



## JOINT SUBMISSION BY ENGLISH PEN, INDEX ON CENSORSHIP, AND REPORTERS WITHOUT BORDERS IN RESPONSE TO THE LAW COMMISSION'S CONSULTATION ON THE PROTECTION OF OFFICIAL DATA

**English PEN** is a charity that promotes public enjoyment and access to literature, and defends freedom of expression for writers, journalists, translators, publishers and members of the public in the UK and internationally. English PEN has a strong record of contributing to legal reform in the UK, and has been involved in a number of the most significant recent cases considering the relationship between the activities and rights of journalists (and their sources) and the legal framework for national security, counter-terrorism, and surveillance.<sup>1</sup>

**Reporters Without Borders** – known internationally as Reporters Sans Frontières (RSF) – is an international non-profit organisation working to defend the freedom to be informed and to inform others throughout the world. RSF accomplishes its work through its wide network of correspondents in 130 countries, its offices and sections in 13 cities including its new London bureau – and its consultative status at the United Nations, UNESCO, and the Council of Europe. As a leading defender of press freedom and freedom of information, RSF alternates public interventions and effective behind-the-scenes actions.

**Index on Censorship** is a nonprofit that campaigns for, and defends, free expression worldwide. Since 1972 Index on Censorship has published work by censored writers and artists in an award-winning quarterly magazine, and in addition promotes debate, supports those persecuted for their free expression, and monitors threats to free speech. Index on Censorship believes that everyone should be free to express themselves without fear of harm or persecution – no matter their views.

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<sup>1</sup> Including *Big Brother Watch and ors v United Kingdom* (App No. 58170/13) in the European Court of Human Rights, and the Court of Appeal and Divisional Court proceedings in *R (David Miranda) v Home Secretary and Commissioner of Police for the Metropolis* (See [2014] 1 WLR 3140 (Div Ct); [2016] 1 WLR 1505 (CA)).

## INTRODUCTION

1. English PEN, Reporters Without Borders, and Index on Censorship welcome the opportunity to provide a joint submission in response to the Law Commission's important consultation with respect to the proposed reform of the law governing the protection of official data within the United Kingdom.
2. While the mechanisms of information exchange and data collection, retention, storage, and distribution of information have developed markedly worldwide in the past quarter of a century, the legal framework governing the field has remained largely unchanged. At the same time, the participation, since 2001, of the United Kingdom and its key strategic allies in ongoing counter-terrorism and security operations at home and abroad has led to a significant increase in the number of persons involved in the collection, retention, storage, and distribution of sensitive information in relation to those activities.
3. A legal framework designed originally for application to a relatively small number of officials dealing in a relatively limited amount of sensitive information handled in a restricted number of ways now faces significant challenges to remain robust and appropriate, while avoiding arbitrary or absurd outcomes. Accordingly, English PEN, Reporters Without Borders, and Index on Censorship support the work of the Law Commission in conducting the present consultation to assess the operation of the current legal framework and to consider appropriate options for necessary reform.
4. In this joint response, four issues identified in the Law Commission's Consultation Paper<sup>2</sup> will be addressed in turn, namely:
  - 4.1. The feasibility of a *public interest defence* in general, addressing Provisional Conclusion 23;<sup>3</sup>
  - 4.2. The feasibility of a *statutory commissioner model* in general, addressing Provisional Conclusion 25;<sup>4</sup>
  - 4.3. The particular question of the adequacy of existing legal safeguards to protect journalistic activity without a *public interest defence*, addressing Provisional Conclusion 24;<sup>5</sup> and

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<sup>2</sup> Law Commission, 'Protection of Official Data: A Consultation Paper' (Consultation Paper No 230) (2017) ('Consultation Paper').

<sup>3</sup> Consultation Paper, [7.23]-[7.66] and [8.38].

<sup>4</sup> Consultation Paper, [7.77]-[7.84] and [8.41].

<sup>5</sup> Consultation Paper, [7.67]-[7.76] and [8.39].

- 4.4. The particular question of whether sensitive information relating to the economy should be brought within the scope of official secrets legislation, addressing Consultation Question 9.<sup>6</sup>

## **ISSUE I: THE FEASIBILITY OF A PUBLIC INTEREST DEFENCE**

5. In its evaluation of the merits of a public interest defence, the Consultation Paper raises three potential issues, as follows:
  - 5.1. First, it is suggested that the existence of a public interest defence will undermine the trust upon which the relationship between Ministers and the civil service is based, since civil servants may take advantage of such a defence to leak information for partisan political reasons (and Ministers may in turn suspect civil servants of doing so);<sup>7</sup>
  - 5.2. Secondly, it is suggested that applying such a defence entails risk to others and national security, since a disclosure which may appear in the public interest now may, when judged against as-yet-unknown facts, turn out not to have been in the public interest after all;<sup>8</sup> and
  - 5.3. Thirdly, it is suggested that claimed difficulties in defining what constitutes the public interest will undermine legal certainty and lead to confusion.<sup>9</sup>

### **Workability of a statutory defence**

6. The first and third potential issues identified in the Consultation Paper may be considered together, as each derives from the same fundamental concern that a public interest defence will be unworkable due to the difficulty in achieving a legal definition of '*the inherently ambiguous*'<sup>10</sup> concept of public interest. It is, after all, only where the concept of public interest is incapable of proper definition that it is at risk of being deployed as a cover for partisan motivations (the first identified problem) or is at risk of uncertain outcomes (the third identified problem).
7. English PEN, Reporters Without Borders, and Index on Censorship consider that the anxiety as to whether the concept of public interest is capable of workable legal protection is overstated. There are a variety of legal mechanisms capable of

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<sup>6</sup> Consultation Paper, [3.210]-[3.214] and [8.25].

<sup>7</sup> Consultation Paper, [7.39]-[7.42].

<sup>8</sup> Consultation Paper, [7.43]-[7.49].

<sup>9</sup> Consultation Paper, [7.50]-[7.64].

<sup>10</sup> Consultation Paper, [7.51].

ensuring that a statutory public interest defence operates in a manner which is clear, consistent, fair, and politically impartial.

*The subject-matter approach: the operation of the defence in domestic employment law*

8. One such mechanism would be a modified version of the approach which was taken in UK law by the enactment of the Public Interest Disclosure Act 1998, the whistle-blower protection legislation which first introduced the system of protected disclosures into the Employment Rights Act 1996.
9. The 1998 Act created a category of disclosure, such that employees making qualifying disclosures were protected from their employers applying sanctions (such as dismissal) to them in response. To amount to a qualifying disclosure, the information needed, in the reasonable belief of the employee making the disclosure, to show one or more of the following:<sup>11</sup>

(a) that a criminal offence has been committed, is being committed, or is likely to be committed;

(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring, or is likely to occur;

(d) that the health or safety of any individual has been, is being, or is likely to be endangered;

(e) that the environment has been, is being, or is likely to be damaged; or

(f) that the information tending to show any matter falling within any one of the preceding paragraphs has been, is being, or is likely to be deliberately concealed.'

10. The approach taken to protecting disclosures made in the public interest, therefore, did not refer to the public interest in abstract, but rather sought to identify key areas where it would be considered uncontroversial that disclosure would be in the public interest. That the regime sought to protect the public interest despite expressly using that terminology was recognized by the Court of Appeal in *ALM Medical Services Ltd v Bladon*, in which Lord Justice Mummery noted:

'The self-evident aim of the provision is to protect employees from unfair treatment (i.e. victimization and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure, and elimination of misconduct, malpractice, and potential dangers by those likely to have early knowledge

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<sup>11</sup> Public Interest Disclosure Act 1998, s1; Employment Rights Act 1996, s43B(1) (in force from 2 July 1998 to 24 June 2013, when amended by Enterprise and Regulatory Reform Act 2013, s17).

of them, and (b) protecting the respective interests of employers and employees.<sup>12</sup>

