

*Diploma in Journalism*



# **Essential Media Law for Journalists**

(Including an introduction to court reporting)

## **Programme of Study**

for England and Wales

### **2011-2012**

Candidates are required to achieve a grade A-C in this exam to meet the industry standard and gain eligibility for entry to the NCTJ's professional qualification, the National Certificate Examination (NCE).

This programme of study provides a detailed list of topics which could occur in the exam.

#### **The exam**

200 marks, expressed as a percentage

Time allowed: 2 hours 30 minutes

The mark out of 200 will be divided by two to create a percentage mark, with any half mark in this percentage being rounded up to the nearest whole digit. Marks of 50 per cent or more are required to achieve a C grade or higher.

Grades will be awarded as follows: (percentage marks)

A – 70+	marks
B – 60-69	marks
C – 50-59	marks
D – 40-49	marks
E – 30-39	marks
F – 0-29	marks

Grade descriptors can be found at the back of this programme of study.

The NCTJ syllabus is set out below. The syllabus comprises topics which may occur in exam questions and topics which will not occur in exam questions but which, nevertheless, should also be studied. The syllabus is based on information contained in McNae's *Essential Law for Journalists*, 20th edition, July 2009.

Tutors should ensure that candidates buy or have regular access to this textbook, that they are aware of and have access to its associated website, and that they have copies of or access to this programme of study, including that part below, headed 'Subjects to be studied, NOT examined'.

## **Subjects to be studied and examined**

The descriptions below are to guide tutors and students on the content of the exam.

The descriptions below indicate what scope of knowledge is expected of students during the exam, as regards

- the law;
- the Press Complaints Commission, the Editors' Code of Practice (PCC code);
- Ofcom and the Ofcom Broadcasting Code

when explaining such matters or applying the law or these codes to a scenario.

**Where these codes share an identical or similar ethical requirement**, an exam question which requires a candidate to answer wholly or partly in relation to ethical (i.e. self-regulatory or regulatory) considerations will permit the candidate to answer in respect of either the Editors' Code of Practice (PCC code) or the Ofcom Broadcasting Code – i.e. the candidate will not be expected in the marking guide for such a question to refer to both codes. Tutors should make clear to candidates that such 'alternative' answers are acceptable, and can point out that in the 'Subjects to be studied and examined' part of this programme of study such identical or similar requirements of these codes are referred to in the same sub-section of the programme (e.g. sub-section 3:5, below).

All elements of the programme of study must be studied even in respect of those parts of the codes for which, as explained above, it is acceptable for a candidate in the exam to answer in respect of one code and not the other.

As indicated above, to recognise the fact that some law tutors will need a transitional phase to include the teaching of broadcast regulation as a topic, the NCTJ media law examinations board has decided that until September 1, 2012 no Essential Law examination will contain a question solely relating to the Ofcom Broadcasting Code. That is, until that date candidates will, as indicated above, be able to choose to answer by reference to the Editors' Code of Practice or the Ofcom Broadcasting Code. This means the content of some sub-sections of the "Subjects to be studied and examined" part of this programme of study – i.e. those sub-sections which relate solely to the Ofcom Broadcasting Code - will not feature in examination questions until that date. These sub-sections are clearly labelled as such, below (e.g. sub-section 3:1). They are included in this 2011/2012 Programme to give notice that a candidate who sits or resits the Essential Law exam after that date may find it includes a question based on one or more of these sub-sections. It should also be noted that any resit candidate for the Diploma exams should ensure he/she revises by reference to the programme of study for the academic year in which the resit examination is due to occur.

In the programme of study, 'publication' includes 'broadcasting'.

The level of detailed knowledge expected of candidates in the exam and as regards topics studied but not examined is indicated by the detail (and case examples) included in the text of the 20<sup>th</sup> edition of *McNae's Essential Law for Journalists* and its companion website, (or, after publication of the 21<sup>st</sup> edition, that edition) and in the Editors' Code of Practice (PCC code) (<http://www.pcc.org.uk/cop/practice.html>) and in the Ofcom Broadcasting Code (<http://www.ofcom.org.uk/tv/ifi/codes/bcode/>). If in doubt about the level of detail required for any specific topic, tutors are invited to consult the media law board and confidential marking guides. Below, page references given are for the 20<sup>th</sup> edition of *McNae*. These page references are supplied for guidance on the whereabouts in the book of specific matters, to aid

teaching, study and revision. Law tutors will be expected to guide candidates about the wider context of such matters, which will involve students needing to read other materials not cited below.

PCC and Ofcom adjudications are referred to in the programme of study for illustrative and interpretative purposes. Candidates will not be *required* to quote from adjudications in their answers to examination questions but will receive 'other valid points' credit for discernable references to relevant adjudication(s).

Tutors and candidates need to check the McNae Online Resource Centre (for its web address, see McNae's) for updates on law and ethical matters. There is indication below of some topics for which there are updates, or will be updates should new statute come into effect.

