminals concerned about some aspect of media coverage. Both groups often express concern about the nature of approaches made to them by journalists for information and quotes, particularly when offers of payment are made.
- 2.03 MediaWise advises people not to 'sell their stories'. Those who choose to are advised to seek professional legal advice before signing contracts which are generally unfair and unequal, with all the power in the hands of the editors. Those who sell 'exclusives' often discover that they are browbeaten into giving information, including details that they have every right to refuse to reveal, and some find their reputations damaged either by the way the story is presented, or by 'spoiling copy' published by rival papers.
- 2.04 In our view the common practice, until fairly recently, of newspapers offering inducements to witnesses in criminal cases puts at risk the course of judicial process, and is tantamount to bribery if not contempt of court. Protecting public confidence that accused citizens will obtain a fair trial under the criminal justice system has been our paramount concern when advising on such matters.
- 2.05 Newspaper editors or programme producers are willing to 'invest' often large sums of money to obtain the rights to a person's version of events because they believe it will increase their circulation/ratings. These are primarily commercial rather than journalistic decisions. The main reason for drawing up binding contracts linked to payment is to prevent other papers or broadcasters from obtaining access to information that may be in the public interest or, often more accurately, of interest to the public.
- 2.06 Some argue that this competitive approach to news-gathering is appropriate in the 'free market'. MediaWise regards press freedom as a responsibility exercised by journalists on behalf of the public, to research and disseminate information of direct relevance to people's lives that might otherwise remain hidden from the public domain. Press freedom should not be abused as 'a licence to print money' or to make money out of others' misfortune.
- 2.07 MediaWise believes that if information is in the public interest it should not have a price tag. Payment to witnesses in criminal cases is a form of 'cheque-book journalism', and we regard cheque-book journalism as an abnegation of press freedom. The purchase of 'exclusives' is a marketing device designed to gain a competitive advantage over rivals, rather than genuinely to serve the public interest. The practice runs counter to the NUJ Code of Conduct, and puts pressure on freelancers and agencies to produce the stories that major print and broadcast publishers believe will 'sell'.

- 2.08 It cheapens the justice system if evidence is regarded as a commodity to be sold to the highest bidder. While there may be instances where the offer or payment of money has brought to light evidence of crimes or has led to successful criminal conviction, it is also the case that genuine 'whistle blowers' tend not to supply information for financial gain.
- 2.09 It would be very difficult to devise appropriate legislation to outlaw abuses of the cheque-book, especially since there will be conflicting views about which stories are 'in the public interest' and which are merely 'of interest to the public'. Furthermore, we recognize that a blanket ban on cheque-book journalism could put some quite legitimate journalistic practices at risk.
- 2.10 This has included gaining an insight into both the mindset and the operating methods of criminals. For example, numerous popular 'consumer' programmes on television have employed former criminals to alert the public to confidence tricks and means of access used by burglars. It is clearly in the public interest to use such first hand information as a means of assisting the public to protect themselves from criminal activity.
- 2.11 However we are well aware that members of the public, and especially victims of crime and their relatives, disapprove of convicted criminals receiving substantial payments for telling their stories (in print or on film) or exploiting their notoriety, whether it is Jeffrey Archer appearing as a juror in a 'reality TV show' financed from the licence fee or murderers sharing fees and serialisation rights with ghost writers.
- 2.12 It is also clear that the current system of self-regulation does not properly address the complexities of such practices. If it is legitimate to write and have published a book about a criminal career it is impossible to prevent commercial deals for promoting and/or serialising extracts in print or broadcast, as editors have been quick to point out in the past.
- 2.13 The insertion of a new clause outlawing payments in the Editors' Code of Practice was announced on the morning of 27 November 1996 witnesses just as the late Sir David English, then Chair of the industry's Code of Practice Committee, and Lord Wakeham, then chair of the Press Complaints Commission (PCC), were to face a grilling from the National Heritage Select Committee on the very topic.
- 2.14 Sir David, who was also Editor-in-Chief of the Mail group of newspapers, had come around to the idea that the Code should be strengthened in this way following public criticism of the *Daily Mirror* for offering cash to convicted fraudster Darius Guppy, and the *Daily Mail* for paying £300,000 to publicise a book by gaoled Barings' trader Nick Leeson. Previous criticism of the practice he passed off as 'some grandiose announcement of the old Press Council around the time of the (Yorkshire) Ripper trial,' neglecting to mention he had been editor of the Daily Mail in 1983 when it was castigated for making payments to relatives of Peter Sutcliffe. At the time he dismissed the adjudication as 'short-term, short-sighted and smug (proving) yet again that the Press Council does not truly understand the concept of a free press.'
- 2.15 It is to be hoped that similar attitudes no longer prevail, although the newspaper industry relies upon 'self-regulation' only insofar as it does not interfere with what newspapers want to do. The primary purpose of the PCC remains to protect the industry from the imposition of statutory controls. There are many working journalists who share the view that the PCC alone is an insufficient safeguard against excesses committed in pursuit of commercial self-interest.