11. So long as the areas of subject matter are selected with care, this approach to protecting the public interest avoids any theoretical difficulty entailed in defining the public interest in a general sense. Responding to the concerns raised in the Consultation Paper, a public interest defence for the disclosure of official data which was structured in this manner – i.e. as a defence made out where the information disclosed demonstrated criminal or other unlawful conduct – would neither give rise to unworkable uncertainty nor provide cover for partisan political activities.
12. Plainly, there would need to be consideration given to which areas of subject matter should qualify as justifying disclosure in the context of official secrets. Reasonable views may differ as to whether exposure of danger to health and safety of a person, protection of the environment, or criminal or other unlawful conduct which attracts a low level of sanction if proved, are sufficiently serious to justify disclosure of official secrets. But the solution to that lies in prior clarification of the categories of serious subject matter: it would be entirely possible, for instance, for a public interest defence to protect disclosure of information which demonstrated, for instance, criminal activity of a level of seriousness which attracts punishment above a particular threshold, or breach of human rights which applied to a large number of people, rather than to define the subject matter in a broad way covering the exposure of less serious conduct.
13. It is of note that this approach to public interest disclosure was amended again in 2013 pursuant to the Enterprise and Regulatory Reform Act 2013, which added the additional condition that, for a disclosure of information to qualify as a protected disclosure under the Employment Rights Act 1996, it would, in addition to demonstrating the subject matter set out above, also need to be made *'in the public interest.'*<sup>13</sup> That provision was inserted in response to the fact that the breadth of the subject matter categories justifying disclosure – in particular the category of information demonstrating that a person was failing to comply with *'any legal obligation'* to which they were subject – had led to persons relying on the public interest disclosure protections when disclosing information relating solely to alleged breaches of *their own* employment contracts.

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<sup>12</sup> *ALM Medical Services Ltd v Bladon* [2002] ICR 1444; [2002] EWCA Civ 1085, [2] (Mummery LJ).

<sup>13</sup> Enterprise and Regulatory Reform Act 2013, s17; Employment Rights Act 1996, s43B(1) (in force from 25 June 2013).

14. That approach was endorsed by Judge Altman in the Employment Appeal Tribunal decision of *Parkins v Sodexho Ltd*.<sup>14</sup> It was the effect of that decision to which the legislative reform was directed. It is clear that introduction of that phrase ‘*in the public interest*’ was not intended to be a new or additional test, but rather a confirmation of the original intention of the protected disclosure regime, and a protection against mis-use of that regime for purely personal ends. Supporting the Enterprise and Regulatory Reform Bill, the Parliamentary Under-Secretary of State for Business, Innovation, and Skills, Mr Norman Lamb MP, noted that:<sup>15</sup>

‘The original aim of the public interest disclosure legislation was to provide protection to individuals who made a disclosure in the public interest – also known as blowing the whistle [...]

[T]he decision in the case of *Parkins v Sodexho Ltd* has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is a matter of purely private rather than public interest, and then claim protection, for example, for unfair dismissal [...]

The [public interest] clause will remove the opportunistic use of the legislation for private purposes. It is in the original spirit of the Public Interest Disclosure Act that those seeking its protection should reasonably believe that their raising an issue is in the public interest...’

15. In keeping with the express intention of the government that the exposure of categories of illegality and wrongful through disclosure constitutes an exposure in the public interest *except where* clearly occurring for purely private reasons, the Employment Appeal Tribunal has applied the amended test under section 43B(1) of the Employment Rights Act 1996 to protect disclosures of information even where the class of the public whose interests are affected may be relatively small. For example, in the case of *Chesterton Global Ltd v Nurmohamed*, Mr Justice Supperstone considered that a disclosure relating to company manipulation of accounts affecting the remuneration payable to approximately 100 senior managers of the company nationwide could come within the test of a disclosure of unlawful conduct in the public interest.<sup>16</sup>

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<sup>14</sup> *Parkins v Sodexho Ltd* [2002] IRLR 109 (EAT), subsequently applied in the EAT in cases such as *Odong v Chubb Security Personnel* EAT/0819/02/TM and *Felder v Cliveden Petroleum Co* UKEAT/0533/05/DM.

<sup>15</sup> House of Commons, Public Bill Committee, Session 2012-13 (3 July 2012, afternoon), cols 387-389 (Norman Lamb MP).

<sup>16</sup> *Chesterton Global Ltd (t/as Chestertons) v Nurmohamed* [2015] ICR 920 (EAT). See also: *Underwood v Wincanton plc* UKEAT/0163/15/RN.

16. Employment law has, therefore, reached a workable mechanism for protecting disclosures in the public interest, whereby a range of subject matter of clear presumptive public interest are nominated, and disclosures relating to that subject matter are protected except in circumstances where the disclosure, despite relating to that subject matter, is in fact pursued for purely personal motivations.
17. A subject-matter led approach would be equally viable in the official secrets context although, informed by the experience in the field of employment law, a narrower definition of the type of subject matter justifying disclosure would be appropriate. It may be that only disclosure of material demonstrating criminal activity above a threshold of severity, or widespread human rights violations affecting a class of the public at large, is acceptable: that is properly a matter for Parliament in the drafting of the scope of such legislation. But the fundamental point to be made is that, contrary to the contention in the Consultation Paper that any sort of defence for disclosures in the public interest necessarily involves the creation of an uncertain and novel concept of public interest, English law, in the analogous framework of whistleblowing disclosures by employees, operates a workable defence of public interest disclosure. There is nothing in principle to restrict the adoption of a similar approach in the context of official secrets.

*The subject-matter approach: the operation of the defence under the Australian Public Interest Disclosure Act 2013*

18. Indeed, just such a subject-matter approach to a public interest defence for the disclosure of secret information exists in Australian law pursuant to the Public Interest Disclosure Act 2013, which provides, in its section 10, that if an individual '*makes a public interest disclosure*' the individual '*is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure.*'<sup>17</sup>
19. Given the operation of this statutory provision as a defence to disclosure, it is surprising that the Consultation Paper does not contain a discussion of its merits in Chapter 7, but instead merely rehearses the operation of the legislation in Appendix A.<sup>18</sup>
20. The regime under the 2013 Australian Act is intricate, and applies different standards depending upon whether the disclosure is being made through internal official channels, to a legal practitioner, or the public.<sup>19</sup> There are a number of key elements which are worthy of note:

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<sup>17</sup> Public Interest Disclosure Act 2013 (Cth), s10(1)(a).

<sup>18</sup> Consultation Paper, [A.211]-[A.243].

<sup>19</sup> Public Interest Disclosure Act 2013 (Cth), s26.

20.1. First, the information being disclosed must satisfy a definition of '*disclosable conduct*,' that is to say information about conduct which: (i) breaches a statute; (ii) perverts the course of justice or involves corruption; (iii) constitutes maladministration; (iv) is an abuse of public trust; (v) results in wasted public money; (vi) unreasonably results in a danger to the health and safety of one or more persons; and (vii) results in an increased risk of danger to the environment.<sup>20</sup> Of course, that subject-matter approach is generally in keeping with the approach already found in English law in the Employment Rights Act 1996, as set out above.

20.2. Secondly, certain limiting conditions take disclosures, which would otherwise qualify, outside the scope of the protection of the statutory defence.

20.2.1. One such limitation is that where a disclosure is made '*externally*' – that is, to the public at large where internal mechanisms have failed to address the concern – a court assessing the availability of the defence is asked to determine whether it is, on balance, '*contrary to the public interest*.'<sup>21</sup> The legislation provides a list of factors to which regard should be had when assessing that question, including the nature and seriousness of the disclosable conduct, the risk disclosure could cause damage to national security, the proper administration of justice, and the importance of legal professional privilege.<sup>22</sup>

20.2.2. The second key limitation is that information will not be eligible for protected disclosure if it exposes conduct which an '*intelligence agency engages in in the proper performance of its functions*'<sup>23</sup> or if the disclosure contains what is termed '*intelligence information*.'<sup>24</sup> As to the first limb, both the Explanatory Memorandum<sup>25</sup> and the statutory Inspector-General of Intelligence and Security,<sup>26</sup> suggest however that, while intelligence agency conduct in technical breach

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<sup>20</sup> Public Interest Disclosure Act 2013 (Cth), s29.

<sup>21</sup> Public Interest Disclosure Act 2013 (Cth), s26(1), Table: Item 2, col 3(e).

<sup>22</sup> Public Interest Disclosure Act 2013 (Cth), s26(3).

<sup>23</sup> Public Interest Disclosure Act 2013 (Cth), s33.

<sup>24</sup> Public Interest Disclosure Act 2013 (Cth), s41.

