Guardian News and Media Response to Law Commission Consultation Paper no 230 on protection of Official Data

About GNM

Guardian News & Media ("GNM") is the publisher of theguardian.com and the Guardian and Observer newspapers. As well as being the UK's largest quality news brand, the Guardian and the Observer have pioneered a highly distinctive, open approach to publishing on the web and has sought global audience growth as a critical priority. GNM is owned by Guardian Media Group, one of the UK's leading commercial media organisations and a British-owned, independent, news media business.

In March 2017, Guardian journalists were recognised as News Reporter of the Year, Sports Journalist of the Year and Specialist Journalist of the Year at the Society of Editors UK Press Awards. The Guardian was awarded in the Content Team of the Year, App of the Year and Product Team of the Year categories at the 2016 British Media Awards. Its journalistic excellence was also recognised when it became the first news organisation of non-US origin to receive the Pulitzer Prize for its investigation into US National Security Agency ("NSA") surveillance.

Ofcom's latest annual report on news consumption in the UK[1] found that regular readers of the Guardian have more trust in our journalism, believe is it more accurate and reliable, and that it offers a more diverse range of opinions than regular readers of any other UK newspaper, or regular users of digital news sources including BBC online, Facebook and Google News.

The Guardian is also known for its globally acclaimed investigations, for example as a driving force behind the Panama Papers, which involved reporting on the leak of 11.5m files from the database of the world's fourth biggest offshore law firm, Mossack Fonseca. The Panama Papers coverage has led to a huge number of proposed financial reforms across the world. In December 2016, the Guardian was awarded Investigation of the Year at the British Journalism Awards for this investigation.

1. Executive Summary

Successive parliaments, governments and policymakers have attempted to use reviews and regulatory instruments to silence legitimate stories, information leaked in the public interest, and whistleblowers.[2] A recent memo by the Cabinet Secretary ordered that "*Anyone found to have leaked sensitive information will be dismissed, even where there is no compromise of national security.... The*

[1] https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/news-media/news-consumption

[2] E.g. a series of reports have found sustained attempts by government to crack down on the ability of journalists to protect sources and whistleblowers, including the UN Special Rapporteur to the UN General Assembly and Institute for Advanced Legal Studies

prime minister has directed that we urgently tighten security processes and improve our response to leaks… ".[3]

These moves form part of a wider attempt to restrict the flow of information within democratic life, and to centralise power within certain sections of government. We are concerned that the Law Commission proposals mark a continuation of this trend. GNM is very concerned that the effect of the measures set out in the consultation paper ('CP') would be to make it easier for the government to severely limit the reporting of public interest stories.

1.1 The value of responsible journalism

Responsible journalism plays a crucial role in disseminating information in the public interest. It acts as a check against individuals and state actors leaking mass online datasets, and results in the publication of important stories. News organisations filter and moderate source material - in a modern democracy, a global digital environment, responsible journalism should be properly respected and protected, not threatened and chilled. It has long been recognised in law that whistleblowing has a public value. Such whistleblowers are essential for revealing sensitive information in the public interest but can expose themselves to serious risks and pressures.

The Law Commission's proposals have the potential to permit the prosecution, conviction and ultimately the imprisonment of journalists whose reporting touches on 'national security' issues , even if no damage is caused and even if the reporting is in the public interest. There is also a danger that the proposed changes would mean that lots of new information would be caught - information in areas that we would argue are not 'national security' areas at all, such as economic activities like the Brexit negotiations or budget proposals. The collective effect of these measures could be to dramatically reduce journalists' ability to report responsibly.

We detail below a number of stories that we do not believe would have been published under the proposals set out in the CP, which include:

- Investigation into workings of a Metropolitan Police undercover unit that resulted in a judge-led public inquiry established by Theresa May.
- Disclosure of a US "Collateral Murder" video of a July 2007 airstrike by an Apache helicopter firing on and killing a group of civilians.
- 2012 investigation of collusion between the police and the Loyalist terrorists who murdered six men in a bar in Northern Ireland in 1994, that resulted in new police inquiry.
- The UK military's involvement in the running of a prison in Baghdad that was the scene of well-documented human rights abuses.

On the Snowden revelations, we note our role as careful facilitators, curators and

[3] https://www.theguardian.com/politics/2016/dec/04/government-memo-brexit-leaks-leaked-cabinet-secretary

moderators. During that reporting, Guardian staff took every decision very carefully. In nearly four months they published a handful of stories about GCHQ, and not a single GCHQ document in full - they quoted small portions of documents. In total, they published less than one per cent of the material they received.

1.2 The consultation process

We are concerned by the process which informed the Law Commission's developments of these proposals. In its report, the Law Commission listed the Guardian amongst a number of organisations that were "consulted" before the proposals were published. This particular consultation was brief and informal and ended with a promise, subsequently breached, that everyone would be kept informed about the next steps. That is in contrast to the Law Commission's pre-meetings with government - the Cabinet Office alone attended at least 17 separate meetings and there were numerous meetings with the Attorney General's Office, Home Office, 'Multiple Government Departments', the CPS, the MoD, HMRC, and others - in all, some 30 odd meetings with government departments. By contrast, the consultation with journalists and organisations whose primary interest is in freedom of expression was cursory and informal. This seemingly weighted and partial pre-consultation process, can only risk disadvantaging citizens in terms of the justification behind the proposals that resulted.

1.3 The need for the consultation - summary of GNM views

We do not agree with the attempt within the consultation to equate the publication of "open data" - tightly defined within parameters set by the government of the day to the general public and media on equal terms - with transparent and open and government. The central objective of public interest journalism is to hold the government of the day to account for the power that it holds and exerts over society. It is not to report on data that is released by the government on its own terms.

There is no evidence of any pressing need presented in the CP to change the existing regime, save to update some outdated terminology. Many of the changes proposed in this consultation pose a serious threat, whether directly or by the chilling effect of criminalising certain conduct, to public interest journalism. If any of the changes proposed in this consultation that aim to lower the damage test or widen the potential ambit of the offences are brought into force, a clear public interest defence must be introduced in parallel into UK law.

GNM agrees that espionage or spying for a hostile state should remain a criminal offence and that where disclosures of official information cause actual harm, this may outweigh the freedom of expression rights in public interest journalism. However, there is a balance to be struck here, and GNM submits that proof of actual harm is where the correct balance lies. Further, to best protect official data, GNM submits that the government should focus in the first instance of

practical matters such as (a) proper security; and (b) a clear classification of what is secret / confidential / official data. Secondly, there are civil law actions and remedies available that suffice in the case of most leaks and unauthorised disclosures of official data, using the law of confidence or, where appropriate, pre-publication injunctions. Criminal laws and criminal sanctions should be a last resort reserved only for the most serious of cases, where actual harm results.

We recognise the need for some modernisation, and point to some limited, and welcome, changes within the proposals. However, it is noteworthy the degree to which the language and changes being proposed in the CP suggests radical reform of the existing law that would take the punitive elements of a revised legal framework back to an early 20th Century position, whilst significantly expanding the type of material covered by the new law. The LC's proposes a high degree of elasticity of new concepts that can potentially mean anything ministers want them to mean at any given time.

We are concerned about the introduction of proposals relating to capturing "*sensitive economic information relating to national security*". We are not clear what the proposals intend to catch within this provision - it could include trade deals, leaks of the budget and more. We believe that it must be envisaged to capture more that simply matters of straight national security, which are already picked up in existing definitions. We note the Government's previous attempts to crack down on leaks of Brexit negotiations and we are concerned that the new powers would be used to stifle reports that are embarrassing to Government in relation to their European negotiations, such as the leaked May 2017 story about the Prime Minister meeting the European Commission President. This kind of censorship would be dramatic and of serious detriment to the exercise of democracy.

In the OSA 1911 section, where the existing term "*useful to an enemy*" term is concerned, the words "useful to an enemy" have effectively provided the journalist with their public interest defence as well as making it clear that this is about espionage or spying. The proposal to change this term and replace it with "useful to a foreign power" is deeply troubling, as it is a term that could cover almost anyone, including allies. It also appears to start to blur any distinction between what are supposed to be offences of "espionage" or spying and offences of leaking secrets.

The proposals also represent a dramatic expansion of the grounds on which the Guardian, its editor and journalists could face prosecution, significantly broadening what has traditionally been thought of as espionage.

Similarly for the OSA 1989, going from a damaging disclosure to being 'capable' of damaging is a significant weakening of the test. It means that a disclosure which is *unlikely* to cause damage may nevertheless be an offence because in circumstances that are highly unlikely to ever arise, it *might* cause damage. This may mean that if a journalist has been told by an official that a disclosure would be damaging, but has good reason not to believe it, they might still commit an

offence - because having been *told*, they may now have reasonable cause to believe that it is 'capable' of being so. The Law Commission seems entirely unaware that, day in day out, FOI tribunals are dealing with the question of whether disclosures are 'likely' to harm defence, international relations, law enforcement - without causing the enormous harm they see as inevitable.

If leaks of "really highly secret" information are to be further criminalised, the test of actual harm should be retained alongside the implementation of a parallel express public interest defence available to both the leaker and / or any publisher. Such a test would be along the lines that "the defendant reasonably believed that publishing the information was in the public interest" (the Defamation Act 2013 test) or that "in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest" (s 55 Data Protection Act test).

Even if the current test remains unchanged, consideration should still be given to the inclusion of an express public interest defence into the regulatory environment in the UK. GNM rejects the Commission's standpoint that there are too many difficulties involved in implementing a public interest defence.

The CP deals with relevant domestic and European law at Chapter 6. However, it does so from a narrow perspective - any discussion of protecting official information needs to take place in a proper, wider, freedom of expression context. The vital role of the media in a democratic society is recognised by domestic law and Strasbourg jurisprudence. The press has long been accorded the broadest scope of protection in the European Court of Human Rights ("ECtHR") case law, including with regard to whistleblowers and confidentiality of journalistic sources. We believe that the Law Commission substantially underplays the freedom of expression elements - and therefore risks breaching existing law.

The DA-Notice committee has proven to play an important role in handling confidential information prior to publication, and we encourage Law Commission to engage with this in a way that allows the media and the intelligence agencies to use this forum in a positive way. .

1.4 Snowden

A number of key practical conclusions can be drawn from the Guardian's experience from the Snowden disclosures, which are relevant to any discussion of how to protect official information in the digital age, and we outline these below. There was a clear and unarguable public interest in the matters that the Guardian reported on and no harm, despite much rhetoric, has ever actually been shown.

At a time of huge political instability in North America, the fact that we know

about - and can hold checks and balances against the use of - surveillance capabilities that could be used against domestic citizens in the United States, is due to responsible reporting of the Snowden revelations. Yet the initial reaction from many politicians in the UK was to attempt to silence our reporting. This desire to immediately stifle the dissemination of information should be challenged, and balanced against the public interest of citizens knowing how power is exercised by those in positions of power and authority.

As a result of the Snowden disclosures, there were a plethora of legal challenges and independent reviews that questioned the existing legislation and intelligence practices, which were found to be seriously deficient and in some cases, illegal. The Home Secretary, now Prime Minister, acknowledged the need for a new legislative framework for surveillance, which has now been passed in the form of the Investigatory Powers Act.

2. Detailed introduction

It is essential that the Official Secrets Acts 1911 and 1989 (the OSAs) work for the public good, within the context of our democracy. That includes the crucial rules that protect genuine national secrets - we fully recognise the need for sensitive treatment of certain categories of highly confidential information that has implications for the national interest. GNM therefore welcomes the opportunity to comment on this CP.

We have responded to the parts that we believe are most directly linked to the activities of our journalists. In particular, we focus on the rights and freedoms of the media to report on issues in the public interest. Given the scope and premise of the CP, GNM has decided not to respond to specific questions or provisional conclusions, as opposed to setting out firstly what it considers to be a number of relevant background considerations not or not fully covered by the CP, followed by setting out a number of specific concerns it has about some of the proposals on the CP, which it believes have the capacity to impact adversely on journalists and journalism. We also set out some of the stories that have been published by the Guardian which are clearly in the public interest, but which may not have ever come to light if the proposals in this CP were in place at the time they were published.

In our submission, we will endeavour to set out the crucial role that experienced professional responsible journalism plays in disseminating information in the wider public interest, versus the role of individuals and state actors, for whom the leaking of mass online dataset is often done in their own personal interest. We believe that, where a legitimate public interest has been responsibly identified, reporting via leaks of official data should be protected and certainly not subjected to the risk of criminal prosecution.

2.1 The trend toward silencing journalism

Successive Parliaments have attempted to use reviews and regulatory instruments, to silence legitimate sources and whistleblowers. A report published by the Institute of Advanced Legal Studies[4], found that,

> *"The UK Government has, in recent years, pursued a number of policies and legislative proposals that have substantially weakened protections for sources. Most urgently, these include the Investigatory Powers Act that has recently become law… Technological change means that journalists, freelancers and publications are faced with previously unprecedented difficulties in protecting their sources. The technological protections for sources have not kept pace with the ability of states and other actors to use technology to intercept or monitor communications…*
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> *"Working investigative journalists and media lawyers, many with several decades of experience, are profoundly concerned about the growing technological and legal vulnerability of confidential sources including whistleblowers, the protection of whom is essential to the pursuit of responsible journalism in the public interest. There is a need to strengthen whistleblower protection legislation in the UK…"*
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> *"It is vital that any new legislation on official data, official secrets and espionage - as proposed by the Law Commission in February 2017 - protects journalists and whistleblowers who disclose information in the public interest."*

These moves to restrict whistleblowing and leaking form part of a wider move to restrict the flow of information within democratic life, and to centralise power within certain sections of government.

