Public Concern at Work's Response to the Law Commission's Report 'the Protection of Official Data'

May 2017

Background

1. By way of introduction, Public Concern at Work (PCaW) is an independent charity and legal advice centre. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. The advice line has been running for 25 years and currently we advise over 2500 cases every year; this unique insight into the experience of whistleblowers informs our approach to policy and campaigns for legal reform.

2. We have been part of a civil society campaign group that includes charities, academics and journalists who are concerned by the recommendations found in this report. As a group, we have agreed on some central objections to the report these are repeated at the beginning of this submission:

    - **The wrong reforms at the wrong time:** The case for reform is far from clear. The Law Commission has claimed the Official Secrets Act (OSA) language is archaic and developments in digital technology have meant mass disclosure of information is a threat to national security. There are flaws in this reasoning; the courts have handled the wording of the OSA without an issue so far, and rather than increasing the punishment for disclosure that will have a draconian and chilling effect, the focus could instead be on safeguarding this data. While some who make disclosures will have the necessary security clearance to access information, in the examples of Snowden and Manning in the US (for instance), it seems the discloser had greater access than they should have done. So this is a matter of tighter government control of information rather than higher penalties for disclosure. This could be an issue that sits with the Information Commissioner's Office rather than an OSA issue.

    - **A public interest defence is needed:** The Commission have ruled out a public interest defence on the basis that it would cause legal uncertainty due to the difficulty in defining the public interest test for judges, juries and more importantly individuals coming into contact with sensitive government information. The Commission have overlooked the fact that our courts and laws already grapple with the public interest and are well placed to apply this defence. For instance the courts already interpret the public interest when deliberating on cases involving the law of Confidence, Data Protection or 'Whistleblowing'. The Government has not shied away from allowing individuals to judge what is (and is not) in the public interest when they create a public interest test or defence in other pieces of law.[1] The Crown Prosecution Service already decides if a prosecution is in the public interest so individuals are already subject to the same legal uncertainty.

    - **Rejection of the Canadian Model:** The Commission have rejected the Canadian Model because it has a public interest defence. Their preferred option is to create a system where concerns can be taken to the Intelligence Services Commissioner as an independent 'external' body. The Commission also state that the Canadian model

[1] See 43B of the Public Interest Disclosure Act, the Data Protection Act and the Law of Confidence.

would bring no additional benefits, ignoring the fact that it allows wrongdoing to be brought to public attention if all other attempts at resolution have failed. We are unclear on why the Commission are so confident that this is the right model to adopt, without the additional oversight of a possible external disclosure and the Public Interest Defence - as is found in the Canadian model and as is clearly set out in the Tshwane principles.

- **No case for removing the need to prove damage:** The Commission have argued that there is no need for the prosecution to prove damage in cases of disclosure of classified information even where the issue at hand is not one of deliberate espionage. When this is combined with the decision not to implement a public interest defence, the OSA is made more draconian as there will be no route to defend disclosures. In effect, we are moving to strict liability. This is not mitigated by the Commission's claim that proving damage can cause further harm because the courts already have various tools available to mitigate this risk.
- **The danger of extending protected information to economic matters:** The Commission have argued that economic information should be added to the list of sensitive information protected by the OSA where it "relates to national security". The rationale may have stemmed from the fact that the new Investigatory Powers Act extends the scope of investigatory powers to include economic issues, but this does not mean that there is evidence for this to be mirrored in the OSA. In the past this has been looked at and rejected, the Franks Committee considered it in relation to fixed interest rates but this rationale fell away once interest rates were reformed and there was no need to protect this information.

- **The proposed increase in prison terms is excessive:** The Commission have proposed undoing the reforms to the OSA made in 1989 which replaced wide ranging draconian offences that conflated espionage with disclosures of serious public interest information, about wrongdoing, risk or malpractice with a tighter drawn set of offences. It can thus be argued that the proposals bring back the previously discredited offences but with greater personal jeopardy for those affected.

- **Journalists and editors should not face prosecution for handling secret data:** The handlers, recipients and journalists involved with the sensitive information will now be captured by the Commission reforms. This is a serious threat to the freedom of the press and should be resisted if we are to maintain this vital element of our democratic system.

Proving Damage

3. The following section of our response will cover the proposed removal of the need for the prosecution to prove the unauthorised disclosure of information caused damage; we will cover questions 9-12 from the consultation.

4. The current legal position is that prosecution under the OSA must either: demonstrate that the unauthorised disclosure caused damage to national security, defence or relations with a foreign country; or the court can make an automatic assumption that certain categories of information in these areas would cause this damage without the need for the Government to demonstrate this. This automatic assumption element is to avoid the situation where damaging disclosures need to be repeated in open court.

5. The Commission conclude that for the prosecution to have to prove damage, a perverse situation is created where the more sensitive the information disclosed, the less likely there is to be a prosecution. The report justifies this conclusion by highlighting the following:

1) The prosecution would need to exacerbate the damage of unauthorised disclosures by repeating them in open court;

2) To avoid the above problem, the law has been drafted in such a way that certain categories of information come with an automatic assumption that damage would be caused by revealing the information without authorisation. The report revealed that stakeholders in pre-report consultation stated this legal test was 'insurmountable' for many prosecutions;

3) In conclusion, the report believes that proving damage is too much of a burden on prosecutions and gives would-be offenders a defence to their actions that the law never intended to give.

6. The alternative suggested by the Law Commission is that instead of proving damage, a defendant's thought-process at the time of making the disclosure should be examined by the courts. This test would focus on whether the individual knew, or had reasonable grounds to know, that the information would damage national defence, national security or relations with a foreign country. There would also be a defence where the individual reasonably believed they had authority to publicly disclose the information.

7. We find fault in these conclusions. Firstly, the courts are well versed in dealing with sensitive information within their proceedings, whether this is via holding part of the hearing behind closed doors, applying reporting restrictions or giving clear directions to juries that certain information unveiled in open court should not be repeated outside (ie imposing reporting restrictions).

8. Secondly, we are slightly confused by the report's conclusion that stakeholders found it 'insurmountable' to prove certain categories of information cause damage automatically. To prove this, the State would only have to suggest that the disclosure causes a risk to national security which – as Dr Ashley Savage (an expert in the field) – points out, is typically 'seen *as a matter for the government of the day'* and one where '*judges are traditionally reluctant to make assessments'*.[2] Indeed, Home Affairs spokesperson Joanna Cherry QC for the Scottish National Party has further stated that *'the courts tend to respond with considerable deference to government claims of national security, viewing them not as a matter of law, but as executive-led policy judgements.'*[3] It would appear that the Government has no problem proving this element of the offence to the courts.

9. We are alarmed by the absence of any recognition in the report that removing the damage requirement risks lowering the bar for criminal prosecutions to include situations where a civil servant leaks information that merely embarrasses the Government rather than causes actual damage to national security. See Annex A for an extract from the relevant debates on this issue when it was discussed in relation to the reform of the Official Secrets legislation, leading to the 1989 OSA and the initial inclusion of the need to prove damage in the legislation.

'Signing' the Official Secrets Act

Provisional conclusion 12: The process for making individuals subject to the Official Secrets Act 1989 is in need of reform to improve efficiency. Do consultees agree?