## 1. Basic knowledge of the law, including of court processes, of terminology, and of the hierarchy of the courts

- 1.1: That sources of UK law include common law, precedent/case law, statute; that in many instances courts have to consider the European Convention on Human Rights when making decisions (*McNae, pp. 6-10*); the divisions between civil and criminal law and examples of an event which could give rise to both criminal and civil proceedings (*McNae, pp. 13-14*); correct use of the following terms: claimant (*McNae, pp. 14, 153 and 573*); defendant (as appropriate in relation to civil or criminal courts) (*McNae, p. 14, 26 and 153*); solicitor, barrister, counsel (*McNae, pp. 14-15, 77 and 574*); to sue, damages, to prosecute (*McNae, p. 14, 153, 155*); claim form, tort, injunction, settlement, held liable (*McNae, pp. 14, 150, 154-155, 573, 576, 578*).
- 1.2: That most criminal cases are dealt with by magistrates, but that more serious cases are dealt with by the Crown courts, where the verdict is determined by jury, and where judges sentence (*McNae, pp. 42, 75-76*); the appeal routes for criminal cases (*McNae, pp. 8, 70-71, 88-91*);. that in criminal cases the High Court deal with points of law (*McNae, pp. 91-92*);. that most juveniles prosecuted appear in youth courts, unless the offence is grave or an adult is co-accused (see also 3:2 below).
- 1.3: That the main civil courts are the county courts and the High Court (*McNae, pp.150-152, 155*); examples of the types of case heard before civil courts, including county courts, e.g. debt recovery, breach of contract and other torts (e.g. defamation, trespass, negligence), bankruptcy, adoption (*McNae, pp.150-151, 168*); that juries may be used in certain categories of civil cases, including those involving claims of defamation, malicious prosecution or false imprisonment (*McNae, pp.158*).

## 2. Contempt and related matters

- 2.1: The strict liability rule of the Contempt of Court Act 1981, including when criminal and civil cases and inquests become, and cease to be, "active"; the type of material which if published could breach the rule, and why; the type of information which can be published without breaching the rule, and why (*McNae, pp.274-282, 284-285, 295-296*); the contempt risk of archive material accessible to the public on websites, and how the media should react to complaints that such material could or does cause prejudice (*McNae, p. 283*).

- 2.2: A basic awareness that, to prevent prejudice, in the preliminary stages of a criminal prosecution automatic, statutory reporting restrictions are usually in force to forbid the publication at that stage of any references made in preliminary hearings to evidence or to any previous conviction(s) or bad character a defendant has (see footnote <sup>A</sup>); but that once a trial has begun, it is usually the case that the media can report the trial's proceedings contemporaneously, subject to any order made under relevant powers referred to below.
- 2.3: The scope of the defence in section 3 of the 1981 Act, and best practice to ensure this defence can be used (*McNae, pp. 287-288*).
- 2.4: The contempt risks in publishing material to assist the police; what the then Attorney General said in 1981 as regards such assistance; and that there has not yet been a prosecution for contempt in such circumstances (*McNae, p. 287*).
- 2.5: Assessment of contempt risks in publishing material about "active" civil cases, e.g. there is less risk if the case does not involve a jury, but some such risk could remain as regards witnesses, and what sub judice means in this context (*McNae, pp. 158, 295-296, 578*).
- 2.6: A basic awareness that there may be an order under section 4 of the 1981 Act which postpones media reports of court cases, including inquests, and examples of circumstances in which a court may make such an order (*McNae, pp. 289 – 290*)(see footnote <sup>B</sup>).
- 2.7: The general danger of contempt as regards failure to obey court orders, e.g. failing to obey an injunction prohibiting publication (*McNae, pp. 274, 393*) or failing to obey a court order to reveal the identity of a source of information (*McNae, pp. 509-510*)— see also 8.1, below.
- 2.8: The scope of the defence in section 5 of the 1981 Act, and best practice to ensure this defence can be used, as regards publishing features or news stories which allegedly create prejudice to court or inquest cases (*McNae, pp. 293-295*); the reasons for the success and failure of the section 5 defence in contempt prosecutions arising from the Dr Leonard Arthur case (*McNae, pp. 294-295*).
- 2.9: The protection, in section 8 of the 1981 Act, of the confidentiality of jury deliberations in both civil and criminal cases (*McNae, pp. xxxi, 146-148*).
- 2.10: The ban under section 9 of the 1981 Act on audio-recording devices being taken into / used without permission in court, and on any such recorded material being broadcast without permission (*McNae, pp. 145-146*).
- 2.11: The scope of the ban on photography / videoing / filming / portrait-making / sketching in and around the court, and on publication of such material, under the Criminal Justice Act 1925 (*McNae, pp. 143-145*); difficulties of interpretation of "precincts", and how the media legally make / publish portraits / sketches of court proceedings (*McNae, p. 144*); common law contempt as regards photography / videoing / filming in and around a court (*McNae, p. 144-145*).

### 3. Anonymity

- 3.1: ***Ethical considerations as regards identification of juveniles concerned in pre-trial investigations***, as expressed in rule 1.9 of the

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<sup>A</sup> These restrictions are featured in McNae at pp. 51-59, 64-68, 78-83 and 97. However, candidates will not be expected for the Essential Law exam to name, in respect of these restrictions covering preliminary hearings, any specific statute, e.g. the Magistrates' Courts Act 1980, or to state the exact scope of what may be reported when such restrictions are in force or to specify circumstances in which such restrictions can be lifted or do not apply.