A recent memo by the Cabinet Secretary[5] ordered that "*Anyone found to have leaked sensitive information will be dismissed, even where there is no compromise of national security…. The prime minister has directed that we urgently tighten security processes and improve our response to leaks…*" The proposed introduction of inchoate offences in the 1989 Act, together with a lowering of the test of harm, would appear to allow this sort of conduct to be criminalised. The conflation of the standards that should be applied to matters of national security and the standards that should apply to all other government business is extremely dangerous. It signals a will to silence legitimate journalism and debate. Criminalising leaks should be reserved for only the most serious and damaging of leaks. Other situations should, where appropriate, be covered by injunctions and civil remedies.

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[4] supported by the Guardian http://ials.sas.ac.uk/research/research-centres/information-law-policy-centre/research/journalists%E2%80%99-sources-surveillance

[5] https://www.theguardian.com/politics/2016/dec/04/government-memo-brexit-leaks-leaked-cabinet-secretary

The right of the press not to bow to the will of the state was expressed eloquently in 1852 when John Thadeus Delane, editor of *The Times*, wrote two editorials rejecting advice from soon-to-be prime minister Lord Derby that reporters adopt moderation and show respect for power if they expected to keep its influence in Parliament. "If in these days, the Press aspires to exercise the influence of statesmen, the Press should remember they are not free from the corresponding responsibilities of statesmen," Lord Derby said[6]. Delane's response remains as relevant today as it did then:

> *The first duty of the press is to obtain the earliest and most correct intelligence of the events of the time, and instantly, by disclosing them, to make them the common property of the nation. The statesman collects his information secretly and by secret means keeps it back; he keeps back even the current intelligence of the day with ludicrous precautions, until diplomacy is beaten in the race with publicity. The press lives by disclosures; whatever passes into its keeping becomes a part of the knowledge and history of our times; it is daily and for ever appealing to the enlightened force of public opinion—anticipating, if possible, the march of events—standing upon the breach between the present and the future, and extending its survey to the horizons of the world. The duty of the Press is to speak; of the statesman to be silent. We are bound to tell the truth as we find it, without fear of consequences.*
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> *A free independent press should not cover only those subjects and materials that those in government and its supporters approve of. The press exists to serve its readers, to expand the political discussion beyond what custom, taboo and political tradition allow, and most important, to scrutinize the permanent government in all its guises. If the press stops sharing what it has learned with its readers, it becomes an adjunct to power instead of an independent navigator.*[7]

The difficulty that journalists have had in gaining access to government ministers throughout the 2017 general election campaign is another example of how the politicians seek to close down the parameters of democratic debate.[8]

Another example is the new Digital Economy Act 2017 - which requires that Ofcom must share with the Secretary of State documents it is about to publish - and is symptomatic of increasing government oversight and control over information released by a supposedly independent, arms-length regulatory body.

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[6] quoted in Reviving the Fourth Estate: Democracy, Accountability and the Media, p 24, by Julianne Schultz, referenced by Jack Shafer, POLITICO, Oui, Journalists Should Report on Hacked Emails, 8 May 2107, http://www.politico.com/magazine/story/2017/05/08/journalists-report-hacked-emails-macron-clinton-wikileaks-215112

[7] Jack Shafer, ibid

[8] http://www.newstatesman.com/politics/june2017/2017/04/theresa-may-s-stage-managed-election-campaign-keeps-public-bay or https://www.theguardian.com/politics/2017/may/02/theresa-may-liberal-democrats-defectors-south-west-stick-with-tories or http://www.pressgazette.co.uk/editor-says-ban-on-print-media-filming-theresa-mays-visit-is-archaic-as-local-reporters-told-not-to-take-video/

The government's proposed anti-radicalisation commission[9] that Theresa May launched in the wake of terror attacks in Manchester and London introduced a range of measures, many of which were of value. We fully support the government in the reduction of terrorism. However we also have concerns that measures must be examined for their effectiveness in the reduction of terrorism and their further consequences - here we focus on consequences for journalists. The aim of the new commission is to '"monitor and expose" Trojan horse-style extremism and extremists in the public sector and wider society. We note that this government has already attempted to reintroduce elements of the 1987 Broadcasting Act,[10] which would have meant that broadcasters had to pre-vet content with Ofcom before broadcasting. These proposals were not adopted, but we are concerned that the anti-radicalisation agenda could have equivalent censorious and disproportional consequences.

We also anticipate the introduction of a digital charter, in line with the Conservative 2017 manifesto, which has the potential to see the government compel online platforms to over-block content news and journalistic content in the name of anti-radicalisation. We note also that, because such a programme would be non-legislative, Parliament would not have scrutiny over the detail. And, because there is no transparency over the operations of platforms, and our individual social media accounts are private, we may never know that content has been blocked.

This background sets that scene for the consultation - a series of measures and attempted changes that seek to, or inadvertently, restrict the freedom of the media. While we agree that the current OSAs could and should be rationalised and made more coherent, it is essential that such changes do not stifle the publication of public interest news and current affairs. GNM does not believe that there is any evidence of the need to substantively alter the existing legal framework in the way suggested in the CP. Subject to some small changes to language - such as changing "enemy" to "hostile state" and updating plans, sketches to reflect electronic data - we believe the existing provisions in the OSAs provide the correct balance of interests, work well and should remain.

It has long been recognised in law that whistleblowing has a public value. Whistleblowers are essential for revealing sensitive information in the public interest but can expose themselves to serious risks and pressures. It is important that proper confidentiality protection is made available to those who collaborate with journalists, and provide public interest information. To chill whistleblowing is to undermine public access to information, the role of high quality journalism in strengthening our democracy.

2.2 Law Commission consultation process to date

[9] https://www.theguardian.com/uk-news/2017/jun/06/anti-terror-options-tpims-tagging-mass-surveillance

[10] https://www.theguardian.com/media/2015/jun/28/jesse-norman-nervous-about-notion-of-pre-screening-broadcasts

The consultation process began following a letter from the Rt Hon Matthew Hancock MP, the Cabinet Office Minister to Sir David Lloyd Jones, Chair of the Law Commission in July 2015, in which the Minister expressed that: *"the current legal framework for dealing with instances of unauthorised disclosure of government information is not always operating effectively. Overall they are mindful of a broad trend that the impact and sensitivity of unauthorised leaks has increased over time; the damage that can potentially be done has increased; and disclosures have become much easier as internet communications routes have become more prevalent and more easily anonymised. At the same time there have been some difficult cases where the need to prove damage has been problematic, because producing sufficient evidence of damage to national security has been challenging given the sensitivities around disclosure. On a very practical level the Official Secrets Act 1989 does not cover the considerable changes that have occurred in technology, global networks and social media."*

It is noted, in passing, that, as far as the passage which has been underlined above is concerned, no evidence of any actual or hypothetical cases where the need to prove damage has prevented a prosecution going ahead, has been cited in the CP.

The Minister invited the Law Commission to undertake a study into these matters and to provide a report that sets out the current law, analysis of the operation of the law, to highlight any deficiencies, and make suggestions for improving the protection of official information. "*Our overall goal is a strengthened commitment to open government and transparency especially through open data, with clearer boundaries, and a safe space for policy discussion. I want us to be able to provide those handling sensitive HMG information with the clearest possible expectation of what is required of them, and in instances where things go wrong a clear framework that sets out the consequences."*

It is alarming that, at the heart of the initial letter establishing the Law Commission review, it is clear that the ministerial objective is fundamentally at odds with the objective of public interest journalism. As with the review of freedom of information law, commissioned by the same government minister, "open government" is conceived of as a commitment to the publication of "open data". We do not agree with the attempt to equate the publication of "open data" - tightly defined within parameters set by the government of the day to the general public and media on equal terms - with transparent and open government.

The central objective of public interest journalism is to hold the government of the day to account for the power that it holds and exerts over society. It is not to report on data that is released by the government on its own terms. These two opposing views will always be in tension, but the attempt in the CP to prevent the leaking of government documents, even where there is a clear public interest

justification to do so, ultimately undermines the process of good government.

GNM has already expressed concern about the process of consultation by the Law Commission that preceded the publication of the CP[11]. In its report, the Law Commission listed the Guardian amongst a number of organisations that were "consulted" before the proposals were published. This particular consultation was brief and informal and ended with a promise, honoured only in the breach, that everyone would be kept informed about the next steps. Since then, the Guardian has learned[12] that a substantial number of the Law Commission's meetings prior to publication of the CP were with government departments, specifically, though not exclusively with the Cabinet Office, with whom at least 17 separate meetings took place. In addition there were two meetings with the Attorney General's Office, 2 meetings with the Home Office, two meetings with Multiple Government Departments, two meetings with the CPS, and individual meetings with the MoD, HMRC, Treasury Counsel at the Old Bailey, Rupert McNeil (civil service), PSNI (phone call) (some 30 odd meetings with government departments). By contrast, there were just 18 meetings with those outside government[13].

In addition, a freedom of information request for copies of working papers submitted to the LC's review, found that working papers were submitted, but that *"some of the Working Papers relate to bodies listed in section 23(3) of the Freedom of Information Act 2000. Given that this is the case, this information is exempt information by virtue of section 23(1) of the Freedom of Information Act 2000. This is an absolute exemption and there is therefore no need to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information… we also hold a Working Paper that has been supplied to us by a security body listed in section 23(3) of the Freedom of Information Act 2000. Given that it has been supplied to us by such a security body, this information is exempt information by virtue of section 23(1) of the Freedom of Information Act 2000."*[14]

The fact that the Law Commission appears to have received extensive written briefings from the security and intelligence agencies that went on to form a significant part of this CP, is of significant concern. It appears that by the time the CP was published, the authors of the report had already received lengthy written and oral responses from stakeholders whose primary interest is in

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[11] https://www.theguardian.com/commentisfree/2017/feb/12/the-guardian-view-on-official-secrets-new-proposals-threaten-democracy

[12] in a partial response from the Law Commission on 23 March 2017, to a Freedom of Information Act request submitted by Rob Evans, 23 February 2017

[13] Alex Bailin QC, the Defence and Security Media Advisory Committee, Dr Ashley Savage (Liverpool University), Chris Saad (criminal law barrister), Public Concern at Work, Open Rights Group (telephone call), a roundtable at Matrix Chambers (attended by some representatives of media organisations' in-house legal departments and barristers from Matrix), the ICO, Sir Stephen Irwin, Dean Armstrong QC, Dan Hyde (a partner at Howard Kennedy), Dominic Grieve QC, Liberty, David Anderson QC, Keir Starmer QC, Simon McKay (criminal law barrister), Doughty Street Chambers and Old Bailey Judges.

[14] https://www.whatdotheyknow.com/request/working_papers_submitted_to_law#incoming-950538

increasing criminal sanctions for whistleblowers and journalists, whilst consulting in nothing more than a cursory and informal manner with journalists and organisations whose primary interest is in upholding key principles of freedom of expression. This does not appear to represent a fair or balanced consultation process, and is indicative of a CP that is tilted towards a regressive approach to open, transparent journalism.

3. Public interest journalism

Had the proposals in the CP been enacted in previous years, they would certainly have stifled or completely prevented some important stories. This section sets out stories which we believe would not have come to light.

3.1 Examples

1. Peter Francis was a police officer deployed in the 1990s by the Metropolitan Police Service's undercover unit, the Special Demonstration Squad, to infiltrate anti-racist groups. He has since became a whistleblower and was one of the sources for a number of articles published by the Guardian about the workings of the undercover unit. His disclosures through the Guardian have helped to bring about a judge-led public inquiry (the Pitchford Inquiry) into the misconduct of the undercover police officers, which was set up by Theresa May when she was home secretary. In 2014, it emerged that the police appeared to be investigating him over possible OSA breaches[15]. Peter Francis has himself spoken out about his concerns about the CP[16].
2. In 2009, among other documents Wikileaks released a UK document advising its security services on how to avoid documents being leaked;
3. In April 2010, Wikileaks released the US classified "Collateral Murder" video of a July 2007 airstrike by an Apache helicopter firing on and killing a group of civilians; if the CP proposals are carried through, and there was a similar incident involving a UK helicopter, it appears unlikely that details could be published without the risk of criminal sanctions;
4. In an article in 2010 entitled "David Miliband gave MI6 the green light to proceed with intelligence-gathering operations in countries where there was a possible risk of terrorism suspects being tortured, the Guardian has learned"[17] the story quoted a source "with detailed knowledge of Miliband's deliberations". This was part of a series of stories that showed not only how closely the agencies had become involved in the mistreatment of terrorism suspects, but also how their activities were

[15] https://www.theguardian.com/uk-news/2014/jan/13/police-channel-4-stephen-lawrence-undercover-spying; https://www.theguardian.com/uk-news/2014/jan/14/police-chief-apology-lawrence-whistleblower-documents
https://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2014/jan/17/undercover-police-and-policing-police-and-crime-commissioners

[16] https://www.theguardian.com/uk-news/2017/feb/12/uk-government-accused-full-frontal-attack-prison-whistleblowers-media-journalists

[17] https://www.theguardian.com/law/2010/sep/21/mi6-consulted-david-miliband-interrogations

sanctioned by ministers. That series of stories led directly to the coalition government establishing a judge led inquiry, work that has since been taken over by the Intelligence and Security Committee. It also led to the rewriting and publication of the guidance under which the agencies operate and, it seems, a change in their practices.