- 2.16 The public have good reason to be cynical about the motives of newspapers which buy and hype stories for profit rather than the public good. The PCC is still seen as a convenient fig leaf protecting the vulnerabilities of the industry, which struggles to justify its excesses by calling in aid the public interest. Editors do not lose their jobs for breaches of the industry Code. When the editor of the *News of the World* fell on his sword in January 2007, it was in response to the admission of criminal activities by his royal correspondent. The executive who authorised the contract that facilitated the purchase of personal data by illicit means remains in post.
- 2.17 However, it should not be unlawful for a former criminal who has served a sentence, shown appropriate remorse, outlived the 'statute of limitations' set by the Rehabilitation of Offenders Act 1974, and/or made restitution for their crimes, to publish an account of their lives, including their criminality. That would be an inappropriate restriction on their freedom of expression, and the public's right to know and understand better the causes of crime, the mindset of the criminal. It might even be seen as a disincentive to those who are prepared to contribute to crime prevention by talking to young people about how to avoid the errors and circumstances that led them into crime.
- 2.18 There is some significance in the fact that the Home Office consultation document is able to quote only three examples of book publications in the last 40 years that might fall foul of the proposed measures. It is also ironic that the 'moral panic' got up around payments made for serialisation in *The Times* of Gitta Sereny's book on Mary Bell was generated in large part by rival mass media publishers. This is a not unfamiliar technique when one publication wins an exclusive deal. Newspapers that brandish the cheque-book most liberally are the ones most likely to criticise people who enter into agreements with a rival.