<sup>25</sup> See: Parliament of Australia, House of Representatives, Public Interest Disclosure Bill 2013: Explanatory Memorandum, p18, available at: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5027\\_ems\\_aa8faba5-c605-4803-8c4f-776183c718cb/upload\\_pdf/378533.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5027_ems_aa8faba5-c605-4803-8c4f-776183c718cb/upload_pdf/378533.pdf;fileType=application%2Fpdf)

<sup>26</sup> See the evidence given by the Inspector-General to the Senate Committee inquiry. Senate, Legal and Constitutional Affairs Legislation Committee, 'Public Interest Disclosure Bill 2013 [Provisions]' (June 2013), p21, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/publicinterestdisclosure/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/publicinterestdisclosure/report/index)



of foreign or domestic statute will not be disclosable, disclosure of information demonstrating *improper* conduct of those agencies would still be protected.<sup>27</sup> The definition of '*intelligence information*' is information which '*has originated with, or been received from, an intelligence agency*.'<sup>28</sup> a provision the width of which was subject to substantial adverse comment in submissions made to the Senate Legal and Constitutional Affairs Legislation Committee in its consideration of the draft legislation.<sup>29</sup>

21. There has been minimal judicial consideration of the Australian statutory public interest defence, it only apparently having been pleaded in two reported cases: *Clement v Australian Bureau of Statistics*,<sup>30</sup> a clearly unmeritorious case in which the relevant disclosures were made almost 20 years prior to the protections coming into force; and *Wyatt and Auscript Australasia Pty Ltd v Cutbush*,<sup>31</sup> an application to set aside default judgment, where all that needed to be demonstrated was that the defence had a real prospect of success. But there is nothing in either judgment to suggest that the defence is necessarily unworkable or so uncertain as to leave itself open to partisan political abuse, as feared in the Consultation Paper.

*The limitations of only adopting the subject-matter approach*

22. There are limitations to a subject-matter approach to addressing disclosures in the public interest. In circumstances where official secrets may well be concerned with conduct which is at the edge of existing technological knowledge and existing legal frameworks, and to which Parliament has not yet turned its attention, a definition of public interest which relies upon the demonstrating of breach of existing law, while useful, is likely to be of insufficient scope to address the full range of information, disclosure of which would be in the public interest.
23. The broader approach would be to adopt a test whereby disclosure is rendered lawful not only by reference to subject matter which serves as *proxy* for the public interest, but by reference to the public interest itself (subject to certain appropriate preconditions).

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<sup>27</sup> See the argument to this effect in Hardy and Williams, 'Terrorist, Trader, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37(2) *University of New South Wales Law Journal* 784, Section IV.

<sup>28</sup> Public Interest Disclosure Act 2013 (Cth), s41(1)(a).

<sup>29</sup> See: Senate, Legal and Constitutional Affairs Legislation Committee, above n 27, p23.

<sup>30</sup> *Clement v Australian Bureau of Statistics* [2016] FCA 948 (Federal Court of Australia).

<sup>31</sup> *Wyatt and Auscript Australasia Pty Ltd v Cutbush* [2016] QSC 253 (Queensland Supreme Court).

*The broader two-fold approach: Section 15 of the Canadian Security of Information Act*

24. As noted in the Consultation Paper, that approach has been adopted in Canada in the form of section 15 of the Security of Information Act (as amended). This relates to disclosures of official secrets by Canadian civil servants who have already attempted to raise concerns within the context of the Canadian public service (which has a series of independent statutory commissioners which oversee intelligence and surveillance).<sup>32</sup>

25. Section 15 of the Act provides that a person is not guilty of an offence relating to the disclosure of official secrets *'if the person establishes that he or she acted in the public interest.'*<sup>33</sup> Acting in the public interest, for the purposes of that test, has two elements.

25.1. First, an element relating to the subject matter of the disclosed information, namely the disclosure of *'an offence under an Act of Parliament that he or she reasonably believes has been, is being, or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada.'*<sup>34</sup>

25.2. And secondly, the requirement that the public interest in the disclosure must outweigh the public interest in non-disclosure,<sup>35</sup> with the Court to reach that conclusion having weighed the following factors:<sup>36</sup>

(a) whether the extent of the disclosure is no more than is reasonably necessary to disclose the alleged offence or prevent the commission or continuation of the alleged offence, as the case may be;

(b) the seriousness of the alleged offence;

(c) whether the person resorted to other reasonably accessible alternatives before making the disclosure and, in doing so, whether the person complied with any relevant guidelines, policies, or laws that applied to that person;

(d) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;

(e) the public interest intended to be served by the disclosure;

(f) the extent of the harm or risk of harm created by the disclosure;  
and

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<sup>32</sup> And the attempt to bring the information to the attention of these bodies is a prerequisite for a successful public interest defence, unless exceptional circumstances apply: see Security of Information Act (Canada), s15(5)-(6).

<sup>33</sup> Security of Information Act (Canada), s15(1).

<sup>34</sup> Security of Information Act (Canada), s15(2)(a).

<sup>35</sup> Security of Information Act (Canada), s15(2)(b).

<sup>36</sup> Security of Information Act (Canada), s15(4)(a)-(g).

(g) the existence of exigent circumstances justifying the disclosure.’

26. It is correct that, as the Consultation Paper notes, the defence in section 15 has yet to be relied upon. But that is not surprising given that, in Canada as in most jurisdictions, full trials in relation to official secrets disclosure offences are rare. In fact, the only person sentenced under the Security of Information Act is a Jeffrey Delisle, a Canadian naval officer who pled guilty to selling sensitive information to Russia,<sup>37</sup> and did not seek to rely upon any defence. Under the previous version of the same act (then titled the Official Secrets Act), the Canadian government unsuccessfully attempted to prosecute a newspaper for leaking official secrets, but the case was dismissed on the grounds that the information had already entered the public domain prior to disclosure.<sup>38</sup>
27. The absence of a substantial record of reliance on the public interest in Canada does nothing to indicate that such a test is unworkable. If anything, it suggests that the Law Commission’s concern that a statutory public interest defence may incentivize disclosures to partisan ends is misplaced. Where matters touching on the framework governing disclosures under the Security of Information Act *have* been considered in Canada, it has not been suggested that the protection of official secrets is at risk given the existence of such a defence. In one of the *O’Neill v Attorney General of Canada* journalist freedom cases,<sup>39</sup> the Ontario Superior Court was faced with an argument by the Canadian government<sup>40</sup> that the general availability of the section 15 public interest defence indicated that the existence of offences under section 4 of the Security of Information Act of communication and possession of secret official information (by persons other than civil servants) did not contravene the right to liberty and security of the person under the Canadian Charter of Rights and Freedoms.<sup>41</sup> Justice Ratushny rejected the argument, determining that the public interest defence under section 15 was confined to its express conditions of application.<sup>42</sup> It is of note that the Attorney General of Canada, in the separate case of *Re Harkat* prior to the *O’Neill* cases, had also taken a restrictive view of the scope of the section 15 public interest defence.<sup>43</sup>

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<sup>37</sup> *R v Delisle* (2012) NSPC 114 (Provincial Court of Nova Scotia); see Jane Taber, ‘Canadian spy Jeffrey Delisle gets 20 years for selling secrets to Russia,’ *The Globe and Mail* (8 February 2013).

<sup>38</sup> See *R v Toronto Sun Publishing Ltd* (1979) 24 OR 2d 621 (Provincial Court of Ontario).

<sup>39</sup> *O’Neill v Attorney General of Canada* (2006) 82 OR (3d) 241 (Ontario Superior Court of Justice) (*‘O’Neill’*).

<sup>40</sup> *O’Neill*, [54]-[55].

<sup>41</sup> Constitution Act 1982, Schedule B to the Canada Act 1982, para 7.

<sup>42</sup> *O’Neill*, [61] (Ratushny J).

<sup>43</sup> See *Re Harkat* 2003 FC 918 (Federal Court of Canada), in which the Attorney General had notified the applicant that the applicant’s intended expert witness, a former civil servant, would not be able to avail himself of the section 15 defence in circumstances where a disclosure of official secrets was not related to exposing an alleged offence (at [22] (Dawson J)).