5. An investigation in 2012 into allegations of collusion between the police and the Loyalist terrorists who murdered six men in a bar in Northern Ireland in 1994 relied to a significant degree on leaked information: "The Guardian understands that at least five of the men arrested in the months after the shootings were not fingerprinted before being released without charge. No DNA swabs were taken from either of the two people arrested in 1996[18]. "One man, Gorman McMullan, who has been named as a suspect in a Northern Ireland newspaper[19], was arrested the month after the shootings and released without charge. He was one of the people who were released without being fingerprinted and no DNA swab was taken." The Police Ombudsman of Northern Ireland subsequently conducted a fresh investigation into the matter and concluded that there had been collusion between police and the killers.
6. The UK military's involvement in the running of a prison in Baghdad that was the scene of well-documented human rights abuses was disclosed by a number of former special forces personnel who had served there[20]:
7. MI5's involvement in the detention and interrogation of a British Muslim in Egypt - and the agency's knowledge that he was probably being tortured - was disclosed to us by a senior government official"[21].
8. Nick Hopkins' series of stories in 2012 on the performance and safety concerns relating to HMS Astute and its sister boats[22].

Additionally, stories such as those below, might become impossible to publish:

9. Stories about, for example, safety defects in Hercules helicopters: here[23] the story came out from an Inquest but if the information had resulted from a leak about this, would this be able to be published, if the MoD were refusing to act on it?
10. Supposing this story[24] had been about GCHQ spying on Angela Merkel's

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18 https://www.theguardian.com/uk/2012/oct/15/northern-ireland-loyalist-shootings-loughinisland

19 https://www.scribd.com/document/50616601/Sunday-World-also-Gagged-by-Northumbria-Police-Top-Cops-Gag-Newspaper-What-the-hell-have-have-Chief-Superintendent-Chris-Thomson-Temporary

20 https://www.theguardian.com/world/2013/apr/01/camp-nama-iraq-human-rights-abuses

21 https://www.theguardian.com/world/2009/mar/16/azhar-khan-torture-egypt

22 https://www.theguardian.com/uk/2012/nov/15/astute-hunter-killer-submarines-doomed; https://www.theguardian.com/uk/2012/nov/15/hms-astute-submarine-slow-leaky-rusty; https://www.theguardian.com/uk/2012/nov/16/hms-astute-sub; https://www.theguardian.com/uk/2012/nov/16/submarine-corrosion-cost-cutting-mod-memo;

23 http://www.telegraph.co.uk/news/uknews/defence/3241908/Hercules-inquest-MoD-guilty-of-serious-failure-over-deaths-of-10-servicemen.html

24 https://www.theguardian.com/media/2015/jul/02/wikileaks-us-spied-on-angela-merkels-ministers-too-says-german-newspaper

phone, rather than the NSA, could such a story be published if the CP proposals were enacted?

3.2 The Guardian's reporting of the Edward Snowden disclosures

The initial Guardian stories based on the Edward Snowden documents were predominantly, although not exclusively, US focused, and included:

- the disclosure that top secret US courts had ordered the US telephone company, Verizon, to hand over data on millions of calls, published on Thursday 6 June 2013. This was published after discussions with the White House. The Washington Post published a similar story.
- a further series of articles were published about a programme called Prism, a programme operated by the NSA, an intelligence agency of the United States Department of Defense, about the secret collection of data from Apple, Facebook, Google, Skype and others, published on 7 June 2013.
- the revelation that the UK Government Communications Headquarters ("GCHQ") had been able to see user communications data from the American internet companies, because it had access to Prism,[25] on Saturday 8 June.

Following the publication of these stories, a 'DA-Notice' was issued (albeit that the copy sent to The Guardian was sent to an email address that was not routinely checked). The Guardian went on to publish a number of UK focused stories but there was never any suggestion from the DA-Notice committee that anything the Guardian had published was considered to be damaging or endangering to life or security.

From approximately 14 June, for several weeks, the Guardian's senior editors were in a dialogue with representatives of the UK government about how to ensure that what we wanted to publish would not be damaging to national security, nor undermine the UK's intelligences services nor otherwise damage the state. The DA-Notice committee was consulted about every UK security or intelligence services story except the first G20 summit one (17 June 2013), which was considered to be very clearly not damaging. Former editor in chief Alan Rusbridger consulted with experts from within and outside the Guardian's staff before publishing anything that could possibly be represented as having the potential to damage national security. Guardian staff were in an open dialogue with members of the government (and, via the White House, the US intelligence agencies) about whether any material that was proposed to be published might be damaging.

Guardian staff took every decision on what to publish slowly and carefully. In nearly four months they published a handful of stories about GCHQ, and not a

[25] See time line here : https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline

single GCHQ document in full - they quoted small portions of documents. In total, they published less than one per cent of the material they received.

Before any reporting of the Snowden files began, Alan Rusbridger set out clear guidelines by which all Guardian journalists should work. These guidelines covered security and reporting. On reporting, the guidelines stated that nothing should be published or disclosed that was operationally damaging or in any way presented a risk to the safety of those involved in an operation. No names of people engaged in intelligence were to be used. Nothing was written about operations in Afghanistan or Iraq. No agents were named. These guidelines were shared with partner organisations New York Times ("NYT") and ProPublica before any agreement to work with them was reached. In nearly all the stories published by the Guardian, the main storylines were put in advance to Downing Street, the DA-Notice system, the White House or agencies. Their responses were taken into account on every occasion before stories were published.

3.3 Snowden and the public interest

Following the Guardian's publication of the Snowden revelations, there was a high profile and wide ranging debate about the competing public interests of privacy and security, and the legality of the intelligence agencies' activities which the Snowden documents exposed. The stories played a crucial role in highlighting a broad range of public interest considerations, explored in more detail below, but including a review by the Royal United Independent Services Institute (RUSI) that highlighted inadequacies in law and oversight and called for new legislation.[26] The then Home Secretary Theresa May ultimately agreed with this need for legislative change in the face of the revelations. These findings, and other evidence below, show beyond doubt the Snowden disclosures were in the public interest. The ongoing consequences of the theft and usage of tools that were deliberately created by the NSA - whose existence was first exposed by Snowden - to exploit known weaknesses in commercial IT software, to hold the National Health Service and other public and private organisations in the UK and across the world to ransom, is one such example.

At a time of huge political instability in North America, the fact that we know about - and can weigh up checks and balances against the use of - surveillance capabilities that could be used against domestic citizens in the United States, is due to responsible reporting of the Snowden revelations. Yet the initial reaction from many politicians in the UK was to attempt to silence our reporting. This desire to immediately stifle the dissemination of information should be challenged, and balanced against the public interest of citizens knowing how power is exercised by those in positions of authority.

Whatever disapproval there may have been about the Guardian's reporting of

[26] https://rusi.org/sites/default/files/20150714_whr_2-15_a_democratic_licence_to_operate.pdf

these stories, it is clear that what was published played a vital role in allowing and informing the debate on the amount of surveillance that the US and UK governments had carried out on their own citizens and foreign nationals. Widespread violations and abuse of the rights of citizens were shown to have been occurring without appropriate political or judicial oversight. Edward Snowden's point was that the US Congress itself was not just being kept in the dark, but was also being presented with misleading statements by senior personnel within the agencies hierarchy. There was clearly, as there will always be, a tension between the state and the press over what material was needed in order to inform a debate which many leading experts (including the President of the US, former Foreign Secretary Sir Malcolm Rifkind and former NSA director Michael Hayden) conceded was valuable and necessary.

In a Parliamentary debate on the Intelligence and Security Services on 31 October 2013, Dr Julian Huppert MP said:

> "The hon. Gentleman is absolutely right to say that it would be irresponsible to publish hundreds of thousands of documents without having a look at them. That is why I am so glad that that is what *The Guardian* has explicitly not done. It has taken a responsible approach and managed to prevent that. We can imagine what could have happened if there had been a WikiLeaks-style publication. The hon. Gentleman should be concerned about the fact that a contractor was able to get hold of all the information, and that is a serious failure from the NSA and a great disgrace. If it cannot protect information to that level of security, it should be very worried. There are, I think, 850,000 people who could have had access to that information. Was the NSA certain that none of them would pass it on to a foreign power? Frankly, passing it on to *The Guardian* is probably about the safest thing that could have happened to it.[27]"

The then director of public prosecutions ("DPP"), who was also responsible for formulating the 2012 CPS guidelines on when the media should be prosecuted, Keir Starmer QC, was interviewed by the BBC in January 2014 (after his retirement) about Snowden and the Guardian's reporting[28]. During that interview, he said that,

> "just because someone is a whistleblower it doesn't mean they haven't done anything wrong. You have to look at whether what they've achieved is greater than what they've done wrong - almost every case involves some wrongdoing… [I've] not seen anything the Guardian has published that would bring it anywhere near terrorist charges, but obviously there's an ongoing investigation. On the face of it I don't think anyone would be suggesting the Guardian should be prosecuted for offences."

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27 https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131031/halltext/131031h0001.htm

28 http://www.bbc.co.uk/iplayer/episode/b03p80j2/HARDtalk_Keir_Starmer_QC/

There also followed, as a result of the Snowden disclosures, a plethora of legal challenges and independent reviews that questioned the existing legislation and intelligence practices, which were found to be seriously deficient and in some cases, illegal[29].

On 6 February 2015, the Investigatory Powers Tribunal (IPT) held that British intelligence services acted unlawfully[30] by accessing millions of private communications, as collected in bulk by the NSA in the US, prior to December 2013[31]. The decision was the first occasion on which the IPT, the only UK court empowered to oversee GHCQ, MI5 and MI6, ruled against the intelligence and security services.

On 18 February, in a separate IPT legal challenge involving Reprieve and Amnesty International, the Government was forced to concede that the regime governing the interception, obtaining and use of legally privileged material violates the Human Rights Act.[32]

Subsequently, a number of NGOs including Big Brother Watch, Open Rights Group and English Pen brought a legal challenge in Strasbourg based around a breach of Article 8, principally through the indiscriminate use of Prism and Tempora. Separately, Liberty brought a challenge against GCHQ, MI5 and MI6 in the Investigatory Powers Tribunal, on similar but wider grounds [Articles 6, 8 and 10] to this challenge, including that there was an inadequate legal framework and what was done was not "in accordance with law."

In June 2015, David Anderson QC, the UK's Independent Reviewer of Terrorism Legislation, published his Report, A Question of Trust – Report of the Investigatory Powers Review[33] covering the activities of all 600 bodies with powers in this field, including the security and intelligence agencies.

The Report endorsed some of the recommendations of the Intelligence and Security Committee of Parliament ("Privacy and Security", March 2015). It also offered five principles and 124 recommendations to guide the development of a new comprehensive law on surveillance in the UK. The principles and recommendations aim to enable law enforcement and intelligence agencies to protect the UK while also ensuring that their powers are subject to limits in law

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[29] Here: https://undercoverinfo.wordpress.com/2015/04/11/gchq-mass-surveillance-threatened-in-echr-legal-case/
courtesy of Undercoverinfo and the Bureau for Investigative Journalism, is a list of legal cases, as at April 2015, submitted in relation to UK surveillance. Some are still awaiting a hearing. Updates have been included where judgements have been made.

[30] https://www.privacyinternational.org/?q=node/482

[31] http://www.theguardian.com/uk-news/2015/jun/22/gchq-surveillance-two-human-rights-groups-illegal-tribunal

[32] http://www.reprieve.org.uk/press/government-concedes-polices-on-lawyer-client-snooping-were-unlawful/

[33] https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/

and to compliance with human rights standards. In particular, Anderson called for a new legal framework to govern surveillance powers that will provide both capabilities and safeguards.

A further Independent Surveillance Review, conducted under the auspices of the Royal United Services Institute (RUSI) (see above), was commissioned in March 2014, by then Deputy Prime Minister and MP, the Rt Hon Nick Clegg. The RUSI report highlighted inadequacies in law and oversight and called for new legislation to provide a new democratic mandate for digital intelligence that provides "a clear and legally sound framework within which the police and intelligence agencies can confidently operate, knowing that at all times they will be respecting our human rights".

These cases and reviews overwhelmingly demonstrate the need for more transparency, scrutiny, oversight and reform. The results of these reviews, and in particular the rulings from the IPT and other judicial bodies, ultimately led to the repeal of much of the Regulation of Investigatory Powers Act 2000 ("RIPA") and its replacement with the Investigatory Powers Act 2016. Despite GNM's clear and ongoing concerns about about powers in the Act that relate to the ability of the policy and intelligence agencies to access the data and content of journalists, the Act is much more transparent about what the intelligence and security services can do around data collection on UK citizens.

But these issues only came to light because the Guardian and its journalists (and other newspapers in the United States), were willing to challenge and scrutinise what was going on. None of this reform would have been possible without the whistleblowing of Edward Snowden.

3.4 The Guardian as a moderating force

In the modern world of digital publishing, there are very low barriers to whistleblowers - who might be frustrated by attempts to prevent the publication of stories based on their source material – from self-publishing those files online, unfiltered and unmediated by experienced journalists.

