

Ms Lesley Longstone
Chief Executive
Independent Police Complaints Commission
PO Box 473
Sale
M33 0BW

30 June 2015

Dear Ms Longstone,

I am writing in reference to a recent judgement by Paul Berry, casework manager at the IPCC in respect of a journalist, Mr Gareth Davies.

In the course of an investigation by Mr Davies into allegations of fraud by a Ms Neelam Desai, Mr Davies was issued with a first instance harassment warning in the form of a Police Information Notice on 31st March 2014. Mr Davies complained to the Metropolitan Police about the imposition of a PIN, and to the IPCC, ultimately appealing the IPCC's first instance decision. Mr Berry's letter dismissed that appeal.

Others will no doubt have raised questions before about the use of Police Information Notices, and whether that use erodes the right to a fair trial under article 6 European Convention of Human Rights.

It is not the purpose of this correspondence to deal with such matters, important though they are. We do not complain here about the policing tool that PINs represent; rather, we complain that this incident shows an ill-considered use of that tool, and the risk that it may be repeated.

I write to urge you to do two things:

1. To re-consider the decision made by Mr Berry; and
2. To lend careful thought to the need for guidance for officers on the imposition of PINs in similar circumstances and the need carefully to consider competing matters of right, policy and the law.

I understand that Mr Davies' MP, Gavin Barwell MP, has also written on this topic. I am writing as the chief executive of News Media Association (NMA). The publisher of the Croydon Advertiser at which Mr Davies was employed is a member of the NMA. Mr Barwell has published a copy of his letter on his website, and the NMA endorses its content.

I would draw your attention to two paragraphs of the decision of Mr Berry in refusing to uphold Mr Davies' appeal, as follows:

"In appeal you maintain that the warning was improperly issued, repeating the complaint that there has been a 'lack of investigation'. Officers need to have a basis for the alleged harassment but there is no requirement for an investigation..."

"You also believe the matter was not handled in accordance with the Protection from Harassment Act 1997. As you were issued with a Police Information Notice (PIN) and PINs are not issued under the Protection from Harassment Act 1997 officers would not be expected to apply their minds to the provisions of it in such circumstances".

With respect, that simply cannot be right.

We understand the current best practice in respect of the use of PINs to be set out in ACPO/ National Policing Improvement Agency Guidance, entitled: *"Practice advice on investigating stalking and harassment, 2009."*

That NPIA Guidance is totally unequivocal about the relevance of the Protection from Harassment Act 1997 to PINs. For instance, it is stated at page 71:

"Individuals should not be issued with notices relating to behaviour which would not constitute a breach of the PHA, even if it were to be repeated."

Similarly, the House of Commons Library published a note on the use of PINs on 2 March 2015. It explained:

"The Association of Chief Police Officers (ACPO) explained how the policy started, in evidence to the Home Affairs Committee in 2008:

Early "loopholes" were identified after the enactment of the Protection from Harassment Act 1997 when "stalkers" claimed that they did not know that their behaviour (such as sending flowers, cards etc.) amounted to harassment. That their intention was not to cause the victim to be either harassed, alarmed or distressed. To this end, police forces began issuing suspects with a formal notice of warning that the victim alleges that their behaviour does indeed cause harassment, alarm and distress and that, should such activity continue, then a prosecution will ensue.ⁱ"

The matter has also been discussed by the Home Affairs Committee and their summary, published at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/901/90104.htm> on 8 March includes the following direct quotes which are particularly pertinent to this case:

...the intended recipient of a PIN should at least be given the opportunity to give their account of the situation before a police decision is made on the issuance of a PIN. This is not happening in many cases at the moment.

PINs can be a useful tool for stopping harassment, meeting the needs of the victim and addressing problematic behaviour. However, there is a clear danger that they may be used inappropriately if they are not done in conjunction with good risk assessment and sufficient investigation.

Whilst the use of PINS is therefore without statutory basis, what guidance exists is clear that proper consideration of whether "harassment" has taken place (or may take place if the conduct is repeated) is required. As we understand it, PINs are a measure of preventative policing, which warn those to whom they are issued that they risk a criminal investigation if similar activity is repeated/continues. What is and is not (or may or may not become) harassment can only be

determined by reference to Protection from Harassment Act 1997. So, they cannot be imposed without at least some consideration of the law.

If the position of the IPCC and the relevant Police forces is that no such consideration is required, that would seem to fly in the face of the ACPO/NPIA guidance, and leave the position very uncertain.

The advice obtained by our member organisation is that the decision of the IPCC is irrational on this ground, and may be susceptible to judicial review on that basis. However neither we, nor our member, wish for matters to reach that point and therefore encourage open dialogue both about this case, and the use of PINs more generally in similar circumstances.