### **3. An appropriate remedy**

- 3.01 It remains problematic if the public perceive that former criminals can further 'profit' from a life of crime or a particularly unpleasant criminal act by publishing their memoirs. And if it makes sense to impose restrictions on their ability to unduly prosper from exploiting their past, it is equally appropriate to ensure that those with whom they enter into publishing deals of whatever sort do not unduly capitalise on the profits they can make from direct or indirect publicity and sales of the material.
- 3.02 Any measures that are to be introduced should ensure that such publications benefit society and the victims at least as much as those expected to obtain financial benefit from the transaction. These measure will need to be proportionate, of course. Any system of control should take into account the impact of the crime on those directly affected, but there are evident inequities in allowing the victims to be the final arbiters as to the whether or not publicity and/or payment is justified. Even if a former criminal has expressed remorse, some victims and their relatives may regard any publicity about their activities as a form of glorification of crime.
- 3.03 The very notion of 'Making sure that crime doesn't pay' as outlined in the consultation document begs many questions. Would the proposed restrictions forbid the payment of legitimate out-of-pocket expenses incurred by a former criminal in a collaboration prior to publication? Does the notion of 'profit' include a reasonable payment for time spent on research, writing or providing information and advice to a writer/publisher? Do the same rules apply if a criminal has paid some form of compensation to a victim/victim's family or reached a reconciliation with them? Might it fall within the purview of a judge to impose restrictions on future publication of memoirs at the time of sentencing?
- 3.04 Preventing reasonable opportunities for gainful employment once a sentence has been served benefit nobody. Any proposal to restrict the methods by which a convicted criminal might later earn a living also goes to the heart of the nature of the UK penal system. Crime has a human cost for victims and their families, for the innocent relatives of criminals, and for the wider public. Jail sentences and some non-custodial sentences are a cost to the public purse which is rarely recovered. Nor is the cost of the welfare services upon which families of criminals must often rely.
- 3.05 What is more, the apparent failure of a penal system to deliver either retribution or rehabilitation raises further doubts about the wisdom of imposing restrictions on the freedom of expression of those who have been through it. From their experience it may be that failings in the effectiveness of the system, including society's failure to tackle the root causes of crime, may be identified and addressed. In short, there may be a social benefit in listening to what former criminals have to say.
- 3.06 Having considered the options presented in the Home office consultation document, the most preferable remedy would appear to be the creation of a civil scheme which would allow assessment and recovery of improperly obtained 'profits' based on the provisions of the Proceeds of Crime Act.
- 3.07 Aspects of the procedure adopted by the Canadian province of Ontario under the awkwardly titled Prohibiting from Profiting from Recounting Crimes Act 2002 commend themselves, not least because they place an obligation on the publisher to register the terms of any proposed contract or risk a significant fine.

- 3.08 Difficulties arise, of course, as to how much of any proposed fee or assistance in kind – accommodation, for example - might be considered a reasonable disbursement and how much a 'taxable profit' under the terms of whatever measure is adopted. Certainly, any sums offered to a former criminal should be disclosed to the Inland Revenue and attract an appropriate deduction of income tax at source.
- 3.09 Beyond that there would need to be a clear, graduated scheme as to how much of the balance of funds being made available should be sequestered either to pay compensation to victims or to reimburse the public for the cost of police investigations, court time and prison costs.
- 3.10 Inevitably these deductions may be regarded as disincentives to publishers to offer inordinate pre-publication fees or royalties, thereby limiting the ability of a former criminal from profiting unduly from the deal. However that in turn could increase the margin of profit for the publisher, and while the 'author' may not be enriched the publisher could be said to be profiting unduly from the transaction. In our experience victims of crime find this just as distasteful as if the perpetrator were to benefit personally.
- 3.11 Any measure that is introduced should require that a proportion of the revenue generated (from sales, distribution, etc) be relinquished for the purposes of compensating victims or the public purse. To avoid accusations that the state is interfering in matters of commercial confidentiality, the system may have to rely upon the application of standard rates and to voluntary compliance on the part of the publisher. However it could require the publisher (newspaper, book publisher or film-maker) to incorporate into the final product a public statement as to how much has been paid to the former criminal, how much to the exchequer and what proportion of 'profits' is being offered by way of compensation to victims or donation to agreed charities.
- 3.12 This sort of transparency should ensure that all parties to the transaction benefit, including the public – who learn something from the product as well as being reassured that excessive payments have not gone to the former criminal.