<sup>B</sup> Candidates will not be expected for the Essential Law exam to exhibit knowledge of the precise wording of section 4(2) of the 1981 Act.

Ofcom Broadcasting Code (section 1) which states that when covering any pre-trial investigation (e.g. by police) into an alleged criminal offence in the UK, broadcasters should pay particular regard to the potentially vulnerable position of any person who is not yet adult who is involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of them; that the code also states that 'particular justification' is required for the broadcast of such material relating to the identity of any person who is not yet adult who is involved as a potential defendant.

*NB: No examination will contain a question relating to sub-section 3:1 (i.e. this part of the programme of study) until after September 1, 2012.*

3.2: **Juveniles concerned in court proceedings as defendants, witnesses, victims or alleged victims**

The age of criminal responsibility, including that a child aged under 10 cannot be prosecuted, what the term 'juvenile' embraces, and that juveniles charged with a crime are in most instances dealt with in youth courts, from which the public are excluded (*McNae, pp. 94-95, 98*); but that some juveniles may be tried/sentenced in the (adult) magistrates court or Crown court if there is an adult who is co-accused (*McNae, p. 102*); that a juvenile charged with a grave offence will be tried/sentenced in the Crown court (*McNae, pp. 96-97*).

The scope of the discretionary restrictions under section 39 and the automatic restrictions under section 49 of the Children and Young Persons Act 1933 which forbid the identification, in media reports of court cases, of juvenile defendants, juvenile witnesses and juveniles who are not witnesses but who are the victim/alleged victim of an offence (*McNae, pp. 98-100, 102-104*); that section 49 (and probably section 39) ceases to apply when the juvenile reaches the age of 18 (*McNae, pp. 102 and 105*); that the section 49 automatic restrictions cease to apply if a youth court lifts them in the public interest in respect of a convicted juvenile (*McNae pp.100-101*); that sections 39 and 49 do not apply to dead juveniles (*McNae, pp. 99, 235-236*); that either such restriction may apply to a juvenile concerned in ASBO proceedings - either criminal proceedings for alleged breach of an ASBO or a civil hearing to impose an ASBO, so that it may be illegal in some such cases to identify a juvenile as being or having been subject to an ASBO (*McNae pp. 107- 111*).

3.3: **Complainants in sexual offence cases**

The scope of restrictions which automatically confer lifetime anonymity on complainants (victims / alleged victims) in sexual offence cases in general, as regards media reports of them (*McNae, pp. 113-119*).

*NB: As regards particular offences, candidates should be able to recognise in an exam that the anonymity normally applies in respect of allegations of rape, of assault by penetration, of other types of sexual activity with a child (including by an adult family member and including what is termed in older law as incest), of sexual assault, of trafficking a person for sexual exploitation, of controlling a prostitute for gain, of exposure, of voyeurism, and of meeting or intending to meet a child following sexual grooming.*

That such a complainant can, if aged 16 or over, sign a written waiver to consent to be identified in a media report of such a crime/such a court case, and the conditions which need to be honoured to make the consent valid (*McNae, p. 123*); that in some circumstances a court may lift this anonymity (*McNae, pp. 121-123*); that it does not apply when the charge is not one listed by relevant legislation on sex offences, e.g. such anonymity does not apply when a person who was a complainant in a sexual offence case is subsequently prosecuted in respect of that complaint for perjury, wasting police time, or perverting the course of justice (*McNae, pp. 123-124*).

NB: Candidates should know that the anonymity applies in respect of alleged attempts to commit sexual offences, and allegations of conspiracy, incitement, and aiding in respect of such offences.

NB: exam candidates will only be expected, as regards legislation in this context, to name the Sexual Offences Act 2003, and therefore, in the marking of the exam, such a reference will be deemed to refer to any part of earlier legislation still relevant to such anonymity.