It being clear that a PIN cannot be properly imposed without consideration of whether harassment has occurred, or may occur, it is important to look at the Protection from Harassment Act 1997 (the "Act"). Section 1 of the Act provides, so far as material:

*"(1) A person must not pursue a course of conduct—
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.*

...

(2) For the purposes of this section..., the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

(3) Subsection (1) ... does not apply to a course of conduct if the person who pursued it shows—

...

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

Section 7 of the Act provides, so far as material:

"(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person..."

We understand that one of the matters raised by Mr Davies in his appeal was section 1(3) Protection from Harassment Act 1997.

Clearly, news organisations serve an important function in our democracy, often exposing matters of public interest which others often would rather did not reach the public.

As a result, publishers and journalists find themselves repeatedly at the crux of a conflict between the right to privacy under article 8 European Convention of Human Rights ("ECHR"), and the right of free speech under article 10 ECHR. Put more bluntly, where a news organisation carries a defamatory story (such as an allegation of fraud or wrongdoing as in this matter) they run the risk of, first, someone trying to prevent the story being published, and, secondly, being sued as a result of

publication. In any case, it is plainly a matter of journalistic best practice that a journalist get to the bottom of the facts of a story before its publication. Such activity is in the interests of both the publisher and the subject of a story.

For that reason, section 4 Defamation Act 2013 enshrines a defence to claims of defamation of public interest. That statutory provision replaces the provisions of the so-called *Reynolds* defence, based on the case of *Reynolds v Times Newspapers [2006] UKHL 44*. One of the requirements of the *Reynolds* defence, which it is accepted remains a part of the section 4 public interest defence is that a publisher has taken reasonable care in relation to the publication in question. It has been long accepted that such a standard includes putting the allegations of a story to its subject and seeking comment from the subject.

Putting a story to a subject can include contacting them by email or telephone and in some cases knocking on their door to seek comment. Provided that the activity is performed appropriately and professionally, it has long been accepted that such activity is not only legitimate, it accords with the standard of conduct actively encouraged as a matter of the law of defamation and as a matter of policy (for instance a failure to do so can be a matter for a complaint to IPSO about a story). Clause 4 of the Editor's Code of Practice published by IPSO makes clear the standards expected in that respect: <https://www.ipso.co.uk/IPSO/cop.html>.

Such activity is plainly within the ambit of activities envisaged by section 1(3) Protection from Harassment Act 1997, in the same way that professional and reasonable debt collection activity, or solicitor's correspondence.

It is a matter of the deepest concern to us and our members that journalists complying with their ethical and legal responsibility of seeking a right of reply to, or comment on, a story they are investigating could have PINs imposed on them for doing nothing more than complying with the requirements to which they will be held by the Courts as a matter of defamation or by IPSO as a matter of accuracy.

We accept, plainly, that such activity must have its limits. We encourage best practice by all our members and seek no carte blanche for the profession. However, what we do believe is clear is that no journalist acting in accordance with the provisions of the Editor's Code of Practice should find him or herself on the receiving end of a document which is, whatever its nature and limits, a creature of the criminal law.

It is Mr Davies' evidence/position before the IPCC that prior to the issue of a PIN, he contacted Ms Desai:

- On 4 March in person at her home address to summarise an intended story to her (and left when asked to do so);
- By email to her solicitor on 5 March with no response to publication but a short call the following day; and
- By email directly, copying her solicitor, to put further, different allegations to her about the alleged use of someone else's photograph on social media accounts.

It is Mr Davies' submission that such activity is no more or less than the standard expected of journalists and publishers by the Courts and as a matter of ethics.

I therefore ask that this case be reconsidered.

In any case, this case demonstrates a clear need to consider the proper parameters by which the Police may consider imposing a PIN on a journalist, so that all parties can understand where the dividing line rests between journalistic best practice and unlawful harassment.

In common with the approach of Mr Barwell MP, I have sent a copy of this letter to the Home Secretary, the Secretary of State for Justice and the Secretary of State for Culture, Media and Sports.

I look forward to your swift response.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Newell', written in a cursive style. The signature is positioned to the left of a vertical line that extends downwards.

David Newell
Chief Executive
The News Media Association

CC: The Rt Hon Theresa May MP, Home Secretary

CC: The Rt Hon Michael Gove MP, Secretary of State for Justice

CC: The Rt Hon John Whittingdale MP, Secretary of State for Culture, Media and Sport

ⁱ Home Affairs Committee, Domestic Violence, Forced Marriage and “Honour”-Based Violence HC 263-2007-08, Appendix 25, Memorandum submitted by the Association of Chief Police Officers Stalking and Harassment Portfolio 1 October 2007