28. Following the *O'Neill* decision, the Special Senate Committee on the Anti-Terrorism Act<sup>44</sup> considered that the scope of the public interest defence under the Security of Information Act ought to be expanded to apply not only to civil servants, but to all persons who may come into contact with official secrets if the public interest requires it. As the Committee pointed out, *'in addition to the principles that operate to ensure secrecy and loyalty to the government, there is an additional democratic principle by which matters of legitimate concern should be brought to the attention of the public for debate or resolution.'*<sup>45</sup> That proposed expansion has not, however, been enacted.

*The broader approach: Denmark*

29. A broad public interest defence, applicable to all persons and not only civil servants, is found in the Danish Criminal Code, which provides that disclosure of official secrets will not constitute an offence where the person making the disclosure is acting in *'the legitimate exercise of obvious public interest.'*<sup>46</sup> The leading case interpreting the provision is *Denmark v Larsen, Bjerre and Lunde*, relating to two journalists and their editor charged with publishing official secret information in which the existence of weapons of mass destruction in Iraq was questioned.<sup>47</sup> The Court, in determining whether the disclosure was in the public interest, conducted a balancing exercise weighing the factors of the national security interest to which the information related, the actual harm to that interest occurring as a result of disclosure, and the significance of the public knowing and debating the grounds for the Danish government's military participation in Iraq. The Danish Court concluded that the public interest weighed in favour of disclosure, and the defendants were acquitted.

30. The Consultation Paper seeks to refer to this Danish decision as indicative of the uncertainty which may result from a public interest defence. The Consultation Paper raises the possibility that *'different juries could arrive at different conclusions on the same set of facts'* and points to the fact that, in relation to unauthorized disclosures of classified information on weapons of mass destruction in Iraq, *'[t]he Eastern High Court of Denmark did not consider that the unauthorized disclosure was made in the "obvious public interest" because it did not reveal any illegal activity' but the 'Copenhagen City Court, however, ruled otherwise solely on the grounds that*

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<sup>44</sup> The piece of omnibus post-9/11 legislation which created the current version of the Security of Information Act.

<sup>45</sup> Special Senate Committee on the Anti-Terrorism Act, 'Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act' (February 2007), Recommendation 27, available at: <https://sencanada.ca/Content/SEN/Committee/391/anti/rep/rep02feb07-e.htm>

<sup>46</sup> Danish Criminal Code (2010), s152(e).

<sup>47</sup> *Denmark v Larsen, Bjerre and Lunde* (Case No. SS 24.13764/2006) (4 December 2006) (Copenhagen City Court).

*there was a considerable public interest in knowing the basis for the decision that was taken to involve Denmark in the invasion of Iraq.*<sup>48</sup>

31. This passage of the Consultation Paper might give the impression that two different courts in Denmark reached diametrically opposed decisions on the same case: that is not, however, what occurred. The decision of the Eastern High Court (on appeal from the Copenhagen City Court) related to a separate set of proceedings, namely the prosecution of a former intelligence officer, Frank Grevil.<sup>49</sup> First, of course, it is not necessarily fatal for the integrity of a legal test that courts may reach different decisions in different cases. But even taking the criticism at its highest – that there is inconsistency where one Court considers a public interest justification made out without a link to illegal activity, but another Court does not – that points only to the importance of constructing a statutory test with a greater degree of clarity than the very broad reference in the Danish Criminal Code.
32. There is no reason that a statutory public interest defence would be incapable of certain definition in English law. It is not suggested that a bare provision such as that in the Danish Criminal Code should be employed, although of course it is worth noting that current draft of the government’s Digital Economy Bill would provide a defence to liability for disclosure of confidential information about government service delivery ‘*where the publication of the information is in the public interest*’ (without more).<sup>50</sup> A test relating to the disclosure of official secrets could readily make clear the sort of subject matter in relation to which disclosures could attract protection, just as the subject-matter approach of the Public Interest Disclosure Act 1998 does in the employment context, just as the Australian Public Interest Disclosure Act 2013 and section 15(2)(a) of the Canadian Security of Information Act do. Further, it could set out the factors which ought to be considered in determining whether the public interest is met in a particular case, as the Canadian Security of Information Act does and as the Australian Public Interest Disclosure Act 2013 does in the particular context of external disclosures.

### **National security and the impact of future information**

33. The remaining potential issue identified in the Consultation Paper<sup>51</sup> is that the public interest is allegedly particularly difficult to discern in circumstances where the national security implications of a disclosed detail may not be apparent to a person making such a disclosure given that sometimes details which are innocuous in their own right may be rendered harmful to national security when

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<sup>48</sup> Consultation Paper, [7.54].

<sup>49</sup> *Denmark v T (Frank Grevil)* (Case No. U2006.65Ø-TfK2005.796/1 (23 September 2005) (Eastern Division of the High Court of Denmark).

<sup>50</sup> Digital Economy Bill, HL Bill 122, cl 44(2)(i).

<sup>51</sup> Set out at paragraph 5.2 above.

combined with other fragments of information (perhaps years in the future). This 'mosaic' theory of the relevance of information has been frequently proposed by advocates of secrecy in the post-9/11 era. The fact that this theory is frequently encountered does not render it worthy of special respect, as has been observed by various commentators.

34. In this context, it is surprising that the Consultation Paper refers to the student article by David Pozen regarding the mosaic theory without acknowledging the express conclusion of that article, namely that '*[i]n theory, highly speculative mosaic claims are unfalsifiable; in practice, they have proven unimpeachable,*' and that the US courts' willingness to defer to government assertions regarding the risk of fragmentary disclosure '*exacerbates the theory's potential for misuse*' and is itself '*undertheorized and ... prone to misuse.*'<sup>52</sup>
35. Other commentators, such as Professor Hitoshi Nasu, have seen in the US courts increasing acceptance of 'mosaic theory,' in cases such as *Center for National Security Studies v US Department of Justice*<sup>53</sup> and *North Jersey Media Group v Ashcroft*,<sup>54</sup> '*the evisceration of the judicial role in reviewing executive decisions as to what is necessary to protect national security, whilst making national security claims increasingly speculative.*'<sup>55</sup> That conclusion is entirely reasonable, since the logical extension of the position taken in the Consultation Paper is that there should be a blanket rule against non-disclosure of secret information, as no potential disclosing party, nor even any Court, can determine the theoretical fragmentary relevance of a piece of information to an as-yet-unknown 'mosaic' of information at some indefinite point in the future.
36. Indeed, there is no logical reason why such a blanket non-disclosure rule should be restricted to disclosures of secret information at all. Non-secret information is just as likely to contribute to any theoretical future terrorist plan, and ought, on the mosaic theory, also to be suppressed.
37. The absurdity and chilling effect of this position is clear: it has no place in a meaningful debate on the proper limits of information disclosure, which must, if it is to comply with basic principles of rational law-making, be grounded in what may be evidenced in Court, not speculative paranoia. English PEN, Reporters Without Borders, and Index on Censorship submit that the consideration of the impact of 'mosaic' theory of national security risks ought not to form any part of the assessment of a public interest defence to disclosure offences.

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<sup>52</sup> Pozen, 'The Mosaic Theory, National Security, and the Freedom of Information Act' (2005) 115 *Yale Law Journal* 628, 679.

<sup>53</sup> *Center for National Security Studies v US Department of Justice* 331 F 3d 918, 932 (DC Cir, 2003).

<sup>54</sup> *North Jersey Media Group Inc v Ashcroft* 308 F 3d 198, 219 (3<sup>rd</sup> Cir, 2002).

<sup>55</sup> Nasu, 'State Secrets Law and National Security' (2015) 64(2) *International and Comparative Law Quarterly* 365, 401.