Non-traditional digital intermediaries like WikiLeaks operate to a different set of standards to the traditional news media. WikiLeaks is not a news organisation. It often posts (largely) unmediated and unredacted source material online, without any form of consideration, vetting or editing of that material for its potential danger to the public. Such organisations are completely unaccountable to any code of ethics or system of regulation. Wikileaks does not engage in considered multi-article reporting. It does not interview for news stories or provide meaningful context or analysis. It does not, in short "make an understandable story out of the mountain of information" it has gathered[34].

[34] Jonathan Peters, lawyer and research fellow at the Missouri School of Journalism, Wikileaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form, 63 Fed. Comm. L.J. 667, 680 (2011)

There have, for example, been public criticisms of the approach taken by WikiLeaks to redactions as being an "afterthought" and having being done hastily[35]. When WikiLeaks published the Afghanistan logs in July 2010, it withheld some 15,000 that it said were especially sensitive, but did not remove the names of Afghan intelligence sources from some of the published documents[36]. Assange's former "right-hand man" Daniel Domscheit-Berg has said that Assange acted negligently in this regard[37]. David Leigh, the Guardian's former investigations executive editor, told FRONTLINE of meetings he attended with Assange in the run up to publication of the Wiki war logs, when concern was expressed about redactions: "And we said: Julian, we've got to do something about these redactions. We really have got to." And he said: "These people were collaborators, informants. They deserve to die." And a silence fell around the table."[38] Julian Assange has always denied these accusations.

The more restrictive the government is towards established media outlets with clear standards and policies, the more likely it is that future leakers or whistleblowers will bypass traditional organisations and publish through channels which they regard as "freer" and less accountable – or even publish directly to the web themselves.

The Guardian was one of a number of news organisations involved in reporting on information provided by Edward Snowden, as the NYT was also publishing the same details in parallel. This meant that - even if the Guardian had been prevented or chilled from publishing the highly sensitive information about GCHQ, this could still have been disclosed by others and - once disclosed would immediately be widely distributed across the internet. The global nature of communications means that attempts by the UK government to block or chill the publication of material through the use of prior restraint or criminal law threats, cannot prevent publishers in other jurisdictions (or bloggers or new media or individual whistleblowers) from publishing material which is then freely accessible to readers living in the UK.

As the academic and Guardian columnist Emily Bell wrote in relation to the recent leaking of UK intelligence materials being leaked by the US intelligence agencies to journalists at the New York Times,

> "the Podesta emails, the Russian dossier and the Manchester intelligence material all illustrate ways in which digitisation is altering the news cycle. Digital storage and the shifting of conflict zones into cyberspace mean leaks are only going to grow in their frequency and volume, and the motivations of the leaker are already becoming part of each story. And as leaking and hacking increase, news organisations will become known both for what they will, and won't publish.

[35] Introduction, PBS Frontline WikiSecrets (May 24, 2011), http://to.pbs.org/itvaMf.

[36] Peters, ibid, 684

[37] Interview: Daniel Domscheit-Berg PBS Frontline WikiSecrets (May 24, 2011), http://to.pbs.org/itvaMf

[38] Introduction, Peters ibid

The norms for news publishing could also be shaped more directly by the American sensibility, as US-owned entities dominate the growing anglophone news environment. Social platforms, too, operate to an American standard of free speech, which is why violence is far more tolerated than nudity, which is not…
…In the panopticon of the modern news cycle, few things strain the ethics and judgment of news organisations as much as terrorism and the issue of national security. The hideous attacks in Manchester last week were played out often in graphic detail widely available through free social media channels. It was planned, like other attacks before it, to fall squarely in the middle of the UK election cycle. Journalists and editors have an unprecedented volume and variety of external pressures leaning on them to shape and manipulate the news cycle. What we learned last week is that it is easier to publish internationally, than to be an international publisher."[39]

3.5 Political reaction to whistleblowing

As outlined earlier in this response, GNM's experience in the US, throughout the reporting of the Snowden stories, contrasted starkly with its experience in the UK, where the UK government constantly sought to frustrate the publication of stories that it did not like or approve. In the US there was throughout a mature and direct pre-publication dialogue with the American intelligence services and government about the content of stories. These direct conversations pertained to highly technical and complex material, leading to direct conversations between editors, highly specialist reporters and 'subject specialists' at the agencies.

The Guardian forcefully defended the publication of the Snowden stories: there were calls by some MPs and others for Alan Rusbridger and the editors and journalists involved to be jailed for treason or terrorism. On 22 October 2013, in a debate in the House of Commons, the Member of Parliament for Skipton and Ripon, Julian Smith, focused on what he called "a narrower and darker issue: the responsibility of the editors of the Guardian for stepping beyond any reasonable definition of journalism into copying, trafficking and distributing files on British intelligence and GCHQ. That information not only endangers our national security but may identify personnel currently working in our intelligence services, risking their lives and those of their families."

The Guardian's loyalty to the UK was continually questioned, journalists were threatened with jail and Alan Rusbridger was called before the home affairs select committee and asked whether he loved his country. The Guardian was eventually forced to allow intelligence service operatives to supervise the

[39] https://www.theguardian.com/media/2017/may/28/nyt-leaked-manchester-material-reveals-transatlantic-differences

destruction of journalistic material that it held in the UK. The partner of Glenn Greenwald, then a columnist for the Guardian, was detained for nine hours at Heathrow, and encrypted journalistic material that he was carrying was confiscated. The Metropolitan Police implied the Guardian was under investigation - for what, and for how long was never made clear.

The outcome of conversations with the US intelligence agencies were constructive, and led to the redaction of details and documents before publication. The CIA, the FBI and the NSA as well as the Department of Defense all had accessible and available press offices, which enabled documents to be put to them in a timely fashion. Indeed, one of the positives that has come out of the Snowden disclosures is that all of the UK's intelligence services now have much better press office operations.

The US Government has said that it will not prosecute "newsgathering and legitimate news reporting" as a criminal act[40]. Notwithstanding the purported approach of the current US President, historically the US Department of Justice has focused its fire on the leaker, not the outlet that publishes the information, and that has led to more constructive practices. American journalists "almost always call us before they publish classified information" to check if disclosures could put lives at risk, said former FBI chief, James Comey.

4. The proposed changes and the current system

The utmost care must be taken when considering any changes in relation to the protection of official data, to ensure an appropriate balance between the protection of official government information, and the process of responsible reporting by journalists of matters relating to the state, even when that may involve in extremis, leaked official government information. The changes proposed in this CP do not represent such a balance, and would leave the Guardian and other responsible news organisations far more vulnerable to prosecution, under both the OSAs. The creation of such increased risk would have an undeniable chilling effect and may actually increase the public dissemination, in less careful, responsible ways, of the very information the government seeks to control.

In the context of Snowden, for example, if the term "useful to the enemy" was removed and replaced with "useful to a foreign power", there is the potential for a public interest story about GCHQ spying on Angela Merkel's phone, to be caught within that wider definition[41]. Similarly, any story about the existence of

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[40] For example, recently the (former) FBI Director James Comey during a Senate Judiciary Committee hearing on Wednesday 5 May 2017, see http://www.huffingtonpost.com/entry/james-comey-wikileaks-journalism_us_590a0516e4b02655f8432c13?ncid=tweetlnkushpmg00000021 : "All of us care deeply about the First Amendment and the ability of a free press to get information about our work and publish it," .. "To my mind, it crosses a line when it moves from being about trying to educate a public and instead just becomes about intelligence porn, frankly."

[41] the actual story was about the US NSA spying on Merkel's phone https://www.theguardian.com/us-news/2015/jul/08/nsa-tapped-german-chancellery-decades-

access by GCHQ to information from fiber optic underseas cables[42] would also be subject to enhanced criminal sanctions. By contrast, such stories would not fall within the auspices of the existing 1911 OSA because of the current "useful to the enemy" wording. They would not fall within the auspices of the 1989 OSA because (i) the information was not leaked by any relevant UK "insider"; and (ii) was not damaging.

It is noteworthy the degree to which the language and changes being proposed in the CP mirrors the wording of the US Espionage Act of 1917. This Act was based on the US Defense Secrets Act of 1911, which was itself based on the Official Secrets Act 1911. The only known invocation of the Espionage Act against the media arose in 1971 in the context of the failed attempt by the Nixon Administration to obtain an injunction to prevent publication by the New York Times of what are now known as the Pentagon Papers. The case eventually reached the US Supreme Court, which ruled that the government had not met its burden of showing that it was entitled to pre-publication injunctive relief. Although there were mixed views amongst the justices, Justice Black who gave a concurring opinion, wrote:

> *"Madison and the other Framers of the First Amendment, able men... that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."*

Nonetheless, if the US diplomatic cables or war logs published by WikiLeaks had belonged to the UK government, rather than the US, there is little doubt that the actual harm test would have easily been discharged by the government.

4.1. Prior restraint

In the UK, the DA-Notice committee exists, in addition to the standing Notices, to facilitate a process of voluntary consultation before publication on whether information may be damaging to a range of national security scenarios. The DA-Notice committee is voluntary and has no legal authority. Even after a dialogue with the committee has taken place, the decision as to whether to publish a given story lies solely with the editor of publisher of the story. The DA-Notice system has over time served as a useful forum where defence, intelligence and media representatives can meet and discuss things; it can also serve as a valuable way of checking sensitive matters in advance, so as not to risk inadvertently damaging national security or operations. The DA-Notice committee has proven itself to be independent of government. For example, in relation to a Guardian

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wikileaks-claims-merkel

[42] see for example https://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa

story about the Astute Submarine programme[43], while the The MoD called the D-Notice secretariat to try to get them to pull this story, the D-Notice secretariat pushed back, to say that while this story was embarrassing to the UK, it did not represent a threat to national security.

However, in relation to the Snowden disclosures, there was a sense that DA-Notice system was a substitute for good direct communication between the intelligence services and journalists, to the detriment of both parties. The interactions between the DA-Notice committee and the publishers are, in theory, confidential in nature. However, the Guardian has previously expressed concerns that confidential conversations about particularly sensitive stories may be a prelude to injunctions and other forms of prior restraint by government in the name of a vague and broad ranging notion of national security. Such concerns are evidenced by historic interventions such as the 1987 injunction against the BBC[44] and by the Cabinet Secretary's threat during the Snowden disclosures to the Guardian that such restraint may be imposed.

For the DA-Notice system to work there has to be trust that:

- there is an effective and real separation, or Chinese wall, between the DA-Notice officials and the intelligence services;
- an approach to the DA-Notice officials will not trigger pre-emptive action, such as an injunction, by government;
- the officials will make independent judgments about the agreed criteria and will not be "leaned on" by the agencies.

The system must remain advisory and non-binding and the ultimate judgment on what to publish must remain with editors. Given the wide terrain across which the intelligence agencies now operate, and the broad legal framework within which they work, the Guardian has always been extremely concerned about attempts to strengthen the use of prior restraint by government to prevent the debate of difficult, sometime embarrassing issues, which are nevertheless in the public interest. The potential availability of a pre-publication civil injunction, unlike in the US[45], and the absence of any public interest defence, meant in the Snowden disclosures that such a full and frank dialogue with the UK government was hard to achieve. In certain situations, although the existence of a pre-publication injunction regime has problems associated with it, because of the chilling effect it creates and the way in which it can stifle attempts at dialogue before publication, it remains a preferable and more proportionate route than criminal proceedings.

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[43] https://www.theguardian.com/uk/2012/nov/15/hms-astute-submarine-slow-leaky-rusty

[44] See, for example, *Secrecy and the Media: The Official History of the United Kingdom's D-Notice*, by Nicholas John Wilkinson, p 422 onwards - where the then government sought an injunction against the BBC Radio 4 programme "My Country: Right or Wrong".

[45] The idea that prior restraint could operate on the media has been complete anathema to the US since the US supreme court judgment in the Pentagon paper case back in 1970s

During the Snowden reporting, once the UK government effectively forced the Guardian's reporting out of the UK, it lost a degree of influence over the reporting. Reporting was done in collaboration with ProPublica and the New York Times. On more than one occasion, the Guardian placed a higher value on the contacts between the New York Times and the White House than on any parallel conversations with the UK government. By seeking short-term control over the Guardian, the UK government lost long term influence. It was not clear that the government had fully grasped the complexities of the new media environment. The more restrictive that governments are towards mainstream traditional media, the greater the likelihood that future leakers or whistleblowers will bypass traditional organisations and publish through channels which they regard as more free - or even publish directly to the web themselves, with no attempt to filter or curate. The Law Commission should be wary of the impact that its knee jerk calls for enhanced criminal sanctions will have in practice.

4.2 The retention of data by government

Another issue highlighted by the Snowden and Wikileaks revelations is that governments retain too much data, which they then unnecessarily classify. It is clear that this haystack of data is increasingly hard for intelligence agencies to keep secure. The leaking of sensitive information in relation to the live investigation into the attack on Manchester demonstrates how the sharing of intelligence, between apparently close allies, can lead to deep distress, hurt and concern for the families of victims of that attack, as well as hamper the progress of the police and security services investigation on the ground.

In 2013, Edward Snowden leaked classified information from the NSA and GCHQ[46]. US officials suggested that over 1.5 million NSA documents, including 15,000 or more Australian intelligence files and at least 58,000 British intelligence files had been leaked (or stolen, depending on whose side you are on). As David Davis MP said in debate on 22 October 2013, what should have been of concern was the fact that "UK Government secrets are accessible to hundreds of thousands of US Government employees? Perhaps that is why Mr Edward Snowden, a 29-year-old contract employee of three months' standing, was able to access GCHQ files from Hawaii." The Guardian's understanding at the time was that all the Edward Snowden material originated from US NSA files, and that GCHQ had shared all of this with NSA analysts, including detailed information about UK intelligence officers and operations. The Guardian was informed during its discussions with government that there were as many as 850,000 people cleared to look at the material to which Snowden - as a contractor rather than employee of the US government - had access.