10. Whilst we agree that the notification process is in need of reform, we submit that there are substantial failings which necessitate this rather than just a need for efficiency. We think it

[2] P.g. 50, *Leaks, Whistleblowing and the Public Interest, Dr Ashley Savage, 2016, EE Elgar.*
[3] "Draconian secrecy measures are being quietly ushered in. We must fight them", the Guardian 16th February 2017 https://www.theguardian.com/commentisfree/2017/feb/16/secrecy-proposals-journalists-whistleblowers-government-data

will be important to consider these failings when determining what any new process might look like. Currently, the notification process can be used as a means of potentially intimidating whistleblowers. Its use can also provide an absolute veto on the external disclosure of any information relevant to Government activity regardless of whether such information contains public interest information.

11. Anecdotally from our advice line we have often come across the situation where civil servants have been asked to either sign the OSA, or reference to abiding by the act is made part of their contract of employment. Research by Dr Ashley Savage has identified that this practice was prevalent in 24 of the 48 departments who responded an FOI request for information. Only seven of the 48 responses identified that they do not require staff to sign any declaration about the OSA. The research also found that there was little evidence of whether training or guidance was issued to staff around their duties under the OSA, and the overall conclusion was that there was no consistent approach in Government to these practices.

12. There is no legal requirement to either sign an OSA declaration, or to inform staff of their obligations under the act; furthermore the criminal sanctions from the OSA apply to civil servants regardless of whether the declaration has been signed or not. Dr Savage's research highlights how many Government departments and agencies who have no role in dealing with these sensitive areas of policy still ask staff to sign declarations or inform staff of their potential criminal liability in this area. These include the Rural Payment Agencies and the Devolved Governments of Scotland and Wales (where national security and defence is not a devolved issue).

13. This practice is largely symbolic; it is a means of dissuading civil servants from making any disclosures to external bodies, whether to regulators or media organisations, through subtle legal threats. This practice is unacceptable for a number of reasons. First the practice clearly clashes with the protection afforded by PIDA which can provide protection if a civil servant approaches a regulator, or even the media, with information that is not protected by the OSA (given the restricted areas of protected information this protection covers the vast majority of Government information). Secondly this practice clashes with the Civil Servants own code of practice, which also identifies regulators including the Civil Service Commissioners as external bodies outside of Government as places where concerns can be raised.[4]

14. The basic principle of fully informing civil servants of the duties and responsibilities under the OSA is certainly a practice that should be encouraged – this is an area where a blanket approach to the signing of the OSA does not provide a solution and does not sit with the proper accountability of government departments. Guidance and training should also be considered for those departments that deal with protected information on a regular basis, so that there is a consistent approach across Government.

Increasing the custodial sentence

Provisional conclusion 13 We provisionally conclude that the maximum sentences currently available for the offences contained in the Official Secrets Act 1989 are not capable of reflecting the potential harm and culpability that may arise in a serious case. Do consultees agree?

15. Our concern is that this proposal undoes the reforms to the OSA made in 1989 which replaced wide ranging draconian offences that conflated espionage with whistleblowing disclosures with a tighter drawn set of offences. It can thus be argued that the proposals bring back the previously discredited offences but with greater personal jeopardy for those

[4] The Civil Service Code, March 2015: https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code

affected. See our comments above on this point and the Annex A document demonstrating the full debates undertaken in Parliament on exactly this issue.

Categories of protected Information

Consultation question 9 Should sensitive information relating to the economy so far as it relates to national security be brought within the scope of the legislation or is such a formulation too narrow?

16. We do not support proposals that would extend the categories of protected information, and in particular we find extending this protection into economic matters deeply troubling.
17. By way of illustration, it is worth looking at what information this new extension would look to protect, and what damage it would prevent.
18. In terms of the information that would be protected, we are not convinced that any drafting of such an extension would avoid repeating the mistakes of past where criminal liability was inappropriately attached to all types of disclosures. The report makes the argument that such a change could be limited to economic matters as it relates to national security but even following these principles, a wide interpretation of information covered is still possible. By including this category of information into the scope of the OSA, more civil servants, public sector workers, financial service workers and economic journalists would be brought within the remit of the offences already contained within the statutory framework of the OSA. We are not convinced that there is sufficient justification in the Law Commission report for such a dramatic and far reaching reform to the OSA.
19. The disclosure or improper use of market sensitive information is already criminalised through other parts of criminal law e.g. insider trading etc. On top of this, regulators also have rules and regulations around the proper use of information in certain markets especially when it comes to finance. With this in mind we are unsure what criminal act this extension would be outlawing.

20. Our fear is that it will be used to hide Government embarrassment behind the facade of national security. For example, should a concerned civil servant who discloses to the press controversial details on a trade negotiation, or the state of affairs during the Brexit negotiations really be criminally liable for such triggering a public debate? Should the journalist in receipt of such information be concerned that they could fall foul of the OSA. We also fear a chilling effect on public debate where Government experts and officials will feel they need to be more careful about their public comments about the effect of Brexit or any other economic event in fear that it will fall foul of the OSA. These are potential unintended consequences of this particular reform.

Wider unauthorised Disclosure Offences

Consultation question 10 do consultees agree that a full review of personal information disclosure offence is needed?

21. We welcome a full review from the LC on these various offenses. The report makes a compelling argument that the proliferation of such offenses into the criminal law has occurred without consideration about whether some universal principles surrounding the question of public interest disclosures should apply to such offenses.

22. Our concern is that in many cases these non-disclosure offenses have been drafted and passed with no thought given to how they impact the public interest, or on whistleblowing more generally.

This review proposal is timely given the recent case of **Pytel v the Office for Gas & Electricity Markets (OFGEM).** The strictly worded non-disclosure offences found in the Utilities Act 2000 have meant that a whistleblower has been told that he is unable to take a claim under PIDA before an employment tribunal because of the offence in the Act. This has been the subject of a hearing on a preliminary issue and the whistleblower was successful in arguing that the Human Rights Act should assist him (although this is the subject of an ongoing appeal to the EAT). In this case, the offence was so restrictive that both parties in the case were in agreement that filing, defending and hearing the claim would commit a criminal offence and the whistleblower is therefore effectively prevented from having the right to a fair trial.[5]

The inclusion of a public interest defence

Provisional conclusion 23 The problems associated with the introduction of a statutory public interest defence outweigh the benefits. Do consultees agree?

23. We strongly disagree with the report's conclusions in this area, and see the introduction of a public interest defence (PID) as a vital reform to ensure there is effective accountability in this sensitive area of Government activity. An absence of a PID risks undermining internal whistleblowing arrangements across Government, from Whitehall to the intelligence services, pushing concerned civil servants into making anonymous disclosures to the media.

Why is a public interest defence needed?

24. It is legitimate for the Government - with the aim of protecting the public - to withhold information involving national security, defence or the national interest. However, there will inevitably be situations where information may come across either a civil servant or intelligence officer's desk that shows that wrongdoing, risk or malpractice has occurred or might occur which causes the individual concern. Whilst it is hoped that in most cases this could be raised internally with the appropriate person in their department or organisation, there will be times when this is not feasible.

25. In this scenario the OSA criminalises unauthorised disclosures of this type of information providing no mechanism by which a court can balance out the competing public interest needs of a disclosure to an external body, as opposed to the need to keep information secret.

26. As the report points out, this is problematic as it effectively means that the only means of exposing this type of wrongdoing is through an internal mechanism outside of the individual's line management or department, even though the report found little evidence that civil servants or security personnel have faith in the current internal measures. We echo this concern as it is very difficult to judge whether there are effective arrangements in place for intelligence personnel to raise concerns internally (to managers within their place of work) and whether these are periodically reviewed, as these arrangements are neither publically available nor accessible via Freedom of Information Laws.