- 3.4: **Ethical considerations as regards identification of complainants in sexual offence cases**, as expressed in Clause Eleven (Victims of Sexual Assault) of the Editors' Code of Practice (PCC code) (*McNae, p. 125, and 571*).
- 3.5: **Ethical considerations as regards the identification of children in sex cases**, as expressed in Clause Seven (Children in Sex Cases) of the Editors' Code of Practice (PCC code), and that code's public interest exceptions (*McNae, pp. 125-126, 570- 572*) or in rule 1.8 of the Ofcom Broadcasting Code (Protecting the Under-Eighteens - section 1) as regards coverage of sexual offences involving under-18s (*McNae .p.125*).
- 3.6 **Section 11**  
That under section 11 of the Contempt of Court Act 1981 Act a court can permanently ban publication of a name or matter in media reports of such cases; and typical usage of section 11, e.g. blackmail cases; national security matters (*McNae, pp. 128-130*).
- 3.7: **Adult witnesses**  
That it is illegal for the media to identify an adult during their lifetime as being or having been a witness in a court case if an order has been made by a court under section 46 of the Youth Justice and Criminal Evidence Act 1999 because the witness is/was considered to be in fear or distress about identification in media reports, and the scope of this reporting restriction (*McNae, pp. 133-135*).
- 3.8: **Anonymity injunctions under Convention rights**  
That a court (in particular the High Court) may by injunction order that a person must not be identified in media reports of some aspect(s) of their live, or that no such report should be published, because of the person's rights to privacy under Article 8 of the European Convention on Human Rights (see also section 9:1 , below), e.g. a famous footballer accused of adultery (*McNae, pp. 392, 402, 405-406*); that in a few instances involving defendants in notorious criminal cases, the court has made a permanent order that no current photograph be published of such a person or any indication published of their current whereabouts or of any new identity they have or may be given, and that such an order may be based too on Article 2, the right to life (e.g. Jon Venables, Robert Thompson, Maxine Carr) (*McNae, pp. xxx, 136-138*).
- 3.9: **Jigsaw identification** The danger of jigsaw identification if anonymity applies under any of the provisions listed above, and that there is particular danger of jigsaw identification if journalists serving different media organisations or blogging in their own right fail to liaise when covering the same story to avoid jigsaw identification, i.e. they may need to agree prior to publication the specifics of non-identifying detail to be published (*McNae, pp. 105-107*); that there is also a specific ethical obligation to avoid jigsaw identification in respect of children in sex cases/ coverage of sexual offences involving under-18s, as expressed in the Editors' Code of Practice (PCC code) or in the Ofcom Broadcasting Code, see 3:5 above.

## 4. Accuracy

4:1: The ethical obligation to be accurate, as expressed in Clauses 1.i and 1.ii (Accuracy) of the Editors' Code of Practice (PCC code) (*McNae*, p. 568-569) or in rules 5.1 and 5.2 (in respect of Due Accuracy in news) of the Ofcom Broadcasting Code.

## 5. Defamation and related matters

- 5.1: General principles of defamation / libel law, including the definitions of a defamatory statement, of an innuendo and of an inference, and the roles of judge and jury in defamation cases (*McNae*, pp. 303-309); libel dangers from juxtaposition of published matter creating inference, and from lax captioning / use of photographs/ footage (*McNae*, pp. 306, 321, 553); what a libel claimant must prove, and the 'repetition rule' (*McNae*, pp. 318-323); that normally a claimant must commence a defamation action within one year of the publication of the relevant material (*McNae*, pp. 354).
- 5.2: The test of identification in defamation law, the risk of libelling an individual by reference to a group of people, and case law relevant to this risk (*McNae*, pp. 319-321).
- 5.3: The requirements of the defence of justification (*McNae*, p. 327-328); why justification can be a difficult defence to use, i.e. the burden of proof is on the publisher, and the potential difficulty of meeting the standard of proof required, e.g. if a witness proves reluctant to testify, or hard to locate, or when meaning is created in inference and innuendo; that such difficulty can lead to media organisations being reluctant to defend libel actions, and to opt for settlement out-of-court, to avoid risk of high damages / high costs, unpredictable juries (*McNae*, pp. 309-311, 327-331).
- 5.4: The requirements of the defence of honest comment, including its relevance to comment about court cases or inquests, e.g. criticism of judges / magistrates / coroners / defendants (*McNae*, pp. 298-299, 333-337, 376).
- 5.5: The protection of the defence of absolute privilege for MPs / peers / Assembly members as regards what they say in Parliamentary or National Assembly for Wales proceedings; and as regards a media report of a UK court case or of an inquest heard in public, or of the public proceedings of an inquiry held under the Inquiries Act 2005, if the requirements of the defence are met, i.e. the report is fair, accurate, contemporaneous and of proceedings held in public (*McNae*, pp. 248, 269, 337-340).
- 5.6: The scope and requirements of the statutory defence of qualified privilege, and the distinction between the requirements of qualified privilege under Part 1 and 2 of Schedule 1 of the 1996 Defamation Act, as regards media coverage of
- the proceedings in public of courts anywhere in the world, including courts martial and inquests (and when, in the case of UK courts, the coverage is non-contemporaneous, see also section 5:5)
  - the proceedings in public of legislatures anywhere in the world, including the UK Parliament, and of the National Assembly for Wales
  - matter published by governments or legislatures
  - the proceedings in public of public inquiries initiated by a government or legislature anywhere in the world
  - the proceedings in public of a commission / tribunal / committee / person appointed to hold an inquiry by a Minister of the Crown or by a Northern Ireland Dept, or of such proceedings of any other tribunal / committee / board / body exercising functions by virtue of statutory provision, (e.g. when, in the case of an inquiry held under the Inquiries Act 2005, the media coverage is non-contemporaneous, see also section 5:5)

- the proceedings in public of local inquiries held under statutory provision
- the proceedings of public meetings
- the proceedings of press conferences
- statements / reports issued for public information by police / other governmental agencies in the EU, including councils (and including official reports thus issued of the findings of a local inquiry)
- the proceedings in public of council or council committee or sub-committee meetings
- the findings of certain types of association exercising powers to investigate or discipline members

(*McNae*, pp. 248, 258-259, 269-270, 338, 340-347).