#### **4. Human Rights considerations**

- 4.01 Any system for recovery of 'profits' from commercial exploitation of criminal acts must take into account the interests of victims of crime and their relatives, relatives of criminals, and the interests of the public at large including those of publishers. A balance has also to be struck between the right to privacy and to freedom of expression. This can be a notoriously difficult balance to get right.
- 4.02 Just as difficult to gauge are the motives of the protagonists when any form of publishing deal is being struck. Is this a purely commercial arrangement on both sides? Where does the real power lie in the relationship between source and publisher? To what genuine extent is publication in the public interest, especially when producing 'faction' - the drama-documentary or the biopic in which the facts are inevitably modified in some way, since verisimilitude is rarely achieved without bowdlerising the truth, if only by relying on one particular viewpoint?
- 4.03 Under the UK judicial system convicted criminals pay the price for a crime by completing the punishment meted out by the courts. Leaving aside for the moment the versed questions about whether sentencing policies adequately protect the public and whether the penal system provides an appropriate balance between retribution and rehabilitation, the Rehabilitation of Offenders Act 1974 (ROA) allows convictions to be considered 'spent' after an arbitrary time limits based on the nature of both the offence and the sentence.
- 4.04 Reference to 'former criminals' in this submission covers those who have served their sentence and past these time limits. A willingness to 'go public' might this be seen as a form of remorse since, for most offender, the law would no longer oblige them to disclose past offences.
- 4.05 These time limitations should be taken into account when reviewing whether or not it is appropriate to sequester 'profits' obtained by convicted criminals from publishing their 'memoirs'. Once a conviction is considered spent under the ROA, less stringent rules could apply. Indeed one option may be to restrict a former criminal's right to publish until the limitation period has run its course. There could be exemptions to cover publication of material exposing evidence of miscarriages of justice, or where there are over-riding considerations of the public interest - for example when a former criminal is willing to provide information that might help either to solve past crimes or to prevent criminal activity in the future.
- 4.06 It would be an unreasonable restriction on freedom of expression let alone a constraint of trade to require writers, whether journalists or ghost writers, to seek permission from the authorities before entering into arrangements with former criminals to gather information for future publications. However, it is not unreasonable to require the publisher to inform the authorities about plans to publish/broadcast material based on such collaborations, and to provide evidence about any payment made directly or indirectly to a former criminal.
- 4.07 One weakness in this system lies in the risk that the authorities may not have accurate records as to the status of a former criminal. On the assumption that such records do exist and are maintained throughout the ROA statute of limitations, it should then be possible to assess whether or not any part of the proposed payment, or any revenue generated by the product, should be forfeited and in what form.
- 4.08 It should not be the purpose of these measures to prevent former criminals from taking up a career as a writer or journalist or film-maker. Once their sentence is

completed former criminal have personal needs and families to provide for. Nor should the measure restrict their ability to be paid a 'going rate', perhaps based on the average wages, for time devoted to researching or producing a media product even it is not their usual employment.

## 5. The public interest

- 5.01 The Editors' Code of Practices, policed by the Press Complaints Commission, contains an adequate 'definition' of the 'public interest' which should satisfy most reasonable people.
1. *The public interest includes, but is not confined to:*
    - i) *Detecting or exposing crime or serious impropriety.*
    - ii) *Protecting public health and safety.*
    - iii) *Preventing the public from being misled by an action or statement of an individual or organisation.*
  2. *There is a public interest in freedom of expression itself.*
- 5.02 The PCC requires editors to demonstrate fully how the public interest is served, if this defence is invoked, and also takes into consideration the extent to which material is already in the public domain. It places tougher strictures on editors where information being published concerns children under the age of 16.
- 5.03 The BBC already requires its programme makers to contact principals affected by particular crimes when there are proposals to broadcast a programme about the offence, for instance on an anniversary.
- 5.04 Put together these provide a succinct description of an adequate justification for publication of material by a former criminal about a crime. It would not prevent the publication of 'accessible' material, as opposed to highly academic accounts of crime. It might help to prevent sensational 'tabloid' promotion of memoirs or the use of graphic images, for example, and it should exclude justification of any treatment that might be considered pandering solely to prurient interests.
- 5.05 In conclusion it is important that the public's right to know is not set aside when legislating to prevent former criminals and their publishers from profiteering from publication of material about crime. Criminality is an enduring problem which affects significant numbers directly or indirectly, and it is more important that the public understands criminal behaviour and the causes of crime than that publicity about criminal exploits are limited to reports of court proceedings.

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