27. One possible outcome of such a scenario is that far from ensuring proper accountability, because of a lack of trust in internal mechanisms - and an absence of the possibility of a public interest defence - a civil servant or intelligence official with concerns may feel that their only option is to make an anonymous disclosure or a leak of data. The lack of trust combined with very few options other than an internal disclosure may mean that anonymous media disclosures and leaks are more, rather than less, likely.

[5] https://www.cloisters.com/latest/pytel-v-the-office-for-gas-electricity-market-ofgem-new-rights-for-whistle-blowers

28. Furthermore, while the media may not be the starting point for any public interest disclosure, the option of a wider disclosure to the media is a vital option in a functioning democracy and is a vital part of the wider framework employed to prevent wrongdoing.

Addressing the criticism of the concept of a public interest defence

29. In this section we will look at the various arguments made in the report against the concept of a public interest defence (PID):

    a) **PID poses a threat to national security:** The report argues this threat can come where an individual decides a disclosure is in the public interest and yet it will be rare that this person will be fully aware of all the information connected to the disclosure, or have a proper appreciation of the potential damage to national security the disclosure could cause. A poorly drafted PID could create this risk but this can be mitigated by ensuring that the drafting of the defence so safeguards minimises the risk of damage to public security. This issue has already been considered in depth by Principle 43 of the Tshwane Principals provides examples of safeguards that courts and juries could be required to consider when applying the defence as follows:

        - 'Whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;'
        - the extent and risk of harm to the public interest caused by the disclosure;
        - whether the individual had reasonable grounds to believe that the disclosure would be in the public interest;
        - whether the individual has raised their concerns internally or with an external oversight body;
        - The existence of other demanding circumstances justifying the disclosure.[6]

        If these principles are followed when drafting a PID then the right balance between disclosure and national security can be achieved. Such clear principles also provides guidance for concerned workers in relation to the issues they have to consider before making a wider public disclosure which inevitably will mean breaking the law.

30. **PID undermines legal certainty and the coherence of the criminal law:** The report finds this is derived from the ambiguity within the term public interest, and the multiple non-legal factors (e.g. moral, political, social economic etc.) that could be deployed in arguing whether a disclosure is or is not in the public interest. These non-legal factors are issues individuals (including more importantly juries) could reasonably disagree upon making the task of juries almost impossible and leading to inconsistencies from one case to the next, even where the facts presented are of a similar nature. This uncertainty would also mean whistleblowers would be unclear as to whether and how they are protected for the disclosures they make. The effect would be for the 'floodgates' to be opened on all types of disclosures, and an increase in prosecutions as prosecutors would see PID as a matter for the jury to decide rather than a subject with which to engage. We dispute these conclusions; on one level the courts are already adept at weighing up the public interest, whether this is via common principles found in areas of civil law such as the law of confidence, or via a statutory drafted test found in the criminal law such as the Data Protection Act. On a legislative level, a PID could be drafted in such a way so as to give clarity as to the type of disclosures that could be covered by the defence. This list should not be prescriptive but act as a guide to the whistleblower, judge and jury as to the types of wrongdoing and malpractice that should be protected by the defence.

[6] P.g. 56 the Tshwane Principles, published by the Open Society Foundation, 2013.

Principle 37 of the Tshwane Principals gives a good list of such wrongdoing that could be included in the defence:

'(a) criminal offenses;

(b) human rights violations;

(c) international humanitarian law violations;

(d) corruption;

(e) dangers to public health and safety;

(f) dangers to the environment;

(g) abuse of public office;

(h) miscarriages of justice;

(i) mismanagement or waste of resources;

(j) retaliation for disclosure of any of the above listed categories of wrongdoing; and

(k) deliberate concealment of any matter falling into one of the above categories.'[7]

The report is correct in stating that the public interest as a concept is one that is ambiguous, and there is a risk of causing confusion if the OSA was reformed in such a way that just placed a public interest test with no guidance on how it should operate. Principle 37 of the Tshwane Principals already outlines the key components of the type of wrongdoing and circumstances surrounding the disclosure, when made externally and in order to give some counterweight to the power of the State to cover up wrongdoing in the name of secrecy and the national interest. This is clearly a last resort position, but is vital if the power of the state in this area is to be properly and adequately balanced by open, democratic principles.

31. **PID undermines the core value of trust and confidence between civil servants and ministers:** The argument here is that a PID undermines a civil servant's impartiality (a core value) by allowing them to weigh up the public interest against Government policy when deciding to make unauthorised disclosures. The report is effectively arguing that the system of Government cannot operate if ministers cannot trust the confidentiality of their own civil servants. This point is relied upon to an exaggerated extent and we fundamentally disagree. Rather the counter argument applies. In the extreme case of an external disclosure of national security information, providing the possibility of a public interest defence is more likely to enhance trust than undermine it. For instance there is already legal protection for whistleblowers who disclose information that is not covered by the OSA outside the machinery of Government, whether this is to a regulatory body or the media. This protection has been in force for 19 years and there is no evidence to show that such legal protection has caused a shredding of trust between civil servants and ministers. We would also argue that an unintended consequence of no PID and the removal of the need for the prosecution to prove damage in OSA cases would not prevent the disclosure of information but in fact could increase the likelihood that concerned civil servants anonymously disclose their concerns through the media. This is ironically the very outcome this report seeks to prevent.

32. We also want to address comments made in the report about whether PID should be subjective or objective. The report comments upon both scenarios but finds fault in both approaches. An objective defence was criticised for being overly restrictive in its protection, it is rare that a concerned worker will know all the information relevant to judge whether their

[7] Ibid p.g. 49

disclosure was in the public interest and an unknown piece of information may well compromise an objective PID. On the other hand, the report argues that a subjective defence could encourage disclosures of information that are not in the public interest simply because the individual could argue that they had a belief that it was so even if later this assumption is shown to be incorrect. Our view is that this is a very reductive point of view, and if the defence was based on the Tshwane Principles then it could be drafted in such a way so as to have both objective and subjective elements to the legal test. These elements can be seen in principle 37 (the objective element) by outlining the types of wrongdoing included under the defence and principle 43 which provides the subjective element of the defence.

Independent oversight and internal arrangements

We will provide commentary on provisional conclusion 25 and 26 together:

Provisional conclusion 25 A member of the security and intelligence agencies ought to be able to bring a concern that relates to their employment to the attention of the Investigatory Powers Commissioner, who would be able to investigate the matter and report their findings to the Prime Minister. Do consultees agree?

Provisional conclusion 26 The Canadian Model brings no additional benefits beyond those that would follow from there being a statutory commissioner who could receive and investigate complaints from those working in the security and intelligence agencies. Do consultees agree?

33. We welcome the call for reform of the internal whistleblowing arrangements that exist in the intelligence agencies; we feel this is long overdue. We see though a major flaw in the conclusion that changes to internal arrangements on their own, even if the system creates an independent oversight mechanism, can fully replace the need for a PID.

34. As in our answer to provisional conclusion 23, judging the effectiveness of internal whistleblowing arrangements in the intelligence services are next to impossible given the limited information available about these mechanisms. The report demonstrates this problem by highlighting the public criticism that there is no confidence within the service for the role of Staff Counsellor, while also finding other stakeholders found value in the position. We feel there is not enough information about the performance of the Staff Counsellor, or the levels of trust that exist among staff in the intelligence services to comment on whether the role adds value to the internal arrangements. We do though back the report's conclusions that the whole system would benefit from an additional independent oversight tier to the arrangements.