The definition of a public meeting and case law extension of the definition to press conferences, including material distributed at them (*McNae*, pp. 342-343)

Candidates should be able to demonstrate knowledge of good practice necessary to ensure that such media coverage is fair and accurate, and therefore protected by qualified privilege, e.g. proper attribution of quotes; inclusion of any denials made in relevant meetings etc.

NB: Any question on qualified privilege in this exam will not require the candidate to demonstrate in any detailed scenario any precise application of the defence to the reporting of matter aired in courts, inquests and courts martial, but the candidate should know that honest comment can be made about a privileged statement, including about matter reported from such courts, see 5.4. above, and that qualified privilege, if the defence's requirements are met, protects non-contemporaneous reports of court cases.

- 5.7: The scope and requirements of the defence under section 1 of the Defamation Act 1996, and its relevance to matter published on online bulletin boards / comment sites for readers, and to how media organisations should react to complaints about such matter (*McNae*, pp.323-325).
- 5.8: Risks in agreeing to publish apologies and corrections, and in phrasing them badly, and the nature of the defence of accord and satisfaction (*McNae*, pp. 313-314, 349-351).
- 5.9: The nature of the defence of leave and licence, and that usually the safest course is have in writing as a signed statement, or in an audio or visual recording, any such agreement that defamatory matter can be published, if this defence is to be relied on (*McNae*, p. 353).
- 5.10: The defamation risk in implying insolvency / bankruptcy, and when it is safe to report someone is bankrupt, and why (*McNae*, pp. 160-161, 305).

## 6. Copyright

- 6.1: The general nature of copyright under the 1988 Copyright, Designs and Patents Act, including the copyright inherent in speeches, in text - including documents and journalism, letters to a newspaper and fixture lists - in maps, drawings and other types of images, in photos, film / digital footage and in sound recordings - including in online material (e.g. as published on social networking websites) and in television and radio programmes (*McNae*, pp. 446-451).

Moral rights under the Act in respect of a photograph commissioned for private and domestic purposes (*McNae*, pp. 450-451).

Remedies for breach of copyright and of such moral rights (*McNae*, pp. 450 and 456), i.e. injunctions, damages, an order for possession of infringing copies.

That defences to an action for breach of copyright include acquiescence (*McNae*, p. 457) and fair dealing as regards the reporting of current events or the publication of criticism or review, if the work otherwise protected by copyright has already been lawfully been made available to the public, and if there is

sufficient acknowledgement of the work and its author, and (e.g. as regards text, film, digital footage or sound recordings) reproduction of the work is no more than necessary for these purposes (*McNae*, pp. 451-454); that the fair dealing defence does not apply to still photographs (*McNae*, p. 452); that there is also the defence of public interest in publication, but that this defence is narrowly-construed in the context of copyright (*McNae*, pp. 454-455). The date the 1988 Act took effect, and the ownership of copyright in photos created prior to the Act coming into effect (*McNae*, p. 450). That breach of copyright is a criminal offence (*McNae*, p. 457).

## 7. Confidentiality

- 7.1: The elements of a breach of confidence, i.e. the criteria courts apply when assessing the relevant information/images during the determination of whether an action for breach of confidence should be successful (*McNae*, pp. 381-384). Remedies for breach of confidence, i.e. that there may be an injunction granted, and/or a court order to 'deliver up' material and/or a court order for an account of profits and/or an award of damages (*McNae*, pp. 4-5, 387, 392-393). That defences to an action for breach of confidence include that disclosure is in the public interest or that there is insufficient quality of confidence (*McNae*, pp. 5, 382, 394-398). Examples of successful use of these defences, e.g. the Watford Observer case (public interest to local communities in disclosure, and insufficient quality of confidence due to wide circulation of redundancy proposals) and the Lion Laboratories case (public interest) (*McNae*, pp. 382, 389, 394).

## 8. Disclosure of confidential sources

- 8.1: The scope of protection under section 10 of the Contempt of Court Act (*McNae*, p. 515). Examples of cases in the UK in which a court or a tribunal or police ordered a journalist to disclose a source (*McNae*, pp. 391, 509-510, 512-516).
- 8.2: The ethical obligation to protect sources of information who wish their identity to remain confidential, as expressed in Clause 14 of the Editors' Code of Practice (PCC Code) (*McNae*, pp. 17, 508-509, 571) or practice 7.7 of the Ofcom Broadcasting Code, governed by its rule 7.1 (Fairness- section 7).

## 9. Privacy/Misuse of Private Information

- 9.1: ***Protection of privacy in the law***  
The privacy protection in the first paragraph of Article 8 of the European Convention on Human Rights and that a key criterion when a court considers a claim that privacy has been or will be breached is whether there is a reasonable expectation of privacy in the relevant circumstances (*McNae*, pp. 402-403, 405, 566).  
Examples of recent cases in which judges have upheld, in civil law, privacy rights against the media, in particular the cases concerning Princess Caroline of Monaco [Von Hannover versus Germany], Naomi Campbell v Mirror Group Newspapers, and Mosley v News Group Newspapers (*McNae*, pp. 386, 401, 544). That UK courts are required to consider the provision of any relevant privacy code - which would include in cases involving the media either the Editors' Code of Practice (PCC code) or the Ofcom Broadcasting Code - when ruling in

privacy actions (*McNae, p. 403*); that in privacy actions journalists/media organisations may be successful in arguing for their rights under Article 10 (freedom of expression and to impart information) to be upheld (*McNae, pp. 11-12, 566*).