38. In conclusion on the issue of a public interest defence in general, English PEN, Reporters Without Borders, and Index on Censorship consider that the asserted obstacles to a workable statutory defence are overstated. **Accordingly, in response to the question posed in Provisional Conclusion 23 in the Consultation Paper,<sup>56</sup> English PEN, Reporters Without Borders, and Index on Censorship respond that they do not agree that the problems associated with the introduction of a statutory public interest defence outweigh the benefits.**

## **ISSUE II: THE STATUTORY COMMISSIONER MODEL**

39. In contrast to a public interest defence rendering wider disclosure of official secrets lawful (or at least not subject to sanction) in certain circumstances, the Consultation Paper favours an approach whereby persons seeking to raise concerns with respect to secret matters with which they come into contact ought to raise those concerns (only) with a statutory commissioner. The Consultation Paper conceives of this post-holder as a figure independent of government with security of tenure, but armed with powers of investigation (and powers to require co-operation from relevant parties with that investigation) and a duty to deal with the concern raised and report to government without delay.<sup>57</sup>

40. The Consultation Paper suggests that this statutory role could possibly, although not preferably, be filled by a conversion of the pre-existing non-statutory civil service position of Staff Counsellor,<sup>58</sup> but considers the preferable candidate for the role to be the Investigatory Powers Commissioner,<sup>59</sup> recently established under the Investigatory Powers Act 2016.<sup>60</sup> According to the Consultation Paper, the Investigatory Powers Commissioner could receive and investigate information provided by concerned members both of the security services and allied agencies.<sup>61</sup>

41. The suggestion in the Consultation Paper that restricted disclosure of secret information which raises significant concerns to the Investigatory Powers Commissioner is an adequate mechanism of safeguarding the public interest raises two clear concerns, one practical and one theoretical.

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<sup>56</sup> Consultation Paper, [8.38].

<sup>57</sup> Consultation Paper, [7.98].

<sup>58</sup> Consultation Paper, [7.100]-[7.101].

<sup>59</sup> Consultation Paper, [7.113]-[7.115].

<sup>60</sup> Investigatory Powers Act 2016, s227. On 3 March 2017, it was announced that the inaugural office-holder would be Lord Justice Fulford.

<sup>61</sup> Consultation Paper, [7.120].

42. First, from a practical standpoint, it is very difficult to assess how workable the model of disclosure to the Investigatory Powers Commissioner may be in circumstances where the position has no track record, and the post-holder was only appointed on 3 March 2017. The scope of the duties of the incoming Investigatory Powers Commissioner under the legislation creating the position, already appears onerous. The functions suggested in the Consultation Paper would be in addition to the roles of the Commissioner in reviewing and investigating public authorities' exercise of surveillance powers in relation to both communications and bulk data,<sup>62</sup> and authorizing certain surveillance and collection activities pursuant to the Police Act 1997 and the Regulation of Investigatory Powers Act 2000.<sup>63</sup>
43. It is by no means fanciful to consider that the Commissioner's existing oversight and statutory duties may allow the post-holder little time to devote to the receipt of, investigation of, and reporting on, matters disclosed to him. And while unnecessary delay ought always to be avoided in public administration if possible, the impact of delay on public interest disclosure is particularly undesirable, since information disclosed may well be time-sensitive as to pending or imminent actions. In the event that the position of Investigatory Powers Commissioner, by virtue of being burdened with this additional jurisdiction, is understandably not able to discharge the function at speed, that may disincentivize the use of the route for disclosure. Either consequence of that (more unregulated disclosure outside all legal frameworks, or less disclosure of important material to any person despite doing so being in the public interest) would be an undesirable and unintended consequence.
44. Secondly, from a theoretical standpoint, English PEN, Reporters Without Borders, and Index on Censorship are concerned that the Consultation Paper's preferred model of a statutory commissioner takes no account of the key public ethic of transparency and dissemination of information which is in the public interest. Even if it were the case that a restricted disclosure of, say, information tending to show corruption in the security services to the Investigatory Powers Commissioner led to an internal investigation which established unlawful conduct conclusively and sanctioned those liable for it, if a model prizes only efficient administration rather than transparent and accountable government, it ought not to be adopted. Good government ought not only to be done, it must be seen to be done. Transparency and openness with respect to the operation and decision-making of government is an ethic enjoying broad support at the international level, and English PEN, Reporters Without Borders, and Index on Censorship take the view that the Consultation Paper has afforded insufficient consideration to that principle.

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<sup>62</sup> Investigatory Powers Act 2016, s229(1) & (3).

<sup>63</sup> Investigatory Powers Act 2016, s233(2)-(3).



45. Such a principle is entirely consistent with the recognition of a ‘*right to truth*’ at the international level. In the past decade this right has been consistently endorsed by the United Nations Human Rights Council as part of the necessary architecture of rules combatting unlawful activity,<sup>64</sup> and was re-affirmed by the General Assembly in 2015, when it resolved that ‘*the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Governments,*’ especially in contexts touching upon human rights.<sup>65</sup> Eminent academics have also endorsed the right in the Tshwane Principles on National Security and the Right to Information (drafted by leading public international lawyers and international organizations),<sup>66</sup> which themselves have been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>67</sup>
46. Accordingly, in conclusion on the issue of the adequacy of a statutory commissioner model, entrusting responsibility for receipt of secret disclosures to the Investigatory Powers Commissioner, English PEN, Reporters Without Borders, and Index on Censorship consider that such a model raises serious practical and theoretical concerns. **In response to the question posed in Provisional Conclusion 25 of the Consultation Paper,<sup>68</sup> the consultees respond that they do not agree that the appropriate mechanism for disclosure from members of the security and intelligence agencies is to the Investigatory Powers Commissioner.**

### **ISSUE III: SPECIFIC PROTECTION FOR JOURNALISTIC ACTIVITY**

47. The Consultation Paper concludes that ‘*the legal safeguards that currently exist are sufficient to protect journalistic activities without the need for a statutory public interest defence.*’<sup>69</sup>
48. This conclusion is based in large part on the ‘*depth and breadth of analysis*’<sup>70</sup> contained in Lord Justice Leveson’s 2012 report, *An Inquiry into the Culture, Practices and Ethics of the Press*, which concluded, among other things, that

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<sup>64</sup> UN Human Rights Council, Resolution 9/11, ‘Right to the Truth’ (2008), UN Doc. A/HRC/RES/9/11, Article 1; and Resolution 12/12, ‘Right to Truth’ (2009), UN Doc. A/HRC/RES/12/12, Article 1.

<sup>65</sup> UN General Assembly, Resolution 68/165, ‘Right to the Truth’ (2014), UN Doc. A/RES/68/165, Preamble and Article 1.

<sup>66</sup> Global Principles on National Security and the Right to Information (Tshwane Principles) (June 2013).

<sup>67</sup> Parliamentary Assembly of the Council of Europe, Resolution 1954 (2013) on National Security and Access to Information.

<sup>68</sup> Consultation Paper, [8.41].

<sup>69</sup> Consultation Paper, [7.74]-[7.76].

<sup>70</sup> Consultation Paper, [7.74].

journalists should not be treated differently from other citizens in determining whether they have committed criminal offences:<sup>71</sup>

‘In a modern democracy that abides by the rule of law, press freedom can never mean a press which sits outside, above and beyond, or in disregard of, the law. Respect for the law is the common framework within which the press, as an important commercial sector, is enabled to flourish, to preserve and enjoy its freedoms, and to make its unique contribution to a democratic society.’

49. This analysis is correct as a matter of first principles. It is, however, one thing to insist (quite rightly) on the equal application of the rule of law to all citizens. It is another to suggest – as the Law Commission appears to do in its Consultation Paper – that the equal application imperative provides a sufficient basis on which to resist the creation of special protections for such vital journalistic activities as investigative reporting. The Leveson report made clear the need for the law both to protect the public from serious criminality, such as illegal phone-hacking, and to safeguard the integrity of genuine public interest journalism. It was only through the endeavours of investigative journalists, after all, that phone-hacking and other such scandals were brought to light in recent years.

50. In support of its conclusion, the Leveson report invokes two rationales, namely that:

50.1. The creation of a public interest defence could potentially ‘*preclude the commencement of a prosecution even when the activity in question was clearly not in the public interest;*’<sup>72</sup> and

50.2. The prosecutorial discretion – as provided for under the criminal law and as further developed in the guidelines<sup>73</sup> published in November 2012 by the Director of Public Prosecutions (‘DPP’), detailing how the discretion should operate in situations where a prosecutor is deciding whether to charge a journalist with a criminal offence in relation to his or her work – provides an adequate safeguard to journalists facing the threat of prosecution.

51. These rationales, however, are insufficient as a basis on which to conclude that there is no need for the creation of a public interest defence for journalistic activities. The first is a far-reaching counterfactual, which should not be the basis

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<sup>71</sup> Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (2012) (‘Leveson Inquiry’), Vol 1, Ch 2, [5.5].