35. We welcome the proposal to extend the Investigatory Powers Commissioner (IPC) role into being an independent oversight body for whistleblowing within the security services, as opposed to formalising in law the Staff Counsellor's role. This is something that we have also called for in our response to the Investigatory Powers Act when it went through the legislative process in 2015.[8]

36. We do have comments on the form and structure the extension of the role should take. Successive research on the attitudes of workers in the UK has shown that the fear of retaliation, damage to a worker's career and the threat of losing their job all act as barriers to concerned workers raising concerns which they have witnessed in the workplace. Though this research has not been focused on the intelligence sector it would be surprising if these fears did not play out within the security services as much as in any other workforce. In fact,

[8] See http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/written/26316.html for our response

given that intelligence personnel are not covered by PIDA, it might be fair to assume that the barriers to raising legitimate concerns are greater when there is no legal recourse for actions of reprisal or dismissal connected to the raising of whistleblowing concerns. For these reasons, we believe that if these reforms are to be effective, the IPC should be able to act on victimisation that may flow as a reaction to the concerns being raised, as well as the substance of any wrongdoing or malpractice highlighted.

The role and remit of the Investigatory Powers Commissioner

37. Again we believe the Tshwane Principles provide the basis for the principles required to assist law and policy makers to create a robust oversight body.

Internal Whistleblowing Arrangements

38. Before moving on to the specific elements that should be included in the IPC remit, it is worth highlighting that for any whistleblowing framework to be effective it needs to be underpinned by an internal process that encourages staff to raise concerns with line managers as a sensible first step. The arrangements should also recognise that this can be bypassed where necessary. Good arrangements will include a variety of options internally beyond line management so that where raising the concern with a line manager is not an option or a sensible course of action (e.g. where the line manager is implicated in the wrongdoing), or where the concerns have been raised locally but the concerns remain unaddressed, it should be clear that the concern can be raised safely at a higher level.[9]

Investigating the concerns

39. There should be a duty on the IPC receiving the concern to:

a) investigate the wrongdoing and take prompt action;
b) protect the identity of the individual where the concern has been raised in a confidential manner and anonymous concerns (where the identity of the worker is unknown) are considered on their merits;
c) protect the information disclosed and the fact a disclosure has been made - except where a further disclosure of information is needed to remedy the wrongdoing;
d) feedback on progress and completion to the individual who has raised the concern as far as is reasonably possible.[10]

Categories of wrongdoing

40. Given the important and sensitive work the intelligence community carries out, we would suggest that any whistleblowing provisions should carefully identify what wrongdoing can be reported through the internal whistleblowing arrangements.

41. Principle 37 of the Tshwane Principles provides a carefully considered list of categories of wrongdoing that can be disclosed through the whistleblowing arrangements regardless of the security classification or the level of confidentiality attributed to the information. We also recommend this list be produced for the internal whistleblowing arrangements in the intelligence services as well as used by the IPC. [11]

Grounds, Motivation and Proof

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[9] Our advice is that all whistleblowing arrangements should follow best practice as stipulated by the Whistleblowing Commission's Code of Practice, p.g.28. http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf
[10] Principle 39 C. of the Tshwane Principles, p.g.51.
[11] Principle 37 of the Tshwane Principles, p.g.49.

42. An individual should not forfeit protection for raising concerns where they are either incorrect about the wrongdoing they seek to raise, or where they have questionable motives for wanting to come forward. Protection should be forfeited only where an individual knowingly provided false information. Connected to this point is that an individual should not have to provide evidence to justify the concern they are raising. Requiring evidence undercuts the chief aim of a whistleblowing framework which is to provide a safe route for concerns to be raised at the earliest opportunity to ensure incidents of wrongdoing or malpractice do not develop into situations that are more serious.

Taking action against victimisation

43. Victimisation of whistleblowers in the intelligence services should be prohibited, and a non-exhaustive list of acts of victimisation should be created. The list should include the examples provided in the Tshwane Principles:

'(a) Administrative measures or punishment, including but not limited to: letters of reprimand, retaliatory investigations, demotion, transfer, reassignment of duties, failure to promote, termination of employment, actions likely or intended to damage a person's reputation, or suspension or revocation of a security clearance;
(b) Physical or emotional harm or harassment,
(c) Threats of any of the above
(d) Action taken against individuals other than the person making the disclosure may, in certain circumstances, constitute prohibited retaliation.'[12]

44. The IPC should have the power to investigate suspected incidents of victimisation of intelligence service personnel who have raised concerns. The triggering of an investgiation should not be dependent on a request from a complainant to investigate suspected acts of retaliation or victimisation.

45. The IPC should have the power to offer redress to the individual where they are satisfied that victimisation has occurred. They should have the authority to require the intelligence service to:

(i) Reinstate or redeploy a member of the intelligence service;
(ii) Award compensation, loss of wages, loss of holiday benefits, travel expenses, payment of legal fees or any other reasonable cost or expense;
(iii) Recommend disciplinary action for any intelligence service personnel who have been judged to have been responsible for victimisation of an individual who has made a qualifying disclosure;
(iv) Take preventive action to stop the intelligence services from committing acts of victimisation.[13]

46. The parties subject to an investigation into acts of victimisation should be informed of the IPC decision and there should be a system of appeal for all parties involved in the investigation. Any IPC investigation should be completed in a legally determined time limit, unless the IPC believe the investigation will take longer to complete.

47. Our concern is that unless the IPC have the power to look into and take action on victimisation, then the positive reforms in this area proposed by the report will be undermined.

The need for a public interest defence

[12] Principle 41 the Tshwane Principles p.g.53
[13] Ibid p.g.53

48. As we have said the start of this section, we are concerned that any internal reforms will be undermined by the absence of a PID; we further disagree that these reforms replace the need for this defence. Without this defence, we believe there is a risk that staff will not trust the new oversight mechanisms and will likely mean that concerned members of the intelligence services may be more likely to either raise their concerns anonymously with the media, or worse stay silent on concerns of wrongdoing or malpractice.

49. The report is rather confident is assuming that the establishment of an 'information gateway' in the Investigatory Powers Act absolves from prosecution anyone who raise concerns with the IPC about the misuse of powers contained in the act. The section of the act makes no mention of such an exception, so for example would a whistleblower be able to raise concerns that turn out to be incorrect further down the line be exempt from prosecution under the OSA? What about a whistleblower that is judged to have raised malicious concerns, what impact might this have on criminal liability? Simply placing a permission to share information, which in essence is all an "information gateway" is, will not solve the problem.

50. As for the Canadian model, we are more supportive of the model than the report envisages although we do have further comment. The statutory commission that would sit as the independent oversight body would need to follow the principles laid out in points 14-24, and the inclusion of a public interest defence needs to drafted in such a way that enables a concerned individual to make public disclosures without the requirement of raising concerns internally first.

Seeking authority

Provisional conclusion 27 It should be enshrined in legislation that current Crown servants and current members of the security and intelligence agencies are able to seek authority to make a disclosure. Do consultees agree?

51. We have no objections to this as a principle but we question how effective this measure will be in practice.

52. It seems likely that the mechanism would be used where an individual is in a situation where their concerns have either been: ignored by the internal arrangements and/or any independent oversight mechanisms; or where it would be inappropriate to engage with any of these mechanisms (e.g. management or the oversight body are both involved in the wrongdoing). It seems unrealistic in both scenarios that a mechanism allowing an individual to seek authorisation for the disclosure would be used by an individual repetition. For example, if we look at the situation of the whistleblower Catherine Gunn, her case was highlighted in the report as an example of someone who did not trust the independence or effectiveness of the internal whistleblowing arrangements and so decided to anonymously raise her concerns with the media. It is unlikely given Gunn's perception of the arrangements that she would have had any faith in this mechanism if it had been in place during her time with GCHQ. It may well be that if this mechanism existed as the only means to make public disclosures then more people in Gunn's situation would resort to making anonymous disclosures to the media.