We therefore suggest that the following should be considered:

- over-classification of official data should be avoided;

[46] http://www.theguardian.com/us-news/edward-snowden

- the categories of those who can access "really highly secret" information needs to be limited, carefully managed and documented;
- data-sharing between governments should be done on a more restricted basis;
- proper e-security measures need to be employed.

5. Applicable law and relevant international standards[47]

5.1 Special protection for journalism as an element of free expression

The CP deals with relevant domestic and European law at Chapter 6. However, it does so from a narrow perspective. The purpose of this section of the GNM response is to make clear that any discussion of protecting official information needs to take place in a proper, wider, freedom of expression context.

The vital role of the media in a democratic society is recognised by domestic law and Strasbourg jurisprudence. The press has long been accorded the broadest scope of protection in ECtHR case law, including with regard to whistleblowers and confidentiality of journalistic sources. The ECtHR has repeatedly emphasised that safeguards within Article 10 of the European Convention on Human Rights protect not only the substance and contents of information and ideas, but also the means of transmitting it.

The special protection afforded to journalism as an element of the right of free expression is a settled principle within the jurisprudence of the ECtHR and has been widely recognised by many other international and regional human rights mechanisms. In its General Comment 31: *Article 19: Freedom of Opinion and Expression*,[48] the human rights committee observes, at § 13:

> *A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. [...] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*

The ECtHR has adopted a similar position on many occasions, having often held that "freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of

[47] GNM wishes to acknowledge that much of the substance of this section has been taken from an Intervention submission made by GNM to the ECtHR in the case of *Marian Girleanu v Romania*, Application No. 50375/09, which was drafted for GNM by Conor McCarthy (now of Monckton Chambers, then at Doughty Street Chambers)

[48] General Comment No. 34: Article 19: Freedom of Opinion and Expression CCPR/C/GC/34

particular importance" (*Goodwin v the United Kingdom*, (1996) 22 E.H.R.R. 123, § 29; *Jersild v. Denmark*, (1994) 19 E.H.R.R. 1, § 31). These principles have also been re-iterated in a range of Council of Europe instruments[49] as well as a number of other international declarations.[50]

The ECtHR has, on many previous occasions, recalled the need for "strict" or "careful scrutiny" of restrictions imposed on journalistic free expression (e.g. *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (2006) 42 EHRR 1024, § 114). Moreover, in *Bladet Tromsø and Stensaas v. Norway* (2000) 29 EHRR 125 [§ 64], the ECtHR held:

> *The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.*

In General Comment 34 on Freedom of Expression, the UN human rights committee has adopted an identical position (§ 36).

A vital function of the Guardian is to report on all matters of public interest. As has already been mentioned in this response, GNM recognises the importance of maintaining a fair balance between the competing rights of freedom of expression and those set out in Articles 10(1) and (2), the latter of which includes national security.

5.2 Defining journalism

One justification often advanced for not having an express public interest defence for journalists, focuses on perceived difficulties of definition. There have been concerns that such a defence might offer too wide a protection to too wide a group of agents. While most core international and regional human rights treaties do not distinguish journalists as a category of protected persons, international and regional human rights authorities do take account of the status of an individual as a journalist in determining the scope and nature of states' obligations in relation to such a person under international and regional human rights law. Many stakeholders have argued in favour of legal protections being defined in connection with 'acts of journalism', rather than through the definition of the professional functions of a journalist. These have bearings on

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[49] Resolution No. 2: Journalistic Freedoms and Human Rights 4th European Ministerial Conference on Mass Media Policy (1994); CoE Recommendation No. R (2000) 7 on the Right of Journalists not to Disclose their Sources of Information, CoE Declaration by the committee of ministers on the protection and promotion of investigative journalism adopted by the committee of ministers on 26 September 2007

[50] E.g. Inter-American declaration of principles on freedom of expression, approved by the Inter American commission on human rights during its 108 regular session and declaration of principles on freedom of expression in Africa adopted by the Inter-American commission on human rights 17 - 23 October, 2002: Banjul, The Gambia

the protection of both journalists and sources in the digital age[51]. In December 2013, the UN General Assembly adopted a resolution which outlined a broad definition of journalistic actors that acknowledged that:

> "*…journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression*" (UN General Assembly 2013: A/RES/68/163).

In 2014, the intergovernmental Council of UNESCO's International Program for the Development of Communications (IPDC) welcomed the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity, which uses the term 'journalists' to designate the range of "journalists, media workers and social media producers who generate a significant amount of public-interest journalism" (UNESCO 2014).

Many legal definitions of 'journalist' have been evaluated in an overly narrow manner, as they tend to emphasise official contractual ties to legacy media organisations, may demand a substantial publication record, and/or require significant income to be derived from the practice of journalism. This can leave confidential sources relied upon by bloggers and citizen journalists largely unprotected, because these producers of journalism are not recognised as 'proper journalists', even when their output is clearly public interest journalism.

Such definitions also exclude the growing group of academic writers and journalism students, lawyers, human rights workers and others, who produce journalism online, including investigative journalism. The growth of such acts of journalism is only likely to increase as the number of professional journalists falls, and gaps in the news ecosystem emerge.

There are many parallels between investigative journalism and the work undertaken by human rights organisations – organisations that depend upon confidential sources for information about human rights abuses. Such organisations now also often publish directly to audiences and are arguably engaged in 'acts of journalism'. However, there is a difference between reporting the news, writing an editorial, and being an activist.

In 2012, the UN Special Rapporteur on freedom of opinion and expression, Frank la Rue, said that journalists are "defined by their function and service":

> *"Journalists are individuals who observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole. Such a definition of journalists includes all media workers and*

[51] See for example Australian Attorney General George Brandis' defence of that country's data retention policies: http://www.smh.com.au/digital-life/digital-life-news/george-brandis-in-car-crash-interview-over-controversial-data-retention-regime-20140806-101849.html

> *support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play that role."*

This theme, namely that it is the *practice of journalism* rather than the *role of journalist* that should be protected, has also been recognised, for example, by the UN human rights committee: in its general comment 34 on interpreting state's' obligations under Article 19 of the ICCPR, the committee asserted that journalism is:

> *"a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere".*

The Council of Europe's committee of ministers recommendation 2000 states that

> "*a 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication".*

In 2011, the Council of Europe's new recommendation urged member states to adopt a broader notion of media, so as to account for the new digital environment. This recommendation goes beyond the notion of a journalist or journalism; it widens the concept of a protected category to:

> *"all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents,"*

The concept of who is a journalist has also been grappled with by the ECtHR. For example in *Tasz v. Hungary (2009) and Youth Initiative for Human Rights v Serbia*, the ECtHR extended the scope of those who could benefit from Article 10 protections to civil society groups, not just traditional journalists:

> *"The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate"*

However, the ECtHR acknowledges in its jurisprudence that Article 10 is a

qualified privilege not an absolute one and that those seeking Article 10 protections are obliged to uphold certain rights and duties. So, in *Stoll v. Switzerland (2007)*, the ECtHR declared that "all persons, including journalists, who exercise their freedom of expression, undertake *'duties and responsibilities'*, the scope of which depends on their situation and the technical means they use. Further, journalists and anyone enjoying Article 10 safeguards when reporting on issues of general interest are expected to act in *good faith* and "*provide reliable and precise information in accordance with the ethics of journalism*." In *Bedat v. Switzerland (2016)*, the ECtHR ruled that a criminal conviction of a journalist for having published documents covered by investigative secrecy in a criminal case was **not** a violation of Article 10. Article 10 protection:

> "*is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means (...); the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly"* (§ 50).

In Stankiewicz and ors v. Poland (2014), the ECtHR stated that the safeguard afforded by Article 10 to journalists is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. However, if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, journalists could be unduly deterred from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings on the media in general. In this case the journalists complied with the tenets of responsible journalism in the public interest. Their research was conducted in good faith and complied with the journalistic obligation to verify facts from reliable sources. The allegations were underpinned by a sufficient factual basis, and the article's content and tone were balanced. The journalist gave as objective a picture as possible of the Head of the Private of Office of the Minister for Health, having approached a number of sources, and offered to present his version and to comment on the allegations raised. His version of events was present in the article.

In her analysis of attempts to define what makes a "journalist" in the context of USA shield law debates, Karen Russell[52] argues that: "Shield laws should be

[52] Russell L 2014, "Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term "Journalist" and in Passing a Long-Sought Federal Shield Act?" Oregon Law Review, 93, pp 193-227 cited by Posetti in her 2017 Report and by Unesco in World Trends in Freedom of Expression and Media Development:Special Digital Focus 2015: http://www.unesco.se/wp-content/uploads/2016/01/World-Trends-in-Freedom-of-Expression-and-Media-Development-2015.pdf

designed to protect the process through which information is gathered and provided to the public, not the status of the individual or institution collecting it". She notes that a number of jurisdictions in the USA already define journalism in such a way. In the state of Nebraska, for example, the shield law states "[n]o person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public" shall be required to disclose a confidential source or information provided by that source in any federal or state proceeding.
Thus, it is submitted that it is perfectly possible to arrive at a definition that focuses on process ('responsible") and outcomes ("in the public interest") which is not over-wide or uncertain.

5.3 General international standards

In the Council of Europe Committee of Ministers recommendation No. R (2000) 7 to member states on the right of journalists not to disclose their sources of information, "journalist" is defined as "any natural or legal person who is regularly or professionally *engaged in the collection and dissemination of information to the public via any means of mass communication*" (emphasis added).

Journalism, by its very nature, requires the gathering, collation and storage of information, some of which may be sensitive. Indeed, in respect of matters of public interest a good deal of this information may be sensitive and otherwise confidential. The gathering and retention of information or other journalistic material (even if not disseminated) is a fundamental element of journalism and subject to the rigorous protection of the right of free journalistic expression just as the dissemination of information and ideas by journalists is subject to such protection. In consequence, measures which restrict, hamper or discourage journalists from researching and retaining such information must (regardless of whether the material in question is published) be subject to precisely the same rigorous review as restrictions on the dissemination of journalism.

The importance of researching and collating information, even where it is not published, is particularly important for investigative journalists and is expressly recognised by recitals of the Council of Europe Declaration by the Committee of Ministers on the Protection and Promotion of Investigative Journalism:[53]

> "[3.] Convinced that the essential function of the media as public watchdog and as part of the system of checks and balances in a democracy would be severely crippled without promoting such investigative journalism, which helps to expose legal or ethical wrongs that might have been deliberately concealed, and thus contributes to the formation of enlightened and active citizenry, as

[53] https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl-26.09.2007&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true

well as to the improvement of society at large;

[4.] Acknowledging, in this context, the important work of investigative journalists who engage in accurate, *in-depth and critical reporting on matters of special public concern, work which often requires long and difficult research, assembling and analysing information, uncovering unknown facts, verifying assumptions and obtaining corroborative evidence"*. (emphasis added)

As outlined in the Declaration, the protection afforded by the right to free journalistic expression is as crucial in respect of the collation and storage of information by journalists or news organisations – even where such "background" information is not published - as it is in respect of the publication and dissemination of such information. Indeed, decisions as to whether or not to publish material or as to whether or not material should be retained is a crucial aspect of editorial judgment and responsible journalism.

The collation and retention of (even non-published) investigative material, including, on occasion, sensitive material, is a necessary and essential part of investigative journalism, to facilitate:

a. the evaluation of developing or future events, statements or decisions and forming a properly informed view as to the public interest in publication in particular cases, a crucial aspect of responsible journalism;
b. the identification and assessment of leads for potential further investigation;
c. the development of a body of "background" expertise or knowledge on particular issues, to assist with the writing of accurate and properly informed articles and stories in future dealing with the same subject matter (even if not with a direct bearing on the background material in question); and
d. the future publication of the material, if newsworthy, should the public interest justify such a course. The public interest is not after all immutable or a fixity. Although news organizations may determine that certain sensitive information cannot properly be disseminated at a particular point in time in view of the public interest in non-disclosure, subsequently, as events develop, the public interest may justify or necessitate publication. Dissemination may be necessary to reveal serious impropriety or unlawful conduct, not apparent at the time the material was initially obtained. Equally, the interests engaged in non-disclosure may fall away, as would occur, for example, where the information in question becomes public by another means.

All of these aspects of the collation and, where appropriate, retention of journalistic material are vital to enable journalists and newsgathering organisations to perform their journalistic role effectively in a democratic society. Indeed, the protection of these functions is essential to enable the press to perform their role as a "public watchdog" in a healthy democracy, a role of

which the ECtHR and other international human rights supervisory mechanisms have often emphasised the importance (see, among many cases, *Dalban v. Romania*, 31 EHRR 39, § 49; *Bladet Tromsø and Stensaas v. Norway* (2000) 29 EHRR 125, § 59).

The ECtHR recognised the public's right to receive information and the right of access to information via the media in cases such as *Leander v. Sweden*[54]: Article 10 "prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him". Likewise in *Youth Initiative v Serbia,* 2013 : "the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom"; and *Guseva v Bulgaria*, February 2015[55]**.** Thus, the hindering of access to information which is of public interest "may discourage those working in the media, or related fields, from pursuing such matters". As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected".