- 9.2. **General provision for protection of privacy in ethical codes** as expressed in Clause 3 (Privacy) of the Editors' Code of Practice (PCC Code), including the scope of the public interest exceptions (*McNae, pp. 17, 397, 403, 544-545, 569, 572*) or practices 8.2 - 8.6 and 8.8 of the Ofcom Broadcasting Code, governed by its rule 8.1 (Privacy – section 8), including that under this code any infringement of privacy in programmes must be 'warranted' (*McNae, pp. 419-421*).

In respect of the Ofcom Broadcasting Code, the candidate should be clear from the code about the meaning/scope of the relevant terms used in the code, i.e. 'warranted', 'the public interest' and 'legitimate expectation of privacy'. NB: whether, as regards any relevant exam question on privacy, a candidate chooses to answer with reference to the Editors' Code of Practice or to the Ofcom Broadcasting Code, the candidate should know the considerations which apply, as set out in the terms used by the relevant code, when a journalist has to assess if there is a risk of breach of someone's privacy, e.g. whether there is a reasonable/legitimate expectation of privacy in the relevant location/circumstance, and that even in a public place there may be such an expectation of privacy, and whether it is likely that a public interest exception can be held to apply.

- 9.3 **Footage or pictures which are user-generated/supplied by third parties/taken from social media websites** - privacy issues (ethical and legal) in use of footage / photographs supplied by the public or on social media sites such as Facebook, Bebo or Flickr, or from CCTV systems (*McNae, pp. 402, 553-554*).
- 9.4: **Avoidance of intrusion into grief, shock, suffering or distress**, as expressed in Clause 5.1 (Intrusions into Grief and Shock) of the Editors' Code of Practice (PCC Code) (*McNae, p. 569*) or practices 8.16 and 8.18 (Suffering and Distress) of the Ofcom Broadcasting Code, governed by its rule 8.1 (Privacy - section 8) (*McNae, p. 422*).

NB: In respect of sections 9:1-9:4 of this programme of study, and in relation to its sections 10:1-10:4 it should be noted that there is overlap in respect of knowledge candidates are expected to exhibit as regards privacy, e.g. covert filming or covert audio-recording could be held to breach both Clauses 3 and 10 of the Editors' Code of Practice (PCC code) and both .

NB: Candidates who refer to the Editors' Code of Practice (PCC code) in this context should be able to refer to the PCC adjudication in 'Complaint by Mr Paul Kirkland against the Wiltshire Gazette and Herald' (*McNae, pp. 545 and 553*) and to provide a brief synopsis of the findings of that adjudication that there is "a clear need for newspapers to exercise caution when publishing images that relate to a person's health and medical treatment, even if they are taken in public places", and that "rare and large-scale events such as terrorist attacks and natural disasters involve a degree of public interest so great that it may be proportionate and appropriate to show images of their aftermath without the consent of those involved"; Candidates who refer to the Ofcom Broadcasting Code in this context should be able provide a brief synopsis of Ofcom's statement, in the foreword to section 8 of the code, that Ofcom recognises that "there may be a strong public interest in reporting on an emergency situation as it occurs", and that it follows from this statement that broadcasting pictures of people suffering or in distress without their consent may be justifiable if the

emergency situation is a major one which is ongoing or which has just occurred.

- 9.5: ***Provision for protection of children’s privacy and welfare in ethical codes*** as expressed in Clause 6 (Children) of the Editors’ Code of Practice (PCC code) including as interpreted in the PCC adjudication in ‘Complaint by Mrs Laura Gaddis against the Hamilton Advertiser’ (*McNae, pp. 444, 545-546*); or in practice 7.4 (dealing with contributors and obtaining informed consent) of the Ofcom Broadcasting Code, governed by its rule 7.1 (Fairness – section 7), and practices 8.20 - 8.22 (people under 16 and vulnerable people, governed by its rule 8.1 (Privacy – section 8) (*McNae, pp. 443-444*), including as interpreted in the various adjudications in Ofcom Bulletin No. 116 concerning *Whistleblower: Childcare*. Candidates should be aware that breach of a child’s privacy needs a particularly strong “public interest” justification, and that obscuring the child’s identity may be necessary in whatever is published or broadcast.