53. To apply for this measure may require certain fortitude from the individual making the application that not everyone possesses - doubly so given the stress that blowing the whistle can already cause. Our conclusion is that in isolation this mechanism is not enough and will only be effective in a whistleblowing situation if it is part of a suite of reforms that includes protection for intelligence personnel from victimisation where they raise concerns, and a PID.

Conclusion

To conclude, we believe the reforms proposed by this report are the wrong reforms proposed at the wrong time, in summary:

- We reject the report's notion that the introduction of a public interest test would undermine national security, the rule of law or would lead to the "floodgates" opening for unfounded whistleblowing. We believe it is a necessary part of any effective whistleblowing system within Government;
- We are supportive of the report's aims of giving the Investigatory Powers Commissioner an oversight role when it comes to whistleblowing in the intelligence services, but this reform cannot be seen as a replacement for a public interest defence;
- The LC report has not made a convincing case that prosecutions are being hampered by the need to show a disclosure has caused damage. In fact, we believe that they have had little trouble under the current law in doing just this. Removing the damage requirement is dangerous as it increases the risk of abuse - specifically that of using the OSA as a means to pursue a whistleblower who has revealed politically embarrassing information, rather than damaging information, to the media;
- We disagree with the suggestion that the sensitive information protected by the OSA should include economic matters and believe that this would have serious unintended consequences and would inappropriately expand the reach of the legislation and the offences it promulgates.

Public Concern at Work
31 May 2017

Annex A

Quotes from Hansard from 1989 OSA Debate

This document holds selected quotes from the 1989 OSA Debate.

HANSARD 1988 [the Official Secrets Bill]

HL Deb 29 June 1988 vol 498 cc1603-14

Lord Harris of Greenwich

“I think it is right to acknowledge that the new provision [a suggested amendment regarding a PID] would have made it impossible to prosecute an official like Sarah Tisdall, the young woman who was sent to prison for the disclosure of information which the prosecution acknowledged did not in any sense represent an official secret. That being so, we welcome this provision.”

Finally, is the noble Earl aware that we are deeply disappointed that the Government have refused to adopt the proposal in Clause 7 of Mr. Shepherd's Bill? The noble Earl will recall that this featured in our debate in this House and that Mr. Shepherd proposed a defence that a disclosure was in the public interest in so far as the defendant had reasonable cause to believe that the information concerned indicated the existence of crime, fraud, abuse of authority and neglect of official duty. That defence would only have been available, as the noble Earl will recall, if the defendant had taken all reasonable steps to draw these matters to the attention of the appropriate authorities. Is the Minister aware that we very much regret that the Government have not adopted Mr. Shepherd's proposal?

Lord Hooson

My Lords, I wanted to ask whether the Minister would consider persuading the Government to look again at the defence of public interest. As he is aware, once a jury has retired in this country, no judge can control it. It is widely believed by those of us who have conducted official secrets cases that juries consider the public interest but put their own interpretation on it. Would not it be safer for the Government to define what the public interest would be within that context? Will the Government consider that matter before the presentation of a Bill?

Earl Ferrers

The noble Lord, Lord Hooson, mentioned the defence of public interest. Those who have supported a public interest defence must recognise that the Government's proposal would entirely change the context of the argument. We are now proposing that the harm to the public interest caused by disclosure should be defined and should, when it is not self-evident, be proved to the satisfaction of a court. A general catch-all defence would detract from the clarity which we hope can be achieved in the new law.

[NB: a harm test was never incorporated with respect to disclosures made by current and former member of the intelligence and security services]

…….

HC Deb 22 July 1988 vol 137 cc1426-95

http://hansard.millbanksystems.com/commons/1988/jul/22/official-secrets#S6CV0137P0_19880722_HOC_19

Mr. Hurd

Indeed, there are. I am about to deal with the public interest defence. The hon. Gentleman is leaping ahead a little.

Because of the interest expressed in the notion that lies behind the hon. Gentleman's question, that there should be a general public interest defence in the cases that he has mentioned, I should stress that we are not taking away 1430 anything that now exists in the way of a defence. **It is true, as my hon. Friend the Member for Thanet, South (Mr. Aitken) pointed out, that there are some words of uncertain meaning in section 2 [of the 1911 OSA], which one or two defendants have claimed allowed the court to consider whether their disclosure was in the public interest, but it is also true to say that the courts have never accepted those words as referring other than to the public interest as decided by the institutions of Government in this country.** [see separate document containing the text of the 1911 OSA]

We have set out in the White Paper why we think that the introduction of a general public interest defence can be no part of the narrowly targeted scheme that we propose. We believe that that **would bring confusion into the law where we are seeking to achieve certainty**. It **is not a defence to any other offence that the wider or longer-term effects of the criminal act are beneficial and that that benefit outweighs the harm done.** Someone who commits a robbery and spends the proceeds of his crime for the public good is still a robber. The defence that he has used the money for good purpose does not apply.

Mr. Alex Carlile (Montgomery)

What about a specific defence of public interest?

§ *Mr. Hurd*

I am talking about a general principle which the hon. and learned Gentleman will accept.

A person who, by some disclosure, knowingly causes unacceptable harm to the public interest in the hope of doing some wider good is still committing an offence.

I do not think that he can show a statement of the court or a judgment of a judge which accepts that those words imply or contain a general public interest defence [under the OSA 1911]. In all those matters, under the existing law and under our proposal, a jury will have to make up its mind, but juries do not give reasons and, if my advice is sound, as I believe it is, **I do not believe that the courts have established that there is a general public interest defence under the present law.**

Mr. Alex Carlile

Does the Secretary of State accept that he has said that, on the one hand, there will be an absolute offence and that, on the other hand, juries may acquit, despite the absence of a public interest defence? Is not the consequence, therefore, that he is inviting juries in a residue of cases to deliver what he would call perverse verdicts on the grounds of the public interest? If that is the logical conclusion, as it surely must be, why does he not write, not a general public interest defence, but a specific public interest defence into the legislation?

Mr. Hurd

That is a contradiction in terms. I am not inviting a jury to do anything. I am simply observing that, in this country, anyone who faces a charge that might land them a substantial term of punishment, has the right for that to be decided by a jury. That is true under the present law and will be true under our proposals. It is certainly not for a Minister to say what a jury will do. If a future Government were foolish enough to indulge in trivial or vindictive prosecutions, a jury is there as a safeguard. That is

why we have a jury. I am not predicting what it would do. I am simply observing that it is the jury that decides.

Mr. Hattersley

The right hon. Member for Plymouth, Devonport (Dr. Owen)—who had read the White Paper—referred to paragraph 61 which rejected the idea that Crown servants prosecuted under the new Act could offer public interest as a defence and said that because that idea was not included, the White Paper was crucially flawed.

[…]

The heart of the matter and the central issue that we are debating is the need, with any new law concerning official secrets, to take a rational and democratic view of the Security Service's operations. At present, the service acts either like a private army or like the private property of the Prime Minister. In other democracies, the activities of the security services come under the general supervision of Parliament. That rule should apply here. Until it does, the whole nexus between the wrong sort of secrecy and the wrong sort of activity will never be properly exposed. [NB this debate occurred before the passage of the 1994 Intelligence Services Act, which introduced parliamentary oversight]

Until that happens, it is intolerable that everything done by the security services—good or bad, legal or illegal, trivial or significant, in or against the public interest—should be cloaked in secrecy according to the fiat of the Government. But that is what the White Paper provides, and that is why the editor of The Observer—who knows about such matters, as he has been pursued by the Government—regards the proposed Act as in many ways worse than what it seeks to replace. For it specifically rules out—and what the Home Secretary says does not alter my view for a moment—some of the protections provided by the present law. I have no doubt that the defendant's protection of the public interest defence will be removed.