Restrictions or sanctions in relation to the collation or retention of information by journalists poses as much of a threat to free expression as direct restrictions on the dissemination of information or views. Given the importance of preparatory work for investigative journalism and the need to ensure that such work is not indirectly hindered, the standard of review has been found by the ECtHR to be equally rigorous in respect of measures which restrict the ability of journalists to perform their investigative function as that to be applied in respect of restrictions regarding the dissemination of information, opinions and ideas by the press. In *Társaság a Szabadságjogokért v. Hungary* (2009) 53 EHRR 130, a case concerning access of NGO journalists to information in order to prepare an investigation, the ECtHR held at § 27 that:

> *In view of the interests protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to* ***the gathering of information****. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (*emphasis added*).*
>
> *The most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in public debate on matters of legitimate public concern … even measures which merely make access to information more cumbersome.*

In *Dammann v. Switzerland*, Merits, Application No. 77551/01, § 54, the ECtHR expressly rejected the argument advanced by the Respondent State that, "the

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[54] Judgment of 26 March 1987, Series A No. 116

[55] See also *Shapovalov v. Ukraine*, no. *45835/05, § 68, 31 July 2012; Dammann v. Switzerland, no. 77551/01, § 52, 25 April 2006)" [37]*

disputed [confidential] information could not be considered as falling within the scope of the public interest as the applicant [a journalist] had himself decided not to publish it". The ECtHR in that case was under no doubt that measures which restrict or punish a journalist's work of investigating or gathering information – even where such material was not published – fall firmly within the protective scope of Article 10, ECHR.

5.4 Article 10 and national security

In the field of national security, where issues of public importance very often arise, it is crucial that, despite the sensitive nature of the material with which journalists may come into contact, measures which tend to restrict or hamper the media from reporting on issues of public concern are subject to same very strict scrutiny as is applied in respect of other grounds of interference with journalistic expression. Measures which restrict, hinder or discourage journalists from researching and collating information including that which remains unpublished and keeping such information as part of an investigation or for purposes of a future investigation fall firmly within the protection scope of Article 10 and must be subject to the same strict scrutiny as that applied in respect of measures which directly restrict, hinder or discourage the publication or dissemination of information.

Matters of national security, or issues which arise in public life touching on matters of national security, are often *par excellence* matters of public concern. The ECtHR has held on many occasions that it is "incumbent on the press to convey information and ideas on political issues, even divisive ones" (*Ozgur Gundem v. Turkey*, Merits, Application No. 23144/93, § 58; and *Lingens v. Austria*, (1986) 8 EHRR 407, § 41). By much the same token, it is also incumbent on journalists and the free press to report on matters which may be sensitive, including matters touching on national security.

Although the protection of national security provides a ground on which restrictions on journalistic free expression may, in certain circumstances, be imposed, so too is there often a very strong public interest in ensuring that controversies which arise in this context, with all the consequences which these may have for both individuals and the public at large, are subject to properly informed public debate and scrutiny. Thus, measures which are imposed in this context, as much as in any other, call for very careful scrutiny by judicial authorities to ensure that the strict requirements of Article 10(2) are satisfied. This position is reflected in General Comment 34 where the UN human rights committee stated that,

> *[30.] **Extreme care** must be taken by States parties to ensure that … provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of [Article 19] paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of*

legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. (emphasis added).

A similar approach is adopted in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which have been endorsed by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,[56] and noted by the UN commission on human rights.[57] According to Principle 6 of the Johannesburg Principles, on National Security, Freedom of Expression and Access to Information[58] which set out broad standards, the circumstances in which journalism can be punished as a threat to national security are limited:

> ***Principle 6****: Subject to Principles 15 and 16, expression may be punished as a threat to national security* ***only if*** *a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence (emphasis added).*
>
> ***Principle 15*** *General Rule on Disclosure of Secret Information: No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest or (2) the public interest in knowing the information outweighs the harm from disclosure.*
>
> ***Principle 16****: No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.*

These principles were updated and expanded on by the Tshwane Principles on National Security and the Right to Information, published in 2013, which set out detailed guidelines for anyone "engaged in drafting or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information". These principles state, inter alia, at Principles 40,43 and 46 that any person who discloses wrongdoing or other information of public interest should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures. Principle 47 provides that any person who is not a public servant should not be subjected to criminal sanctions for breach of official secrecy.

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[56] *See* Report of the special rapporteur, Mr. Abid Hussain, pursuant to commission on human rights resolution 1993/45, 22 March 1996, E/CN.4/1996/39 [§ 154]

[57] For example, the commission on human rights resolution 1996/53.

[58] UN Doc E/CN.4/1996/39 (1996)

In *Görmüş and Others v. Turkey* (application no. 49085/07) the ECtHR held, unanimously, that there had been a violation of Article 10. The Court held that an article published by the weekly newspaper *Nokta*, on the basis of "confidential" military documents, classified as "confidential" by the Chief of Staff of the armed forces, about a system for classifying the media on the basis of whether they were "favourable" or "unfavourable" to the armed forces, was capable of contributing to public debate. Emphasising the importance of freedom of expression with regard to matters of public interest and the need to protect journalistic sources, including when those sources were State officials highlighting unsatisfactory practices in their workplace, the Court held that the interference with the journalists' right to freedom of expression, especially their right to impart information, had not been proportionate to the legitimate aim sought, had not met a pressing social need, and had not therefore been necessary in a democratic society; the interference had consisted in the seizure, retrieval and storage by the authorities of all of the magazine's computer data, even data that was unrelated to the article, with a view to identifying the public-sector whistleblowers. Lastly, the Court considered that this measure was such as to deter potential sources from assisting the press in informing the public on matters of general interest, including when they concerned the armed forces.

The ECtHR has also dealt with a number of "rendition" cases about the secret detention, questioning, ill-treatment and extra judicial rendition of a number of individuals suspect of terrorism by various State governments[59]. None of these cases or the newspaper stories that were written about them would have been possible without leaks. The public interest in revealing this information cannot be understated.

In *Nasr and Ghali v. Italy*, (application no. 44883/09), 2016, CIA agents, with the cooperation of Italian nationals, abducted an Egyptian imam, transferred him to to Egypt, where he was detained in secret for several months. The applicant complained in addition to the ill-treatment he endured about the impunity enjoyed by the persons responsible, where grounds of State secrecy were pleaded. The Court held, with regard to the *first applicant*, that there had been a violation of Article 3 (prohibition of torture and inhuman or degrading treatment), a violation of Article 5 (right to liberty and security), a violation of Article 8 (right to respect for private and family life) and a violation of Article 13 (right to an effective remedy) read in conjunction with Articles 3, 5 and 8 of the Convention. With regard to the *second applicant (the wife of the first applicant)*, it held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment), of Article 8 (right to respect for private and family life) and of Article 13 (right to an effective remedy) read in conjunction with Articles 3 and 8. In particular, having regard to all the evidence in the case, the Court found it established that the Italian authorities were aware that the first applicant had been a victim of an extraordinary rendition operation which had begun with his abduction in Italy and had continued with his transfer

[59] http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF

abroad. In the present case the Court held that the legitimate principle of "State secrecy" had clearly been applied by the Italian executive in order to ensure that those responsible did not have to answer for their actions. The investigation and trial had not led to the punishment of those responsible, who had therefore ultimately been granted impunity. The Court observed that the domestic courts had conducted a detailed investigation that had enabled them to reconstruct the events. The evidence that had ultimately been disregarded by the courts on the ground that the Constitutional Court had found it to be covered by State secrecy had been sufficient to convict the accused. The Court went on to note that the information implicating the SISMi agents had been widely circulated in the press and on the Internet; it therefore found it difficult to imagine how invoking State secrecy had been apt to preserve the confidentiality of the events once the information in question had been disclosed. In the Court's view, the executive's decision to apply State secrecy to information that was already widely known to the public had resulted in the SISMi agents avoiding conviction. The Court therefore took the view that the domestic investigation had not satisfied the requirements of the Convention. Accordingly, there had been a violation of the procedural aspect of Article 3 of the Convention. The Court also held that the investigation carried out by the national authorities – the police, the prosecuting authorities and the courts – had been deprived of its effectiveness by the executive's decision to invoke State secrecy. The Court had demonstrated that the State's responsibility was engaged on account of the violations of the applicants' rights under Articles 3, 5 and 8 of the Convention. In the Court's view, the applicants should have been able to avail themselves of practical and effective remedies capable of leading to the identification and punishment of those responsible, to the establishment of the truth and to an award of compensation. In view of the circumstances already examined, the Court could not consider that the criminal proceedings had been effective within the meaning of Article 13 with regard to the complaints under Articles 3, 5 and 8. As the Government themselves acknowledged, it had not been possible to use the evidence covered by State secrecy; likewise, a request for the extradition of the convicted US agents had proved futile. As to the civil consequences, the Court considered that, in view of the circumstances, any possibility for the applicants to obtain damages had been virtually ruled out. There had therefore been a violation of Article 13[60].
These cases show the dangers of allowing states to use national security as a "get out of jail" card and of allowing states too wide a margin where "national security" is concerned.

Thus, in the field of national security, where issues of public importance very often arise, it is equally crucial here, as it is in any other field, that, despite the sensitive material into which journalists may come into contact, measures which tend to restrict or hamper the media from reporting on issues of public concern

[60] factual details taken from Press Release issued by Registrar of the Court, 23.02.2016 : http://hudoc.echr.coe.int/eng-press#{"itemid":["003-5307169-6607369"]}

are subject to very strict scrutiny.

5.5 Legal protections for whistleblowers

It has long been recognised in law that whistleblowing has a public value, all the more so when it is directed against the state. Such whistleblowers are essential for revealing sensitive information in the public interest but can expose themselves to serious risks and pressures. It is important that proper confidentiality protection is made available to those who collaborate with journalists, and who provide such public interest information. Chilling whistleblowing undermines public access to information and the democratic role of the media. In turn, this jeopardises the sustainability of quality journalism.

In the Report of the UN Special Rapporteur to the UN General Assembly on the Protection of Sources and Whistleblowers in 2015[61] a review was carried out of national and international laws and practices and recommendations made to improve available protections. The Report points to the fact that the right to access information was established by the two similar versions of Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and that this right underpins the establishment of norms protecting sources and whistleblowers, as persons who bring to public knowledge otherwise undisclosed information. The Report points out that in this context, mere assertions of interests such as "national security" are insufficient; to be lawful under the Covenant, the restriction must actually be necessary to achieve a specified interest, and it must be proportionate to that goal. The Report recommends that:

- National laws should be adopted or revised and implemented protecting the confidentiality of sources: that laws guaranteeing confidentiality must reach beyond professional journalists, including those who may be performing a vital role in providing wide access to information of public interest such as bloggers, "citizen journalists," members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest. Protection should be based on function, not a formal title.
- National legal frameworks protecting whistleblowers should be adopted, revised and implemented: State laws should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of domestic or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.
- Internal institutional and external oversight mechanisms should provide effective and protective channels for whistleblowers to motivate remedial action: In the absence of channels that provide protection and effective remediation, or that fail to do so in a timely manner, public disclosures

[61] http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361

should be permitted. Disclosure of human rights or humanitarian law violations should never the basis of penalties of any kind.

- Protections against retaliation should apply in all public institutions, including those connected to national security: Because prosecutions generally deter whistleblowing, penalties should take into account the intent of the whistleblower to disclose information of public interest and meet international standards of legality, due process, and proportionality.
- Establish personal liability for those who retaliate against sources and whistleblowers: Acts of reprisals and other attacks against whistleblowers and the disclosure of confidential sources must be thoroughly investigated and those responsible for these acts held accountable. When these attacks are condoned or perpetrated by authorities in leadership positions they consolidate a culture of silence, secrecy, and fear within institutions and beyond, deterring future disclosures. Leaders at all levels in institutions should promote whistleblowing and be seen to support whistleblowers, and particular attention should be paid to the ways in which authorities in leadership positions encourage retaliation, tacitly or expressly, against whistleblowers.
- Actively promote respect for the right of access to information: Law enforcement and justice officials must be trained to ensure the adequate implementation of standards establishing protection of the right to access information and the consequent protections of confidentiality of sources and whistleblowers. Authorities in leadership positions should publicly recognize the contribution of sources and whistleblowers sharing information of public relevance and condemn attacks against them.

Similar themes and conclusions are contained a report by the Information Law and Policy Centre at the Institute of Advanced Legal Studies on *Protecting Sources and Whistleblowers in a Digital Age*[62], and a UNESCO study entitled, "Protecting Journalism Sources in the Digital Age", written by Julie Posetti[63]. The latter report found that the legal frameworks that protect the confidential sources of journalism are under significant strain in the digital age and that all stakeholders have a crucial role to play in the introduction, development or updating of better legal safeguards and more protective frameworks for all acts of journalism, including for whistleblowers.

The ECtHR has also recognised – for example in the case of *Guja v Moldova*[64] - that there is a public utility and value in the open discussion of topics of public

[62] http://infolawcentre.blogs.sas.ac.uk/files/2017/02/Sources-Report_webversion_22_2_17.pdf; An initiative supported by Guardian News and Media; authored by Dr Judith Townend and Dr Richard Danbury, the report analyses how technological advances expose journalists and their sources to interference by state actors, corporate entities or individuals. The report's findings are based on discussions with 25 investigative journalists, representatives from relevant NGOs and media organisations, media lawyers and specialist researchers in September 2016.