## 10. Other ethical (including regulatory) considerations

- 10.1: ***That if a person or organisation makes clear that no comment will be offered, journalists should not persist in seeking comment unless persistence is justified/warranted***, as expressed in Clause 4 (Harassment) of the Editors’ Code of Practice (PCC code) and the public interest exceptions (*McNae, pp. 17, 545, 569 and 572*) or in practice 8.7 of the Ofcom Broadcasting Code, governed by its rule 8.1 (Privacy – section 8) (*McNae, p. 420*).
- 10.2: ***The regulation of ‘door-stepping’*** in practice 8.11 of the Ofcom Broadcasting Code, governed by its rule 8.1 (Privacy- section 8). (*McNae, p. 421*). *NB: No examination will contain a question relating to this sub-section, 10:2, of the programme of study until after September 1, 2012.*
- 10.3: ***That covert filming or covert audio-recording needs particular justification to be ethical***, as expressed in Clause 10 of the Editors’ Code of Practice (PCC code) including the public interest exceptions (*McNae, pp. 17, 414, 570-572*) or in practices 8.12 to 8.14 (surreptitious filming and recording) of the Broadcasting Code, governed by its rule 8.1 (Privacy – section 8) (*McNae, pp. 421-422*).
- 10.4: ***That deception, subterfuge or misrepresentation by journalists needs particular justification to be ethical***, as expressed in Clause 10 of the Editors Code of Practice (PCC code) including the public interest exceptions (*McNae, pp. 17, 414, 570-572*) or in practice 7.14 (deception) of the Ofcom Broadcasting Code, governed by its rule 7.1 (Fairness - section 7). *NB: no exam question will expect a candidate to demonstrate knowledge of the provision of this section as regards ‘wind-ups’ or ‘set-ups’ for entertainment value.*

## 11. The impartiality requirements in respect of broadcasting

11.1: The requirement in section 5 of the Ofcom Broadcasting Code for “due impartiality in news” (rule 5.1); the special impartiality requirements for the specified types of broadcasters in respect of news and other programmes covering “matters of political or industrial controversy and matters relating to current public policy”; and – in respect of local or community broadcasters - the requirement to prevent “undue prominence of views and opinions” in respect of such matters.

Candidates should know and understand the terminology in quotation marks above, but in other respects will not be expected to recite these rules verbatim.

They should be able to express in general terms the principles/concepts involved, and have in broad terms knowledge of good practice (for example, that a broadcast station cannot campaign on an issue, and that news coverage must present opposing viewpoints)..

They should know, in respect of the special impartiality requirements, that these can be achieved over time in a series of programmes as a whole, and that the code permits “personal view” and “authored” programmes if the nature of these is clearly signalled to the audience. (see also *McNae*, pp.16-17).

NB: for rule 5.2 of the Ofcom code, see also the Accuracy section of this Programme of Study, above.

A candidate should be aware, in brief, general terms, of the Ofcom adjudication in respect of Bloomberg Television (28<sup>th</sup> April 2005).

A candidate should not suggest that the BBC is subject to the Ofcom code in this respect, in that the BBC has similar but separate guidelines.

Candidates will be expected to know how the impartiality requirement of the Ofcom code contrasts with Clause 1.iii of the Editors’ Code of Practice (PCC code) (*McNae*, pp.16-17).

*NB: No examination will contain a question relating to this sub-section 11:1 until after September 1, 2012.*

## Subjects to be studied, NOT examined

It should also be noted that the NCTJ media law board has decided that, until further notice, it will not set, in this exam, questions on:

- The status, responsibilities and powers of the PCC and Ofcom (*McNae, pp. 16-17*), and their codes other than those parts of the codes detailed in the 'Subjects to be studied and examined' section of this programme of study. Nevertheless, candidates should study the following:
  - All parts of the Editors' Code of Practice; how the PCC and Editors' Code Committee are constituted; the ability of the PCC to request that an adjudication is published with due prominence.
  - How Ofcom is constituted and its legal status; its powers and penalties, e.g. power to order publication of corrections and apologies, power to fine.
  - The key differences between the Ofcom system of regulation and the PCC system of self-regulation
  - The full scope of the Ofcom Broadcasting Code in respect of its Section 1 - Protecting under-18s and children under 15, including the concept of the television 'watershed'; Section 2 - Harm and Offence; Section 3 - Crime; Section 5; Due Impartiality and Due Accuracy, etc; Section 6: Elections and Referendums – and the candidate should be taught that the BBC is not subject to Ofcom regulation in this respect but has similar but separate guidelines; Section 7 – Fairness; Section 8 – Privacy; Candidates should be directed to read Section 4 – Religion and Section 10.

*The following are examples of Ofcom adjudications which may assist in teaching:*

Ofcom Broadcast Bulletin No. 68. Various news organisations – use of CCTV footage.

Ofcom Broadcast Bulletin No. 123: *Top Gear* – Jeremy Clarkson's comments about prostitutes.

Ofcom Sanctions Adjudication: Live Earth. (Repeated bad language) Ofcom Sanctions Committee. 20<sup>th</sup> March 2008: *TalkSport: The James Whales Show* during London mayoral election

Ofcom Broadcast Bulletin No 82. *Toughest Seaside Resorts in Britain.*

Ofcom Bulletin 105: *Bulls..t Detective.*

Ofcom Bulletin No. 148: *Mischief: Your Identity For Sale*

Ofcom Bulletin No. 129: *Amy, My Body For Bucks*

Ofcom Bulletin No. 148: *Pedigree Dogs Exposed* (a long adjudication dealing with several issues – but included here for its observations on the right to respond)

Ofcom Bulletin No 105. *Newsline: cigarette litter.*

Ofcom Bulletin No. 148: *Mischief Your Identity For Sale*

Ofcom Bulletin No. 111. *Look North Mr and Mrs. R.*

- The power of a youth court to lift the anonymity under section 49 of the Children and Young Persons Act 1933 in respect of a juvenile unlawfully at large after being charged with or convicted of a serious violent or sexual offence, or to avoid injustice for a juvenile.