The Home Secretary says that no such defence exists. The fact is, however, that juries have acted on the belief that it does, or on the conviction that it should. Men and women have been acquitted on the belief that what they did was in the public interest. Let us assume that all that that reveals is that the present law is ambiguous, and that liberal-minded juries have chosen to interpret it in a certain way. What the Home Secretary now proposes is explicitly to remove that protection, so that juries will have no doubt in their minds in future. They will be directed that there is no such thing as a public interest defence; that loophole will be closed.

When I asked the Home Secretary a month ago whether various notorious prosecutions under the present Government—that of Mr. Ponting in particular—would have led under the proposed Act to an acquittal or a conviction, there was a roar of "Conviction" from his hon. Friends. Of course Ponting would have been convicted, because the White Paper rules out the concept of public interest and leaves that option no longer open to the Government.

Mr. Richard Shepherd

Would my right hon. and learned Friend care to comment on whether former or serving intelligence service officers should have the right to plead inequity as a defence?

§ *Mr. Brittan*

I was coming to that.

Finally, but most important, is the question what should happen if an intelligence officer discovers, or thinks that he has discovered, serious misconduct. Attention has been drawn to the fact that such a person can go to his superior, but attention has also been drawn to the existence of Sir Philip Woodfield's position as staff counsellor, to whom a person in such circumstances can turn.

Mr. Brittan

Perhaps the right hon. Gentleman would care to listen for a moment before intervening. **I regard the present arrangement for a staff counsellor as something to be built on, not something that is wholly sufficient. It is essential that there should be something rather more substantial than this informal, ad hoc appointment. There should be a formally established and publicly announced—and explained—independent system within the public service for examining allegations of impropriety. Although such a system would have to operate in private, its existence could be announced publicly, as could details about it.** That would do more than anything else to persuade Parliament that it is right to impose the sanctions of the criminal law for life on people in the security and intelligence services who are found guilty of unauthorised disclosure of material, whatever their motives and whatever the circumstances.

The right hon. Member for Sparkbrook has not given sufficient weight to the novelty of this departure from previous practice and the importance of there being someone completely outside the service to whom an officer can turn. It is all very well for the right hon. Gentleman to say that an officer may not have confidence in such a person, but it is possible for an officer to have confidence in nobody. No Government can do more than provide a person of repute and integrity such as all who know him would testify Sir Philip Woodfield to be.

Alex Carlile

If Governments are to be accountable, we must accept that the whistle must be blown and it should be heard to be blown when there is a scandal in Government that should be exposed in the public interest. The words of Mr. Justice Scott, quoted by the hon. Member for Aldridge-Brownhills (Mr. Shepherd) at great length, are words that demonstrate that members of the judiciary, at the highest level, believe that there must be room for the whistle to be blown on Government. Mr. Justice Scott would not—it would not be his style—use words such as "whistle-blowing", but he meant the same thing when he said that the press has a legitimate role in disclosing scandals in Government, and that open democratic society requires that that should be so. He said: the ability of the press freely to report allegations of scandals in government is one of the bulwarks of our democratic society. For that bulwark to mean anything, as Mr. Justice Scott pointed out, the press must be free and it must be free sometimes to report what are no more than allegations based upon reasonable suspicion and evidence. In that context, I shall return later to the question whether there 1458 should be a public interest defence or what the hon. **Member for Aldridge-Brownhills calls an "iniquity defence" which may be more accurate.**

[…]

although the Government chose not to prosecute Cathy Massiter, because they were rightly afraid of the reaction of the jury, she would now be prosecuted by the Government because she was committing an absolute offence. In the case, of an absolute offence, the judge might well be in a position actually to direct the jury to convict. There is an important difference between section 2, which did not enable the judge to direct the jury to convict in the Ponting case, and the proposals in the White Paper which, in my view, would enable the judge to direct and order the jury to convict. That would apply to someone such as Cathy Massiter.

That brings me directly to the public interest or iniquity defence. **We have heard a most extraordinary new constitutional doctrine this morning which can be summarised in six words, "A perverse jury is your safeguard."** The Government say, "We will not introduce an iniquity or public interest defence because we think it is inappropriate. We think that there is no need for it because of the liberalism of this White Paper", but, at the same time, the Home Secretary says, "We are leaving it to juries to decide." This contradiction is extraordinary.

Let us think for a moment of what happened **in the Ponting case. The trial judge gave his directions on the law to the jury. He did not accept the proposition of the hon. Member for**

Thanet, South (Mr. Aitken) that there was a public interest defence. His directions to the jury were unequivocal. He told it that, in law, Mr. Ponting did not have a defence, but he was not able to go so far as to direct the jury to convict. The jury went out. It considered the judge's directions and what Mr. Ponting had done and said, "Not guilty." It said, "Not guilty" on one ground alone. It believed that it would be a monstrous injustice against the public interest to find Mr. Ponting guilty.

Such matters are to be left in the hands of juries, boasts the Home Secretary, but what will happen now? The judge may well have the power to direct the jury to convict, so it may not even retire to its room. It may sit in the court—I have seen juries directed to convict in much more 1460 trivial cases—and the court clerk will stand up and say, "Mr. foreman, on the direction of my Lord, do you find the defendent guilty?" On that occasion, the jury will have to show a new moral robustness and say, "No, we ignore the direction of the judge and we do not convict." What will happen then?

As a matter of jurisprudence and history, the jury's verdict is not binding. It is always accepted as binding, but, as a matter of strict law, it is a recommendation. Under the Government's proposals, what will happen? Will they expect the judge to say, "Thank you very much, members of the jury. I do not accept your verdict. This defendant is found guilty because that is the law." We are entering a new area where the Government are making themselves a hostage of the most extraordinary kind to a fortune upon which no citizen in a free and democratic society should have to rely—the fortune of having a robust and perverse jury.

There will always be a public interest defence, whether the Government like it or not, because the citizens of this country, even if they are vetted jurors, as in the Ponting case, will ensure that there is a public interest defence. It is absurd, stupid, unrealistic and self-demeaning of any Government of the United Kingdom not to recognise in legislation that that is so.

Mr Wheeler

[…] I want to comment briefly on the public interest defence, which has been discussed today. I do not believe that we should try to include the public interest defence in this legislation. That **would create confusion rather than certainty in the law. The criminal law defines an offence in terms of an individual's actions, not his motives, for carrying them out.** The latter may be taken into account by the judge in his summing up or when passing sentence and that may well affect the decision of the jury, but it should not be included in the law.

I have already dealt with special duties on the part of those who serve in the security and intelligence services. With regard to prior publication and the position of newspapers and the media industry, as I understand the White Paper, no one can be convicted of revealing information relating to security intelligence, defence or international relations unless the prosecution can prove that disclosure was likely to cause a specified harm to the public interest and that he or she who proclaimed it knew that. Nor can someone be convicted for disclosing information useful to criminals unless the prosecution could show that the information was still likely to be useful despite its prior publication. The defence of prior publication is therefore subsumed within the test of harm.

Diane Abbott

I shall now turn to the absence of a public interest defence in the White Paper. The Government justify the absence of such a defence by saying that it is not the practice to take motive into account in matters of law. That is a perverse statement because section 1 of the Official Secrets Act, which is not to be abolished, explicitly takes motive into account. It is surely perverse to say that the motive for passing on secrets is admissible if a person will be proved guilty but inadmissible if someone is trying to prove himself innocent.