[63] http://unesdoc.unesco.org/images/0024/002480/248054E.pdf

[64] Application no. 14277/04, 12 Feb 2008

concern, such as the separation of state powers and the independence of investigating authorities, and that the public interest in having the information about undue pressure and wrongdoing within a government office was so important in a democratic society that it outweighed the interest in maintaining public confidence in the office. In that case it held that the dismissal of a whistleblowing civil servant was an interference with his freedom of expression that was not necessary in a democratic society. There was no reason to believe that the civil servant was motivated by a desire for personal advantage and it was found that he had acted in good faith. The heaviest sanction possible, dismissal, had been imposed on him, which not only had negative repercussions on his career but could also have had a serious chilling effect on other civil servants and discourage them from reporting any misconduct. Given the importance of the right to freedom of expression on matters of general interest, and of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the interference by dismissal with Mr Guja's right to freedom of expression, in particular his right to impart information, was not "necessary in a democratic society", in violation of Article 10.

As the ECtHR said in *Nordisk Film & TV A/S v Denmark:*

> "The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest".

5.6 The criminalisation of journalism

There has been a long line of cases in the ECtHR setting out the dangers of criminalising journalists' work. Criminal sanctions, when compared to civil remedies, carry a greater potential to generate a chilling effect on the media and on freedom of expression more broadly. In addition, criminal laws, such as the ones considered in this consultation which involve the exercise of state power and the use of state resources, are particularly prone to abuse in order to silence opponents and critics. Such sanctions can easily be used and abused by the state against journalists in retaliation for unwanted investigations or commentary.

It is well established in the jurisprudence of the ECtHR that the imposition of even very minor criminal sanctions upon a journalist can have a wholly disproportionate chilling effect on those performing the role of reporting on matters of public interest.

The ECtHR in *Cumpănă and Mazăre v. Romania*, no. 33348/96 (2004) ruled that:

> *"The imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired as, for example, in the case of hate speech or incitement to violence."*

Although the extent of censure or sanction may be relevant in the assessment of proportionality, the ECtHR has often held that the fact of the use of criminal law against a journalist is, in itself, significant and liable to hamper or discourage those engaged in journalism. In *Jersild v. Denmark* 19 EHRR (1995) 1 the ECtHR held that it "does not accept the government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted". Similarly, in *Lopes Gomes da Silva v. Portugal*, Merits, Application no. 37698/97, § 36, the ECtHR held that "[c]ontrary to the government's affirmations, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all". This same analysis has been reiterated by the court in many other cases. (*e.g. Dammann v. Switzerland*, Merits, Application No. 77551/01, § 57).

Just as the very fact of a criminal conviction can have a disproportionate effect on journalistic expression, so too can the use of criminal enforcement powers. This is all the more so where the powers that are utilised are concerned with matters of national security or terrorism, given their potentially stigmatising effect in respect of journalists, their work and that of their news organization. These effects are not to be underestimated and can have a very real impact on hampering or discouraging other journalists from engaging in research and investigation of such matters. There is an increasing trend for such powers to be utilized against journalists. It is submitted that, in light of the court's established jurisprudence, the use of such powers in respect of those properly engaged in journalism will almost invariably stigmatising journalists and their use is therefore, very rarely proportionate.

For example, as regards the conviction and small fine to which the applicant was subject in *Dammann v. Switzerland*, the ECtHR held at § 57 that while the penalty had not prevented the applicant from expressing himself, his conviction had nonetheless "amounted to a kind of censure which would be likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topic of current affairs". The ECtHR further held at § 57:

> *"Censuring pre-publication work in this way risks dissuading journalists from contributing to public debate on questions affecting the life of the community. This is, as a result, likely to hinder the press in its work of information dissemination …. "*

5.7 Conclusion

Measures which restrict, hinder or discourage journalists from researching, collating and retaining information (including that which remains unpublished) as part of an investigation or for purposes of a future investigation fall firmly within the protection scope of Article 10 and must be subject to the same strict scrutiny as that applied in respect of measures which directly restrict, hinder or discourage the publication or dissemination of information. It is also particularly

repugnant to criminalise journalistic activity, all the more so where penalties include severe custodial sentences.

6. Specific concerns with proposals in this consultation paper

While GNM agrees that UK law enforcement and intelligence agencies must have appropriate powers to keep the citizens of the UK safe, these powers must be proportionate, effective, properly authorised and sit within an appropriate oversight framework. There is a balancing act to be be carried out and that should be centred around disclosures which cause actual harm. GNM has a number of concerns about the proposals contained in the Law Commission CP, which are set out below.

Some proposals in the consultation are positive, including:

- the proposal that there be an independent, statutory regime to strengthen the avenues available to potential whistleblowers in the security and intelligence agencies;
- the suggestion that the ability for derogation from open justice in cases relating to the *Official Secrets Acts* be limited and clarified: CP p.135; 5.41;
- simplifying and modernising the language to remove anachronistic terms like "code words" and "enemy" and replacing them with language that will future proof the legislation.

Some suggestions appear useful, but do not consider all eventualities, for example:

1. the CP identifies that a person who discloses information may commit further offences by disclosing information to their lawyer for the purposes of defending criminal proceedings: and it is therefore sensible that disclosures made to qualified legal advisers for the purposes of receiving legal advice in respect of an offence should be exempt (see CP p.89; 3.197). However, where a journalist is concerned this would have serious repercussions if they were to discuss such matters with anyone else - an editor for example – there would still appear to be potential problems regarding the ability for offences to proliferate. However, the suggestion is also subject to lawyers being subject to 'vetting and security requirements' (see CP p89; 3.197), which is deeply troubling.
2. Similarly, the CP's support for comments of Lord Bingham in *R v Shayler*, that 'a special advocate could be instructed to represent … [the relevant party's] interests if the material in question was too sensitive to be disclosed to their nominated lawyer' (see CP p88; 3.191) seems overly broad and unspecific. The CP proposal that the ability for derogation from open justice in cases relating to the *Official Secrets Acts* be limited and clarified (CP p.135; 5.41) is a good one, however the actual proposal seems to be based on a misunderstanding of the legal test (see below).

It is understood that what the CP proposes holistically, although there are no drafts, is that the existing OSAs should be replaced by two new pieces of legislation: (1) an espionage act, which would effectively merge offences of leaking information with spying for foreign powers - and (2) an act that prohibits unauthorised disclosure, with the two remaining distinct, along with increased sentences, and a lowered standard of proof regarding damage to the national interest. It is not clear how this latter proposal would sit with the clauses in the Digital Economy Act.

6.1 Proposals regarding Official Secrets Act 1911 ("OSA 1911")

It is envisaged that, if redrafted as per the Law Commission proposals, a new proposed Espionage Act would read something like this (our capitalisation, to indicate new text):

> 1. If any person KNOWING OR HAVING REASONABLE GROUNDS TO BELIEVE THAT HIS CONDUCT MAY BE CAPABLE OF PREJUDICING // MAY CAUSE PREJUDICE TO [UK] NATIONAL SECURITY OR WHO IS RECKLESS AS TO WHETHER NATIONAL SECURITY WOULD BE SO PREJUDICED
>
> (a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or
>
> (b) / (c) makes, GATHERS, obtains, collects, records, or publishes, or communicates to any other person any INFORMATION WHICH HE KNOWS OR HAS REASONABLE GROUNDS TO BELIEVE MAY BE CAPABLE OF BENEFITING a FOREIGN POWER; or
>
> he shall be guilty of felony . . .

A journalist can be charged, in particular under section 1(1) (c) of the existing Act, for an offence involving obtaining /publishing information which might be useful to an enemy, but it would have to be proved that they did this with "a purpose prejudicial to the safety of interests of the state". The changes proposed by the CP would impact on and would significantly lower the threshold where a criminal prosecution might be brought.

Much of what is being proposed in the CP appears to be retaining elements that are already in section 1 of the OSA 1911, however this is done against the background of a number of proposals which would seriously widen the scope and ambit of the section. For example, it is noted that the current offences in the OSA 1911 are not restricted to crown servants and can, theoretically, be committed by anyone including journalists. So, if the the boundaries are widened, they will also inevitably have the potential to impact journalists. The proposal in Provisional Conclusion 2(2) is that a proposed redrafted offence should continue to apply not only to anyone who communicates material which

is covered but also to anyone who (new term) obtains (i.e., possesses) or (new term) gathers (i.e., receives) such information. These terms are not defined, but appear to widen the scope of the offences to someone who holds such information, even if they do not publish it. This thus has the potential to severely impact on the role of journalists to *receive* as well as to impart information. It is not specified whether the remaining "doing" words in s1 OSA 1911 – making, collecting, recording, and publishing - will remain or be replaced by obtains and gathers. As a point of principle (irrespective of whether they publish) journalists who receive, gather or obtain information of the sort covered by OSA 1911, including about prohibited places, should not be under the threat of prosecution, if there is a legitimate public interest in their possession of such information, even if it is not published.

For example, if a journalist obtains information that a nuclear defence installation is unsafe, that concerns have been reported to to the appropriate authorities, but have been discounted, and the journalist then proceeds to investigate whether the information is true, they should not be placed at risk of prosecution. Under the existing wording of section 1 OSA, the of use to the enemy requirement would it is submitted make such a prosecution unlikely, however if that wording were changed to a foreign power, and a foreign state owned institution was thinking of bidding to decommission the plant, this could catch the journalist. Such activity by a journalist should not be considered to be espionage.

While these offences are directed at espionage and might at first glance be thought not to concern the media, the low prosecutorial burdens and reverse onus (see CP pp.16-19) mean that journalistic information-gathering with some connection to a foreign state could be implicated. Indeed, in 1937 a journalist was convicted for failing to name a source pursuant to a power to compel information regarding the commission of offences (see CP p.26; 2.95). The risk of these statutes interfering with journalistic activity is exacerbated by the CP's provisional proposals.

The key limiting factors in the OSA 1911 offences, which undoubtedly has always had the potential to catch journalists, from a journalistic perspective have been (1) that the actions of the person must be "*for any purpose prejudicial to the safety or interests of the State*" and (2) the narrow definitions of information which falls within the section (eg sketch, plan, model, or note or document or information etc) which is (3) calculated to be or might be or is intended to be directly or indirectly *useful to an enemy*. The first limits the last, gives it a UK focus and confines it to what has traditionally been called "espionage" or "spying". Any lowering of this "double-lock" risks re-opening the problems associated with section 2 OSA 1911[65], which criminalised the wrongful communication of a wide range of "information" and was repealed and replaced by the 1989 OSA. As Geoffrey Robertson QC has said, "In legal theory, it was a crime to reveal even the number of cups of tea consumed each day in the MI5

[65] http://obiterj.blogspot.co.uk/2011/09/official-secrets-acts-1911-1989.html

canteen"[66]. Douglas Hurd succinctly explains here[67] the rationale behind the repeal of Section 2 OSA 1911. There is a danger that what is now proposed is reintroducing all the problems associated with section 2.

As far as the first factor is concerned, it is understood that the CP proposes moving away from the no fault regime to introducing an objective element, which appears to be a sensible proposal, however it also appears that the proposal is combined with a proposal to move away from a state of affairs whereby the purpose ***has*** to be prejudicial to a much lower one where "it *may cause* prejudice" or where it was "*capable o*f" causing prejudice; the present section 1 requirement of a *purpose prejudicial* to the safety or interests of the state, had and has the effect of restricting espionage prosecutions to spies who wish to help hostile foreign powers. he overall "harm" threshold is therefore being made much lower. If a test of "capable" or "may" is it to be used, (which GNM opposes) it is submitted that the level of damage or harm that is required to be caused should be increased to serious or substantial.

Further, the CP proposes that the term "safety or interest of the state" is changed to "national security". The CP says that "this is a narrower term than '"safety or interest of the state"' although no worked examples of this are provided. National security is a term that consistently has not been properly defined, although the standing notices issued by the Defence and Security Media Advisory ("DA-Notice") Notice System Committee provides some insight as to the potential breadth of the term[68] [69]. The CP refers to the Grand Chamber ECtHR case of *Kennedy v the UK* in 2010 [2.128]. This was a case brought under, inter alia Article 8 about RIPA. For interference with Article 8 rights to be justified, the Convention says that a person affected must be able to foresee the consequences of the domestic law for him. Kennedy argued that RIPA lacked foreseeability because it listed justifications for interception in general terms only: "national security" and "serious crime", which he said were insufficiently clear. But the ECtHR said it did not matter that the offences allowing interception were not set out by name:

> *"The Court has previously emphasised that the requirement of 'foreseeability' of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on 'national security' grounds," ... "By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance".*

It is submitted that notwithstanding the finding in *Kennedy,* "national security" remains a dangerously wide and vague term to use. As Professor Andrew

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[66] "Freedom, the Individual and the Law" - 7th Ed., 1993 at p.159.

[67] http://www.gettyimages.co.uk/license/673585060

[68] http://www.dsma.uk/danotices/index.htm

[69] See also, for example, the debate on the Justice and Security Bill [HL] Hansard, 17 July 2012, Volume 739, column 120.