<sup>72</sup> Consultation Paper, [7.70].

<sup>73</sup> Initiated at the invitation of the Leveson Inquiry, Vol 4, Ch 2, [7.4].

for making (or preserving) bad law; the guidelines, meanwhile, do not provide adequate protection to journalists operating at the 'sharp end' of their profession.

52. With regards to the first rationale, that the creation of a bespoke defence might preclude the commencement of prosecutions for fear of, or reluctance at, having to overcome it, the absence of such a defence does little, if anything, to give extra force to prosecutors operating according to the general principles contained in the Code for Crown Prosecutors:<sup>74</sup> first to determine the evidential sufficiency of a case; then to consider the public interest in bringing that case. Even where that two-stage test is satisfied, no prosecutor can be absolutely certain of conviction. Equally, the creation of such a defence would do little to displace, or diminish, those principles - even if there were to be a public interest defence under a revised Official Secrets Act, no journalist could be absolutely certain of acquittal.
53. Paradoxically, then, it is only through the creation of a substantive defence, which would over time give rise to a body of binding principles and illustrative case law, that the argument that the existence of a defence would have a chilling effect could be tested. Moreover, where statutory public interest defences do exist in English law, as in the employment context under the Public Interest Disclosure Act 1998 discussed above, no such chilling effect has eventuated.<sup>75</sup>
54. At the same time, the DPP guidelines, on which both the Leveson Inquiry and, by extension, the Law Commission rely in support of their respective conclusions,<sup>76</sup> do not provide journalists with the necessary predictability to enable them to play their vital investigative role. Instead, a journalist must second-guess how a prosecutor might assess a set of broad, ambiguous, and non-exhaustive criteria in deciding whether or not to charge that journalist. The existence of a prosecutorial discretion is an inadequate substitute for the creation of a substantive public interest defence, especially in an area where the law is, as here, far from settled.
55. Proponents of the status quo argue that investigative journalists and those who provide associated services, from whistleblowers to publishers to forensic accountants, have nothing to fear from the criminal law, provided they abide by the law in the course of their work.<sup>77</sup> This view, however, underestimates the extent to which journalists sometimes necessarily operate at the margins of the

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<sup>74</sup> Director of Public Prosecutions, *The Code for Crown Prosecutors* (January 2013) ('DPP Code').

<sup>75</sup> Ashton, '15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?', (2015) 44(1) *Industrial Law Journal* 29.

<sup>76</sup> See, for example, Consultation Paper, [7.74].

<sup>77</sup> See, for example, Leveson Inquiry, Vol 4, Ch 2, [6.7]: 'Neither is a criminal defence necessary. It might be thought that it is only right that both editors and journalists should think long and hard before embarking on what is criminal conduct in an effort to pursue a story and that it should not be sufficient to rely on an undisclosed source or sources as an all embracing defence.'

law, often because of the conduct of their sources, over which journalists have minimal control. This is evidenced by a range of examples from recent years, from the phone hacking revelations to the Snowden disclosures. For instance, in 2013 the *Guardian* newspaper was threatened with prosecution under section 5 of the Official Secrets Act 1989 unless it physically destroyed hard drives and memory chips containing the secret files provided to it and others by Edward Snowden.<sup>78</sup> The *Guardian* destroyed the files notwithstanding that their contents had in some cases already been published and that the files were still held by other media organizations. As the Director of Public Prosecutions responsible for the publication of the guidelines – now a proponent of the introduction of a public interest defence – has himself acknowledged, ‘*We’ve got to recognise that in the course of journalism, journalists will rub up against the criminal law.*’<sup>79</sup> In such circumstances, the need for a public interest defence is plain.

56. Reliance on the DPP Guidelines to prevent inappropriate prosecution of journalists is inadequate. Without displacing the general principles contained in the Code for Crown Prosecutors, the DPP guidelines require prosecutors first to consider whether there exists in legislation a public interest defence to the offence under consideration. Only three statutes currently make express provision for such a defence: the Data Protection Act 1998 (under which a genuine belief that obtaining the data was in the public interest amounts to a complete defence);<sup>80</sup> the Public Interest Disclosure Act 1998;<sup>81</sup> and the Employment Rights Act 1996, as amended by the Enterprise and Regulatory Reform Act 2013. Contrary to the suggestion contained in the Leveson Inquiry,<sup>82</sup> the existence of such defences does not appear to have precluded the commencement of actions under those acts, or opened the floodgates to defendants pleading the public interest in their defence.

57. In the absence of an overarching defence, and where the courts have not yet provided ‘*clear guidance*’ on the proper interpretation of the offence(s) in question, the guidelines provide that ‘*the best course for prosecutors may be to put the relevant facts and matters before the court for consideration (assuming that the evidential stage is otherwise met).*’<sup>83</sup> This statement appears to suggest that, when in doubt, prosecutors might circumvent the main guidelines in order to find out how, if at all, a court would interpret the issue. That the guidelines explicitly anticipate that there may not exist in law sufficiently ‘*clear guidance*’ as to whether, and if so

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<sup>78</sup> Borger, ‘NSA Files: Why the Guardian in London Destroyed Hard Drives of Leaked Files,’ *The Guardian* (20 August 2013).

<sup>79</sup> Greenslade, ‘Keir Starmer to Call for Journalists to Have a Public Interest Defence,’ *The Guardian* (13 July 2015).

<sup>80</sup> Data Protection Act 1998, s32(1)(b).

<sup>81</sup> Public Interest Disclosure Act 1998, ss43B(a)-(c).

<sup>82</sup> Ashton, above n75.

<sup>83</sup> The Crown Prosecution Service, *Guidelines for Prosecutors on Assessing the Public Interest in Cases Affecting the Media* (13 September 2012) (‘DPP Guidelines’), [25].

how, a public interest defence might be raised encapsulates perfectly the anomalous state of the law and, as a result, the need for a public interest defence to protect against the possibility of unjust prosecution(s).

58. The DPP Guidelines, which specifically address the position under the Official Secrets Act 1989, set out a three-part test for deciding whether to prosecute journalistic activity:<sup>84</sup>

‘When assessing whether **the public interest served by the conduct in question outweighs the overall criminality** prosecutors should follow ... a three stage process:’ (emphasis in original)

- (1) assessing the public interest served by the conduct in question;
- (2) assessing the overall criminality; and [then]
- (3) weighing these two considerations.’

59. The concept of the public interest pervades the Act, notwithstanding the absence of a general public interest defence (and the Law Commission’s recommendation that this should continue to be the case). Further, it is only in respect of the ‘strict liability’ offences under sections 1(1)(a) and 4(1) of the Official Secrets Act 1989 (unlawful disclosure by a member of the security or intelligence services and by a Crown servant or government contractor, respectively) that the House of Lords, in *R v Shayler*,<sup>85</sup> confirmed that there is no public interest defence available, leaving it an open question whether such a defence might be available in respect of other offences under the Act.

60. Even if such a defence were not available, however, the Guidelines make it clear that the public interest is of fundamental importance to the decision whether to bring a prosecution under the Act in respect of journalistic activities. The inevitable conclusion, then, is that both the Act and (whether by accident or design) the Guidelines are committed to relegating to the back door the public interest *as a defence* (though, importantly, not the public interest as such). Prosecutors can – indeed, must – consider the public interest that inheres in bringing a prosecution; it is not open to defendants, however, to argue the same in their own defence. What is particularly unsatisfactory is that notwithstanding this imbalance the Law Commission nonetheless invokes the existence of the Guidelines as the basis for resisting the introduction of a statutory public interest defence.

61. Far from providing the necessary safeguards against prosecution for journalists, in fact the Guidelines serve to reinforce the problems contained in the Act. This only illustrates why referring to the existence of the Guidelines is no substitute for the creation of a bespoke defence under a new Official Secrets Act.

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<sup>84</sup> DPP Guidelines, [30].

<sup>85</sup> *R v Shayler (David Michael)* [2002] UKHL 11; [2003] 1AC 247.