Conservative Members know perfectly well that there is a long standing common law defence against actions for breach of confidence on the grounds of public interest. In the discredited section 2 of the Official Secrets Act there is even an implicit defence in terms of the public interest. This is

what the Government seek explicitly to rule out. Conservative Members talk about civil servants who are worried about what they will be asked to do and say that all they have to do is to refer things up the ladder. That is nonsense. If a hapless higher executive officer or Home 1486 Office principal is instructed to do things that are against the public interest, his instructions will have to come down the chain from, perhaps, a permanent secretary or an assistant secretary. It is absurd to say that the matter can be referred back up the chain and to say so shows a lack of understanding of the realities of life for the groundlings in the Civil Service.

Behind the public interest matter is the shadow of what some of us thought was the most serious aspect of the Ponting case—the Government's assumption that there is no distinction between the interest of the state and the interests of the Government. That is what the judgment showed in the Ponting case and it is dangerous. That assumption is the reason for the Government not allowing a public interest defence. That is contrary to traditions of common law and fairness and to the interests of the nation as a whole.

Robin Corbett

The White Paper is repressive in its denial of any public interest defence. What possible harm to security did Clive Ponting do when he told my hon. Friend the Member for Linlithgow (Mr. Dalyell) that the Government had misled the House over the sinking of the Belgrano? Did that damage security? He caused embarrassment to the Government and the Prime Minister but that is no reason to deny people who act in good faith a public interest defence. Surely the public, as represented by a jury, is a better judge of public interest than any Government. That is what the Home Secretary should have meant when he spoke of leaving it to the courts.

It was a serving officer who leaked secret information about the run-down state of our defences in the 1930s to a Member of Parliament called Winston Churchill. Did not he and the people of this country have a right to know that? That officer did no more than Clive Ponting did 50 years later. That illustrates the need for a better definition of exclusion of defence, security and intelligence information.

Ministers refused to confirm or deny the arrival of American cruise missiles at Greenham Common and Molesworth on security grounds. When Sarah Tisdall bravely made that known, she was convicted for her pains and the Government still refused to give that information or any information about the numbers involved. It took the arrival here this week of 20 inspectors from the Soviet Union, under the terms of an intermediate-range nuclear forces treaty signed between two foreign powers, to let the people of Britain know that the number of operational missiles at Greenham is 96 and at Molesworth 18. Fancy that—the Russians can know how many American missiles are down the road from the House but we cannot, and nothing in the White Paper will assist us in getting such information in the future.

February 22, 1989

HC Deb 22 February 1989 vol 147 cc1036-50 1036

http://hansard.millbanksystems.com/commons/1989/feb/22/public-interest-defence#S6CV0147P0_19890222_HOC_360

Robin Corbett's proposed amendment

§ '.—(1) It shall be a defence for a person charged with a offence under this Act to prove that the disclosure or retention of the information, document or other article was in the public interest insofar as he has reasonable cause to believe that it indicated the existence of

crime, fraud, abuse of authority, neglect in the performance of official duty or other serious misconduct.

1037 (2) In the case of a Crown servant or government contractor charged with an offence under sections 1,2,3,4,6, or 8 of this Act, subsection (1) above shall only apply if he has taken reasonable steps to comply with any established procedures for drawing such misconduct to the attention of the appropriate authorities without effect.'.—[Mr. Corbett.]

Mr Corbett

This clause is not about spies and espionage, but about public servants who, through their duties, find that the public are being misled or worse. It is also about editors and journalists who, in a free society, have a duty to expose official malpractice. The new clause tries to meet the Home Secretary's ludicrous claim that a public interest defence is somehow a "trump card". Under new clause 2 public interest would be a defence—not the trump card, but one of many in the pack—to put before court, but not the overriding defence claimed by the Minister of State in his letter to The Independent today.

The public interest defence could be used only in limited cases where there were allegations of specified types of misconduct. It is not a green light to every whistleblower in Whitehall. There would be no protection, for example, for someone who wanted to argue that Britain's nuclear weapons were against the real public interest. There would have to be "reasonable cause", demonstrated in court, to believe that serious misconduct was taking place. It would not be enough for someone to say "I think that it is happening." The evidence would have to be strong enough to persuade a jury.

6.15 pm

Another test of the defence is that the misconduct would have to be serious enough to justify disclosure in the public interest in the categories listed: crime, fraud, abuse of authority, neglect in the performance of official duty or other serious misconduct … a serious threat to the health or safety of the public. **The Minister should note that the new clause and amendment No. 8 do not cover the work of the security or intelligence services, the armed forces or any other matters touching the vital interests of the nation.**

There is yet another test—I am beginning to sound like the Home Secretary and his hurdles—in that a civil servant could invoke the public interest defence only if he or she had first tried to get the problem dealt with internally, but without success. That touches on the point made by the right hon. Member for Old Bexley and Sidcup (Mr. Heath) who spoke of the public right to know not simply about the wrongdoing, but that the wrongdoing had taken place and had been stopped. I stress that the public interest defence would not benefit anyone whose real purpose was to embarrass the Government and who leaked information without first invoking the available procedures.

The existence of internal Civil Service remedies—the right to complain to the head of the Civil Service—does not remove the need for a public interest defence in the limited form proposed by the new clause. The public 1038 interest defence would operate only after reasonable efforts to deal with the problem internally had failed. I stress that that defence is not available to journalists and to other non-civil servants.

Amendment No. 8 relates to the key element of the offence outlined in clause 3—that the offence does not depend on the nature of the information disclosed. That is irrelevant. Again it raised the possible prospect of the Government acting against a newspaper which planned to publish something that was simply embarrassing to the Government. In matters of public safety, such as health or a leak from Sellafield, the Government may decide that they do not want to inform the public immediately although clearly it would be in the public interest that the information should be made public speedily. Yesterday's debate about the dangers arising from salmonella and listeria illustrates the need for such information to be public.

I shall not develop my argument further because of the timetable, but the Home Secretary should consider carefully this narrower, more restricted public interest defence, which seeks to meet many of his main objections. These are modest amendments and would cause the Government no harm if accepted. The Government could still prosecute. All that would happen is that in a narrow band of specified areas a proper public interest defence would be available.

Richard Shepherd

…Throughout the debate on the public defence, the Government have argued that there is no such concept in law. When confronted with the possibility of using the Obscene Publications Act, they told us that that legislation is really defective and should be amended or repealed. They ignored the fact that the very first Official Secrets Act of 1889 included a public interest defence, which was felt to be such an important legal matter involving the freedoms and rights of citizens as well as the protection of Government information that it required the distinction of the Attorney-General moving a Government amendment.

The Government have asserted the proposition that the internal structures of government are so secure and certain that there can never be a failure to remedy crime, fraud or iniquity. That proposition is profoundly distasteful to the House. Only last week, during our debate about prior publication, the Home Secretary drew our attention to hypothesis. Could we not hypothesise circumstances in 1039 which a Government do not enable legitimate existence of fraud or crime to be remedied internally? The amendment seeks to clarify what would happen to the civil servant.