- Anonymity provision in respect of children involved in family law cases, including cases concerning wards of court (*McNae*, pp.171, 174-179 and check *McNae Online Resource Centre* for updates); of people involved in unresolved employment tribunal cases (*McNae*, pp. 262-266) and of people whose cases are being dealt with by mental health tribunals (*McNae*, pp. 257 and 260)
- Contempt danger under section 12 of the Administration of Justice Act 1960 in the reporting of some categories of private hearings/hearing in chambers including those involving a child's upbringing, e.g. a feature writer should be very wary of quoting from a social worker's report on a child, even if the child is not to be identified in what is published (*McNae*, pp.130-132, 179-182 and check *McNae Online Resource Centre* for updates)
- The risk of common law contempt if jurors are identified in the media (*McNae*, pp. 144, 147-148)
- As regards the period *before* a case becomes 'active' under the 1981 Contempt of Court Act, the risk of common law contempt in publishing detail of or comment on a case deemed "pending" or "imminent" (*McNae*, p. 297)
- The common law contempts of scandalising the court and of interference with witnesses/their evidence (*McNae*, pp. 298-299)
- Liability for financial penalty under the Courts Act 2003 for serious misconduct which results in a wasted or aborted trial (*McNae*, p. 284)
- The defences in libel law to publishing someone's previous criminal convictions (i.e. justification and qualified privilege) and to inference created by such publication (i.e. honest comment), and the requirements of all such defences in this context, and the effect on these defences of the Rehabilitation of Offenders Act (*McNae*, pp. 374-377)
- The libel defence of offer of amends (*McNae*, pp. 351-353)
- That slander is defamation by the spoken word, and the type of circumstance in which a journalist may be at risk of an action for slander when conducting an interview or making an investigative inquiry (*McNae*, p. 370)
- The nature of malicious falsehood (*McNae*, p. 371-372)
- The scope and requirements of the defence under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, and its relevance to matter published on online bulletin boards / comment sites for readers, and to how media organisations should react to complaints about such matter
- The Theft Act's prohibition on "no questions asked" rewards for return of stolen goods (*see McNae Online Resource Centre*, ch. 2)
- The reporting of bankruptcy matters except in relation to defamation risk in implying someone or a company is or may soon be insolvent (*McNae*, pp. 160-161, 305)
- Trespass; the danger of prosecution for aggravated trespass, e.g. during the reporting of protest activity (*McNae*, pp. 414-416, 547-548)

- Sensitive personal information under Data Protection Act in privacy cases, including film/digital footage, photographs (*McNae, pp.428-430*)
- The prohibition against hacking into phone communications, as specified in the Regulation of Investigatory Powers Act (*McNae, pp.413-414*)
- Legal restrictions under the Representation of People Acts preventing the publication of false statements about candidates at election time, and preventing the publication of exit poll data, or forecasts based on it, while polling continues (*McNae, pp.492-496*)
- The Official Secrets Acts (*McNae, pp.498 -506 and McNae Online Resource Centre*)

As indicated the topics listed above should be studied, in addition to topics listed as potential exam content.

If required to, centres must be able to produce material (and student representatives) to assure the NCTJ, e.g. during accreditation visits, that all such topics are covered.

The media law board wishes to stress that the following requirements are important in the effective delivery of this programme of study:

- (1) regular assessment of candidates' work;
- (2) at least one visit to a magistrates court and at least one visit to a Crown court.
- (3) close liaison with other course tutors, to ensure subject integration.

## MEDIA LAW GRADE DESCRIPTORS

Grades	Key Issues and content	Examples and Application
<b>A</b> (70+)	Very broad knowledge, very detailed, accurate	Excellent explanations with reference to relevant examples and practical application to local/national stories. Candidate should not make basic legal errors or create legal risks in journalistic output. Significant analysis and good application.
<b>B</b> (60-69)	Broad knowledge, detailed, mainly accurate	Good explanations with reference to relevant examples and practical application to local/national stories. Candidate is very unlikely to make basic legal errors or create legal risks in journalistic output. Provides evidence of analysis and application.
<b>C</b> (50-59)	Basic understanding of key concepts	Acceptable explanations with reference to relevant examples and practical application to local/national stories. Candidate is unlikely to make basic legal errors or create legal risks in journalistic output.
<b>D</b> (40-49)	Some grasp but a number of misunderstandings and evidence of limited understanding of key concepts	Limited use of appropriate examples and or use of irrelevant examples, lacks application to local/national stories and limited appreciation of the demands of practical journalism. Candidate is likely to make basic legal errors or create legal risks in journalistic output.
<b>E</b> (30-39)	A large number of inaccuracies evident, plus confusion and lack of basic understanding of key content	Makes a few and/or misplaced references to examples. Far too generalised. Candidate is very likely to make basic legal errors or create legal risks in journalistic output.
<b>F</b> (0-29)	No relevant knowledge	No understanding of context. Candidate will almost certainly make serious legal errors and create serious legal risks in journalistic output.