62. That it papers over certain problems in the Act, however, is the least of the inadequacies contained in the Guidelines. In regard to the first limb of the test for deciding whether to prosecute, the guidelines provide for a list of non-exhaustive examples capable of serving the public interest:<sup>86</sup>

- (a) Conduct which is capable of disclosing that a criminal offence has been committed, is being committed, or is likely to be committed.
- (b) Conduct which is capable of disclosing that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which s/he is subject.
- (c) Conduct which is capable of disclosing that a miscarriage of justice has occurred, is occurring or is likely to occur.
- (d) Conduct which is capable of raising or contributing to an important matter of public debate. There is no exhaustive definition of an important matter of public debate, but examples include public debate about serious impropriety, significant unethical conduct and significant incompetence, which affects the public.
- (e) Conduct which is capable of disclosing that anything falling within any one of the above is being, or is likely to be, concealed.

63. The first three examples ((a)-(c) above) of conduct capable of serving the public interest are almost identical to the '*protected disclosures*' regime set out in sections 43(B)(1)(a)-(c)<sup>87</sup> of the Public Interest Disclosure Act 1998 (which, as discussed above, provides for a public interest defence). The guidance thus appears to have incorporated certain worthy features of that Act but failed to carry this incorporation through to its logical conclusion with inclusion of a statutory defence.

64. Example (d) has no equivalent in the Public Interest Disclosure Act 1998. It is debatable whether the additional gloss contained in the DPP Guidelines in respect of example (d), '*an important matter of public debate*,' provides much, if any, additional reassurance to journalists concerned about the threat of prosecution. The concepts contained under (d) - '*serious impropriety*,' '*unethical conduct*,' and '*significant incompetence*' - are subjective. As a result, journalists, and/or those carrying out journalistic activities, are currently left with no choice but to speculate as to whether or not a prosecutor would agree with them that a course of conduct would satisfy the conditions under (d) above. Such an exercise is inherently unpredictable and, as such, carries the potential to inhibit the exercise of proper investigative journalism. At the same time, the scope for challenging a prosecutor's discretion is very limited. Absent bad faith, improper purpose, or some other abuse of process, it is not open to defendant journalists (or others) to judicially review the decision to commence, or continue, a prosecution.

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<sup>86</sup> DPP Guidelines, [31].

<sup>87</sup> Public Interest Disclosure Act 1998, ss43B(1)(a)-(c).

65. This sheds light on the inadequacy protections in the Guidelines for investigative journalism. Not only is the option of raising a public interest defence not open to those engaged in journalistic activity, but the investigative journalist considering whether to follow a lead or embark on a certain course of conduct (both of which, needless to say, could come to nought, notwithstanding the journalist's 'reasonable belief'<sup>88</sup> that the information sought would be in the public interest) must place his or her trust in the value judgement of a (hypothetical) prosecutor. As evidenced by the failure of past prosecutions under the Official Secrets Acts – for example, the prosecution of Clive Ponting under the 1911 Act for disclosing details regarding the sinking of an Argentine warship during the Falklands War – it is far from a given that a jury would necessarily agree with prosecutors as to the nature of, or damage to, the 'public interest'.
66. It would be preferable for new legislation in this area to make explicit provision for a public interest defence, and for a jury, rather than a prosecutor, to be tasked with deciding whether the public interest in knowing the information disclosed outweighs the alleged damage caused by a journalist's actions.
67. In considering the second limb of the three-part test – '*assessing the overall criminality*' of the conduct in question – the Guidelines provide for nine (also non-exhaustive) factors likely to be relevant in an assessment of 'overall criminality':
- (a) The impact on the victim(s) of the conduct in question, including the consequences for the victim(s).
  - (b) Whether the victim was under 18 or in a vulnerable position.
  - (c) The overall loss and damage caused by the conduct in question.
  - (d) Whether the conduct was part of a repeated or routine pattern of behaviour or likely to continue.
  - (e) Whether there was any element of corruption in the conduct in question.
  - (f) Whether the conduct in question included the use of threats, harassment or intimidation.
  - (g) The impact on any course of justice, for example whether a criminal investigation or proceedings may have been put in jeopardy.
  - (h) The motivation of the suspect insofar as it can be ascertained (examples might range from malice or financial gain at one extreme to a belief that the conduct would be in the public interest at the other, taking into account the information available to the suspect at the time).

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<sup>88</sup> Public Interest Disclosure Act 1998, s43B(1).

- (i) Whether the public interest in question could equally well have been served by some lawful means having regard to all the circumstances in the particular case.

68. The DPP Guidelines provide that the prosecutor's final step – balancing the assessment of the public interest served by the allegedly criminal conduct against that of the 'overall criminality' – should not be an arithmetical exercise, tallying one column against another, but should, rather, be determined on a case-by-case basis. The Guidelines indicate that 'special care' should be taken in cases which involve the disclosure of journalists' sources. Whilst this is a welcome feature of the Guidelines, it nonetheless reinforces how precarious a journalist's position often is in the face of the law. Notwithstanding the decision in 2011 of the Grand Chamber of the European Court of Human Rights in *Sanoma Uitgevers BV v Netherlands*,<sup>89</sup> which held that the protection of journalists' sources is 'a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest', in 2012 the Crown launched, and then abandoned,<sup>90</sup> a case against the *Guardian* and *Observer* journalist Amelia Hill in relation to her source at the Metropolitan Police Service for various leaks in respect of the phone-hacking investigations. This example only reinforces the insufficiency of relying on the prosecutorial discretion alone as a safeguard against unjust, or unsafe, prosecutions.

69. In short, the DPP Guidelines are incapable of providing the certainty, legal clarity, or predictability necessary for journalists to carry out their work. The Guidelines demand that journalists place their faith the judgement of a prosecutor working through a list of broad and non-exclusive criteria. This judgement is effectively unreviewable, absent exceptional circumstances. That is not an adequate protection for journalists and it is an undue burden on prosecutors. **Accordingly, in answer to the question posed in Provisional Conclusion 24,<sup>91</sup> the consultees respond that they do not agree that there are sufficient existing safeguards for journalists in the absence of a statutory public interest defence.**

#### **ISSUE IV: ECONOMIC INFORMATION AS A CATEGORY OF PROTECTED INFORMATION**

70. The Law Commission acknowledges that the Official Secrets Act 1989 has been the subject of criticism on the grounds that the categories of information protected under it are overbroad in scope and 'raise difficult issues of

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<sup>89</sup> *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1284 (Grand Chamber).

<sup>90</sup> Milmo, 'Guardian Reporter Amelia Hill Will Not Face Criminal Charges Over Alleged Scotland Yard Leaks,' *The Independent* (29 May 2012).

<sup>91</sup> Consultation Paper, [8.39].



*interpretation,*' such as, for example, in the definition of the '*interests of the United Kingdom.*'<sup>92</sup> The Consultation Paper therefore rightly invites consultees to put forward views on whether, and if so, how, existing categories might be narrowed. Set against that background, it is surprising that, with respect to the field of economic information, the Consultation Paper suggests that the scope of liability should in practice be broadened. The Consultation Paper asks:<sup>93</sup>

'Should sensitive information relating to the economy insofar as it relates to national security be brought within the scope of the legislation or is such a formulation too narrow?'

71. This question purports to refine - '*is such a formulation too narrow?*' - the categories of protected information, but in reality proposes to expand them. Economic information is not protected under the current legislation; its incorporation, therefore, could only serve to broaden, rather than curtail, the categories of protected information as currently exist.
72. The question is prefaced by the assertion that this issue has been '*brought to [the Law Commission's] attention*'<sup>94</sup> and that the Commission believes it merits further consideration on the basis that the question of economic information was considered by the 1972 report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (the 'Franks Committee'). Aside from the discussion by the Franks Committee in 1972 - which did not lead to amendments to Official Secrets legislation on this point - it is not apparent who advocates for a consideration of, or amendment on, this issue.
73. English PEN, Reporters Without Borders, and Index on Censorship are concerned about the possible threat to freedom of expression that could result from a broadening of the protected categories. In the first instance, the consultees believe that the Law Commission should endorse the view in favour of narrower, rather than broader, categories of protected information under a revised, omnibus Official Secrets Act. The impetus for the commission and publication of the Consultation Paper, after all, was that the Act as stands has been criticized in recent years as being not fit for purpose in the digital age. English PEN, Reporters Without Borders, and Index on Censorship consider that any revised Act should provide for more precisely-defined categories of protected information than currently exist, not the reverse. It would be a regressive step if the 1989 Act were to be replaced with legislation more closely resembling the catch-all provisions contained under section 2 of the Official Secrets Act 1911.