It is really a last-ditch amendment because the Government have rejected almost every other attempt to give balance to the Bill. Had there been a serious injury, it would have been possible to argue whether the injury was serious and that would provide the opportunity for a defence. However, the damage tests consistently have been set at such a trivial level that it is difficult for a defence to secure freedom on those bases. The amendment seeks to avoid the possibility of having to rely on a perverse jury which does not understand the issues, because in the case of an absolute offence it is not necessary ever to reveal what has caused the offence. Under clause 1, if a civil servant has revealed a piece of information, he has to plead whether or not he revealed the information, but there is no opportunity for the jury to examine the merits of the information that he revealed. Unless the jury is perverse, it appears that an automatic conviction would follow.

The amendment challenges the central proposition in the Bill. The Bill claims that the public or national interest is synonymous with the interests of the Government of the day.

[…]…Bill asserts that the absolute offence applies to any piece of information revealed. Therefore, the determinant of whether it should apply are the Government. They hold to themselves that judgment. The House is in conflict with the assertion in the Bill that the national interest is synonymous with the interests of the Government of the day, as that is unacceptable in a free, liberal democracy. We are trying to repudiate that assertion. We accept that there may be times when the two are synonymous, but there are also times when that manifestly is not true.

Mr. Rooker

In issues such as defence procurement, the security of the state is a borderline matter, but vast amounts of public money are spent. **Committees in the House have heard that tens of millions of pounds of public money have been wasted because of the operation of the equipment that is purchased, or because of the companies and contractors that supply such equipment double-charging and fiddling on the maintenance. Those issues involve crime and fraud in the normal sense. If civil servants try to follow procedures to bring such matters into the open, surely 1040 there must be a defence, or do the Government argue that there is never crime or fraud within the Government machine?** That argument does not stand up. Over the

years, the House has heard evidence of instances where Government contractors have been hand in glove with those they should not be, or fiddling the taxpayer. That is crude ordinary crime and fraud, not the crime that we discussed earlier involving spies and spooks. Everyone knows what I mean by the crimes that we are discussing here.

How can it be that civil servants who are aware of such crime and trying to put matters right—but failing to do so—are not able to say that it was in the public interest that the information relating to the crime or fraud ought to be made public and therefore they used the public interest defence? The Home Secretary should be a little more forthcoming about the Government machinery dealing with cases involving civil servants than he was during the very short debate in Committee.

Kenneth Hind

The real danger in the clause is that there is no consideration of the damage that can be done to the national interest. The person disclosing the information may think that it would be in the public interest. However, although that person may be honest, he may be misguided and may feel that he has reasonable cause to believe that it indicated the existence of crime, fraud, abuse of authority, neglect in the performance of official duty or other serious misconduct. What if that is not so? We are left with untold damage done to the national interest by somebody who acted in good faith when there were clearly other ways of dealing with the matter.

Douglas Hurd

The **argument of the Opposition and the proponents of a public interest defence—even defined narrowly—is that it should be allowable for somebody to make a disclosure, however great the damage that might result from that, provided that the information disclosed gave him reasonable cause to believe that it showed some form of serious misconduct or any neglect of official duty.**

There is a further point about timing which the Opposition have not hauled on board. If a disclosure were made, damage would result and that would be past recall. There would then be an argument before the courts about whether there was justification under any of the different 1045 public interest defences that had been proposed. The public servant concerned might be able to show that he sincerely thought that he had reason to believe that his disclosure showed some neglect of official duty. But the damage would have been done. The public servant might or might not be convicted, depending on what the jury decided, but the damage could not be repaired. My right hon. Friend the Secretary of State for Defence could not run the armed services—and nor could the Security Service or the police be run—on the basis of the damage being done, with an argument then taking place between lawyers on a definition of whether disclosure was justified.

Mr. Rees

I had been going to intervene, but the Home Secretary has now sat down. I wonder whether he can explain the problem that I am facing. I used to think—and I still think—that under section 2 the Attorney-General of the day, who holds that position as legal adviser to the Government—not in any political sense—advises on prosecution and, as things are at the moment, makes his decision in the public interest. The Home Secretary will remember that we touched on this tangentially earlier when the former Solicitor-General, my right hon. and learned Friend the Member for Warley, West (Mr. Archer), made it clear that the words "public interest" are used in the remit of the Attorney-General in a different way from the use of "public interest" in discussion of the Bill. Nevertheless, under the Bill, the Attorney-General has to consent to prosecution.

In deciding whether there shall be a criminal prosecution and on the Attorney-General evaluating some of the criteria that we have been discussing, such as the harm test and whether harm may be caused, could it be that it would be in the public interest not to prosecute? I recall that in some instances it was thought better to keep quiet than to let the information get out and that course of action has been regarded as being in the public interest. Is that public interest aspect still present in this Bill?

Sir Ian Gilmour

My right hon. Friend the Home Secretary deployed his usual forceful arguments against the public interest defence but the arguments that he advanced against it are totally inapplicable. He referred first to revealing the battle plans of the British Army of the Rhine. As my hon. Friend the Member for Aldridge-Brownhills (Mr. Shepherd) said, that would clearly fall under section 1 of the Official Secrets Act, but, even if it did not, the idea that anyone could justify that as being in the public interest on the grounds that he might have been given reasonable cause to believe that it indicated the existence of crime, fraud, clearly could not be advanced as a defence. It would be laughed out of court and the jury would not look at it. Surely the same applies to the other example given by my right hon. Friend about revealing counter-terrorist 1048 operations. The idea that somebody could say, "I did that because, after all, there was a little crime about" simply would not work. It is not—

Mr. Hurd

Indeed, it might not work. The jury might not be convinced and then whatever harm had been done would have been done and there would be no rectifying it, but it would be a small satisfaction if the chap went to prison.

§ *Sir Ian Gilmour*

The chap is going to prison anyway. He is unlikely to have his decision about revealing this information determined by whether there will be a public interest offence. He will be a man, certainly on the examples given by my right hon. Friend, who will be either off his head or a near traitor. So the idea that he will be influenced by a provision such as this is not applicable. In other words, my right hon. Friend has adduced a way out of arguments that would not apply to any of the examples that we have in mind.

Mr. Norman Buchan

The Home Secretary goes on to say that the danger in giving a public interest defence is that the cat will already be out of the bag. He gave as an example the battle plans of BAOR and said that by the time the matter came to court the secret would be out. But we are talking in terms of a defence, and it would be no defence for me to release the battle plans of BAOR and say that I thought fraud had been committed in Squadron No. 2. That would not be the point. It would have come out because I had already released those battle plans. At that point, not at any later stage, the facts would have come out.

I share the anxiety of the hon. Member for Caithness and Sutherland (Mr. Maclennan) about Government amendment No. 1. The fact that something is confidential 1049 could of itself be sufficient to establish guilt under the previous subsection. It cannot be right, with such contorted thinking, to leave the measure without any public interest defence.

In the same way as it has been argued that the law of confidentiality cannot be extended to find people guilty simply to cover up an iniquity—in the words of the last century—so it cannot be the case here that a crime—be it fraud or whatever—revealed in this process must automatically carry a verdict of guilty because a public interest defence cannot be adduced.

I return to the example that I have given in the past and to which I have not yet received a reply from the Home Secretary, and that is the position we face on the Clyde. If it is known that a nuclear

leak has taken place, and it is in the interest of the communities there that that fact should be revealed, the decision to reveal cannot be defended in the courts because the harm that would have been done would come under clause 2 in relation to defence.

We cannot leave the Bill—any more than we could leave the law of confidence, the concept that the Government have been fond of using in recent years—without a defence. Equally, if there is no public interest defence in this case, the Home Secretary is stripping out almost all possible forms of defence, despite the fact that we are dealing with areas which are prone to offence of one kind or another. That is the enormity of what the right hon. Gentleman is doing, sometimes on the basis of grammar. I hope that he will look at the whole matter