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<sup>92</sup> Consultation Paper, [3.205].

<sup>93</sup> Consultation Paper, [3.214].

<sup>94</sup> Consultation Paper, [3.210].

74. Further, it is submitted that any proposal to include economic information as a protected category under a revised Act would be misconceived. It would be difficult, if not impossible, to incorporate economic information within the scope of the Act in a way that did not impinge unduly on legitimate disclosures. The Consultation Paper provides no specificity as to how such a category might be defined or construed. '*Economic information*,' is an overbroad category; '*[A]s it relates to national security*' only marginally less so. The Act lacks interpretive clarity in regard to the parameters of the '*national interest*.' The generic formulation put forward in the Consultation Paper – '*sensitive information relating to the economy in so far as it relates to national security*' – would do little, if anything, to resolve this ambiguity; it is just as likely, if not more, that it would compound the problem.
75. Just as the absence of a general public interest defence for journalistic activities leaves investigative journalists and those working with them in the unenviable position of having to second-guess a (hypothetical) prosecutor's exercise of discretion when considering whether to take receipt of, seek out and/or publish protected information (the knowledge of which may nevertheless be in the public interest), so no one in possession of, or tasked with handing, sensitive economic information could, without more specificity as to the kind of information, economic or otherwise, the disclosure of which could or would lead to serious national economic '*damage*,' feel confident that they knew exactly where the bounds of such an offence might lie. This could only have the effect of inhibiting legitimate disclosures.
76. A further problem inherent in the lack of specificity as to the language and content of the proposed category is revealed by a hypothetical scenario in which a Crown agent unlawfully discloses information which carries the potential to cause grave harm to the national economy but that, for whatever reason, this harm or damage does not come to pass. Would such a situation violate the protected category in the manner of a strict liability offence, on the basis of conduct alone? Or would the offence only be engaged in the case of damage arising as consequence of the disclosure? If the former, the offence would be so broad as to criminalize most, if not all, legitimate disclosures. If the latter, however, the category would fail in its purpose in that it would not carry the same deterrent force.
77. In addition, there does not appear to be a pressing need for such a revision. The Franks Committee was primarily concerned with the '*dangers posed*' by section 2 of the Official Secrets Act 1911 for the '*freedom of the Press*.'<sup>95</sup> The Committee was appointed in the wake of a much-criticized, and ultimately unsuccessful, trial of

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<sup>95</sup> Jaconelli, '*The Franks Report on Section 2 of the Official Secrets Act 1911*,' (1973) 36(1) *The Modern Law Review* 68.

four journalists accused of publishing without permission a document prepared by an Adviser to the British High Commission in Lagos at the time of the Biafran War. As the Consultation Paper notes, the Franks Committee recommended that where the disclosure of certain economic information – such as the external value at which our currency is to be maintained, or the Bank of England’s official holdings of international reserves – would cause ‘[e]xceptionally grave injury to the economy’ and where ‘such injury could have wider repercussions on the life of the nation,’<sup>96</sup> such information ought to be protected from unauthorized disclosure ‘by the criminal law.’<sup>97</sup>

78. That proposal remained in circulation for more than a decade after the publication of the Committee’s report, during which time the UK suffered through two recessions, the oil crisis and the deflationary crisis of the early 1980s, providing some idea of what an ‘[e]xceptionally grave injury’ might entail. Nevertheless it was not taken up by Parliament in passing the Official Secrets Act 1989, which repealed and replaced section 2 of the 1911 Act. Further, whereas the proposal to include economic information as a category of protected information was put forward by the Franks Committee without qualification, wholesale repeal of section 2 was only the ‘boldest’ of five proposals<sup>98</sup> put forward by the Committee, but was ultimately incorporated by the law as revised. Irrespective of the merits of creating a criminal offence for the unauthorized disclosure of sensitive economic information, this history provides an indication of the difficulty of, and also the lack of appetite for, implementing such a proposal in law.
79. Finally, the introduction of a bespoke category under the new legislation of secret economic information, the unauthorized disclosure of which might cause grave damage to the economy or to national security broadly defined, carries the potential to do more harm than good. As indicated above, the creation of a new offence would enhance the scope for criminal prosecution(s) where a raft of economic torts, civil and other non-criminal disciplinary measures governing the disclosure of economic information already exist. This risk outweighs the (hypothetical) benefit, in terms of deterrent effect, that the introduction of a new category might entail.
80. Definitions of economic information in existing statutory frameworks already raise concerns.

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<sup>96</sup> Departmental Committee on Section 2 of the Official Secrets Act 1911, *Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911* (Cmnd 5104, 1972), pp 51-52.

<sup>97</sup> Consultation Paper, [3.211].

<sup>98</sup> In its submission to the Franks Committee, JUSTICE proposed the inclusion under s 2 of a statutory public interest defence in cases where the leaked information was passed and received in good faith and in the public interest and where the national interest was not likely to be harmed by its disclosure. See: Jaconelli, above n 95, 69.

80.1. The Investigatory Powers Act 2016, authorizes the Secretary of State to issue a warrant for the interception and examination of citizens' communications *'if it is necessary - in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security.'*<sup>99</sup>

80.2. The Freedom of Information Act 2000 provides that information is exempt from being subjected to Freedom of Information Act requests if its *disclosure 'would, or would be likely to, prejudice--(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or (b) the financial interests of any administration in the United Kingdom.'*<sup>100</sup>

80.3. The Data Protection Act 1998 gives the Secretary of State a power to order that certain corporate finance data is exempt from disclosure if such an exemption is *'required for the purpose of safeguarding an important economic or financial interest of the United Kingdom.'*<sup>101</sup>

The inherent ambiguity of the language of these statutes raises serious concerns, but those concerns arise within the context of the civil law. These categories, whilst providing some indication of how one might begin to draw up a protected category of economic information, are unacceptably broad for the purpose of transposition into the criminal law.<sup>102</sup>

81. In short, the consultees submit that the categories of information encompassed by the legislation ought to be more narrowly drawn. Overbroad categories increase the scope for bringing prosecutions under the Act, thereby generating a threat to freedom of expression, rather than enabling it. In particular, sensitive information relating to the economy in so far as it relates to national security should not be brought within the scope of the existing, or any revised, Official Secrets Act. It would be difficult, if not impossible, to enshrine such a category without seriously impeding legitimate disclosures. As such, it is difficult to see how the creation of such a protected category would not be ineffective at best, harmful at worst. Finally, there does not appear to be any obvious need for such a category: the proposal has been tested for the better part of 30+ years, and not adopted, with good reason. Furthermore, there is a raft of civil mechanisms governing the disclosure of economic information, the language of which would not be suitable for transposition into the criminal law. **For all these reasons, in**

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<sup>99</sup> Investigatory Powers Act 2016, s20(2)(c).

<sup>100</sup> Freedom of Information Act 2000, s29(1)(a)-(b).

<sup>101</sup> Data Protection Act 1998, ss6(1)(b) and 6(2)(a).

<sup>102</sup> Jaconelli, 'Tax legislation, forestalling, and economic information,' [2013] 4 *Public Law* 754.

**response to Consultation Question 9,<sup>103</sup> English PEN, Reporters Without Borders, and Index on Censorship submit that there should be no category of protected information created for sensitive economic information.**

## CONCLUSION

82. English PEN, Reporters Without Borders, and Index on Censorship welcome the opportunity to contribute to the Law Commission's consideration of the legal framework governing the disclosure of official secret information. It is plainly important that official secrets legislation is fit for purpose in addressing the nature of contemporary secret information and the range of persons who are involved in the creation and exchange of that information.
83. Against that background, it is essential that any reform in this area take account of the potential impact on legitimate activities pursued in the public interest, including the activities of investigative journalists and the sources upon whom they rely. English PEN, Reporters Without Borders, and Index on Censorship consider that the provisional conclusions advanced in the Consultation Paper with respect to protection of public interest disclosures are inadequate and that expanding the scope of protected information to include economic information is misguided.

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<sup>103</sup> Consultation Paper, [3.214] and [8.25].