Preston has written in the context of a history of American national security[70], it is a virtually limitless term, with no defensive perimeter. "*But national security encompasses more than just physical threats, It also includes the defence of [American] values. National security is about safeguarding ideology as well as territory and sovereignty*." At its heart, national security means safety, the broad defence of the nation against foreign threats.

On balance, while GNM believes that the current terminology of "safety or interest of the state" is unsatisfactorily vague and lacking specificity, the term "national security" is not a satisfactory replacement, especially if the terms "useful to the enemy" is also to be widened in scope. It is a dangerously elastic concept that can potentially mean anything ministers want it to mean at any given time. Should that term be changed, rather than replacing it with another equally vague term (and bearing in mind that in an Art 10 context, vagueness leads to uncertainty which can create a chilling effect) we prefer using a phrase such as "for a purpose prejudicial to the safety or defence of the nation".

As far as the term "*useful to an enemy*" term *is* concerned, the words "useful to an enemy" have effectively provided the journalist with their public interest defence as well as making it clear that this is about espionage or spying. The proposal to change this term and replace it with "useful to a foreign power" is deeply troubling, as it is a term that could basically cover almost anyone, including allies. It also appears to start to blur any distinction between what are supposed to be offences of "espionage" or spying and offences of leaking secrets.

So, for example, when taken in conjunction with the other proposed changes, this section as now redrafted would appear to cover the squaddie who revealed that his fighting equipment was deficient as well as the journalist who published it; leaks about the inadequacies of the Snatch Land Rovers[71] also appear to be captured by the new proposals, as would a leak in "peacetime" about army manoeuvres or military training tactics. Indeed, it may even prevent entirely legitimate reporting of tragedies such as deaths in training in the Brecon Beacons and elsewhere[72]. Likewise the leaks of the US embassy ("wikileaks") military and diplomatic cables in 2010 / 2011, (through which predominantly internal US government cables were disclosed), revealed what UK government officials really thought about North Koreans or Tunisia or Bulgaria[73].

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[70] CAM, Issue 81, Easter 2017, p 13

[71] https://www.theguardian.com/uk/2008/nov/01/snatch-land-rovers-army

[72] https://www.theguardian.com/uk-news/ng-interactive/2015/jul/14/sas-brecon-beacons-march-army-reservists
https://www.theguardian.com/uk-news/2016/jul/20/soldier-dies-on-training-exercise-in-brecon-beacons-mod-says

[73] https://www.theguardian.com/world/us-embassy-cables-documents/211524 ; https://www.theguardian.com/world/2010/dec/21/wikileaks-cables-british-police-bangladesh-death-squad ; https://www.theguardian.com/world/us-embassy-cables-documents/218106 - https://www.theguardian.com/uk/2010/dec/08/wikileaks-cables-trident-nuclear-us https://www.theguardian.com/world/us-embassy-cables-documents/187855 - https://www.theguardian.com/world/us-embassy-cables-documents/193188NB the military and diplomatic docs story is here https://www.theguardian.com/media/2011/jan/28/wikileaks-julian-assange-alan-rusbridger

Likewise the sort of story written by the Guardian's defence and intelligence correspondent, Ewen MacAskill whilst at the Scotsman in the 1990s[74] about the reliability of a lift that would raise nuclear submarines out of the water for refits at the Faslane naval base on the Clyde would appear to be covered. This was based on "secret naval documents passed to The Scotsman" which revealed that the hoists had been involved in "numerous accidents around the world".

In relation to the Snowden disclosures, the changes proposed in the CP would make it easier for ministers and politicians to argue that publishing information about GCHQ - however responsibly - "was capable of prejudicing national security" and that this information might be of use to a foreign power, than it would be to argue that it was directly or indirectly useful to an enemy. If the main concern is that it is not clear whether the term "useful to the enemy"encompasses individuals, states or organisations, it is submitted that could be dealt with easily enough by inserting a short definition to make it clear that it encompassed all of the above.

Taken together, GNM believes these proposals represent a dramatic expansion of the grounds on which the Guardian, its editor and journalists could face prosecution, significantly broadening what has traditionally been thought of as espionage.

As per the current proposals it is indeed difficult to see why any part of the Official Secrets Act 1989 would need to be retained, as the combined effect of the proposals in the CP for the OSA 1911, create such a potentially wide and all embracing offence.

Any changes to language also need to take account of the potential collateral impact they may have elsewhere in the OSAs. For example section 2 (2) (b) of the OSA 1920, contains a reference to "communication with a foreign agent". The expression "foreign agent" is defined to include "any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or without the United Kingdom, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or without the United Kingdom, committed, or attempted to commit, such an act in the interests of a foreign power". There is a danger that changing definitions could mean that any journalist communicating with a citizen from any other country about anything connected with national security could be vulnerable to prosecution.

It is key that any proposed redrafted offence retains its focus on espionage / spying and in that context the "enemy" is an essential element of the offence; it is submitted that further thought needs to be given to how best that focus can be

[74] The Scotsman, 2 May 1990, Trident base safety fears: Naval documents reveal concern over history of hoist accidents; https://www.nuj.org.uk/news/journalists-must-be-vigilant-with-security-and-communications/

maintained.

It is accepted that in this context the use of the term 'espionage" may also be problematic. The CP talks about an Espionage Act, and this too is a term that is not defined. The CP quotes an MI5 definition at 2.2, but goes on to say at 2.9 that espionage "not only encompasses the unauthorised disclosure of information but also the process of obtaining information that is not publicly available".

Taken together, these proposals represent an extremely bleak landscape in the future for journalists who seek to publish national security information in the public interest. This is particularly so given that the CP proffers the possibility of a 14-year potential custodial sentence and contains no express or implied defences for journalists by seeking to remove the wording on "useful to an enemy", and lowering the test of prejudice from actual to capable, and further introducing a "reasonable grounds to believe" test. An exemption for responsible journalistic activity in the public interest must be included in any update / response to this CP.

In conclusion, while GNM acknowledge that introducing a fault element will allow a greater focus on culpability, GNM is concerned that the other changes proposed, when taken together will seriously expand the potential for journalists to be caught by the proposed redrafted offence. In particular, the combination of "may cause" or "capable of causing" prejudice" with the removal of the limiting words "useful to the enemy" and their replacement with the much wider "foreign power" would seem to leave a potentially much more wide ranging offence, even allowing for the introduction of some fault element.

6.2 Proposals regarding OSA 1989

6.2.1 The ambit and intention of proposed changes

The OSA 1989 was created during the height of Cold War paranoia. Spycatcher was making its way through the courts and Clive Ponting had been acquitted by a jury under the OSA 1911 for disclosures relating to the Falklands War. Its aim in part was to ensure there was no public interest defence available for disclosing "official secrets" or classified information. As Alex Bailin QC has pointed out[75] – if Cathy Massiter, the M15 officer who was motivated by her conscience to leak details of government spying on trade unionists and others, had been prosecuted under the OSA 1989, she would have had no defence. The OSA 1989 was also aimed at replacing the much discredited, over-wide and much criticised section 2 OSA 1911, which was regarded as a catch-all and could cover even the menu in the canteen at GCHQ. The OSA 1989 created a number of criminal offences of disclosing classified information without lawful authority. These can be committed by "government insiders" eg members of the security and intelligence services, Crown Servants (including the military and the police) and government

[75] https://www.theguardian.com/law/2011/sep/22/official-secrets-act-cold-war

contractors. Sections 1 to 4 focus on what can be termed "insider" offences, ie they are offences that certain defined categories of people within the state apparatus can commit. Additionally, there are two offences (ss 5 and 6) that can be committed by "outsiders" – such as journalists who receive classified information that has been disclosed to them without authority and then disclose it themselves. In the case of these latter two offences, there should be an express public interest defence available for both the disclosurer and the journalist.

There is a need therefore to identify at the outset what the purpose of these proposals is. If the amendments proposed to the OSA 1911 are carried out, it is difficult to see what purpose any revised OSA 1989 would fulfill.

As identified in the House of Commons Library Briefing Paper of December 2015 on the Official Secrets Acts[76], there have been a number of successful prosecutions under the OSA 1989. Ten public civil servants, and three members of the public, including one TV journalist have been prosecuted. In five cases, the charges were dropped[77]. Concern has been expressed in this context that the OSA 1989 is used to justify investigations that do not result in charges, or that result in unfounded charges[78]. In one case, a jury found the public servant not guilty[79]; in another, a public servant was required to pay a small fine[80]. Six prosecutions have resulted in custodial sentences, the maximum of which was one year[81].

It is of course always possible to tinker with legislation, edit, update or improve it, but generally this is only done where a serious flaw or fundamental problem is identified. In this case, no such problems are identified in the CP. There is therefore a general issue about whether any change is actually needed.

6.2.2 Ambit of any revised OSA 1989

Consideration needs to be given to making this a very narrow, clearly defined statute that seeks to criminalise leaks of very highly confidential or secret information which will cause serious or substantial harm or damage to the state. To that end, unless the information leaked is (1) highly confidential; and (2) causes serious or substantial harm, in so far as publication to the wider public is concerned, the use of civil breach of confidence proceedings must be a preferred route. This is particularly so where there are already – according to the CP Chapter 4 - a number of other offences which can capture the unauthorized

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[76] Briefing Paper Number CBP07422, file:///Volumes/Downloads/Internet%20Downloads/CBP-7422%20(1).pdf

[77] Pasquill, 2007; Gunn 2003; Geraghty 1999; Wylde 1999; Garrett 2005 (an ITV News journalist)

[78] See eg the case of Major Stankovic – *Stankovic v Chief Constable of the Ministry of Defence Police*, CA,[207] EWHC 2608

[79] Nicholas Thompson 2004; (Daniel James and Clive Ponting were prosecuted under the 1911 OSA)

[80] Richard Jackson 2008

[81] Tomlinson, 1997; Hayden 1998; Lund-Lack 2007; Keogh 2007; O'Connor 2007; Shayler 2000

leaking of official government information. Additionally there is also the Bribery Act and the common law offence of misconduct in a public office, which have successfully been used to prosecute civil and state servants who leaked information. In certain situations, although the existence of a pre-publication injunction regime has problems associated with it, because of the chilling effect it creates and the way in which it can stifle attempts for dialogue before publication, (see 4.1 above) it is a preferable and more proportionate route than criminal proceedings. Criminal proceeding should be reserved for only the most serious offences.

6.2.3 Whistleblowers and leakers

Generally speaking, as the CP acknowledges, there are two sets of actors whose conduct needs to be considered – the leaker and the recipient / publisher. Some of this is considered in the discussion in Chapter 7 of the CP on public interest.

The ECtHR has recognised that there is a public utility and value in whistleblowing[82]. The social and public utility of whistleblowers and the need to properly protect them is a key facet of any discussion on how leaks of official data should be dealt with. As Lady Shami Chakrabarti, the shadow attorney general for England and Wales and former director of Liberty from September 2003 to March 2016, wrote recently:[83]

> *"Journalists and the whistleblowers with whom they work perform an essential service in ensuring transparency – often where government would keep us in the dark. There are at present very few means by which wrongdoing within government agencies can be exposed, and as a consequence it falls to individuals. There is no question that protecting national security is important, but public interest journalism and individual ethics have their place in democracy alongside security and the law."*

There is a considerable body of international standards and discussion on when and in what circumstances whistleblowers should be protected when they publicly blow the whistle. See for example, Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, adopted by the Committee of Ministers on 30 April 2014[84]. Following a draft directive on the protection of whistleblowers proposed by the Green MEPs last year, the European Commission is now discussing whether new measures should be put in place and is currently consulting civil society and

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82 See section 5 above and for example *Guja v Moldova* at page 36 above

83 https://www.theguardian.com/commentisfree/2017/feb/13/whistleblowers-official-secrets-act-law-commission

84 https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec%282014%297&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true

other stakeholders on the issue. Notwithstanding Brexit, any discussion and consideration of the appropriate level of protection for whistleblowers in the UK needs to take place in that wider context, so that the UK is in line with wider international standards.

There is a breadth to the discussion of how and when whistleblowers should be protected which goes beyond the immediate context of the CP. What is under consideration in the CP is when should whistleblowers be protected when a public disclosure is made in the public interest. It should be noted in this context that a whistleblower may or may not also be a confidential source, in which case there are other layers of overlapping considerations.

It is possible to identify three potential channels for whistleblowing: internal, external and public (e.g. to media and NGOs)[85]. Whether protection is available may depend on the availability of suitable internal and external processes, but all assume the whistleblower has reasonable grounds for believing that the disclosure is in the public interest.

One option, is that a whistleblower should be protected if he/she discloses information publicly where he/she has reasonable grounds for believing that the disclosure is in the public interest, only when other available and appropriate routes have been tried and these have failed, which could be described as a cumulative or escalated approach. This is the sort of approach adopted by the Public Interest Disclosure Act. On this analysis, a whistleblower would be protected if he/she discloses information publicly where he/she has reasonable grounds for believing that the disclosure is in the public interest, but only after:

A. he/she has first reported the information internally or to an appropriate external regulatory or an elected parliamentary or local government official or to the police if these reporting channels are available and considered by the whistleblower to be effective AND no action has been taken by that person after a reasonable period of time, or;
B. if appropriate internal or external channels are not available, or are not reasonably considered by the whistleblower as effective or themselves expose the whistleblower to risk of harm (see for example the ECtHR approach in *Guja v. Moldova)*, or;
C. if the public whistleblowing takes place in the event of what the whistleblower reasonably believes to be an immediate threat to life, public health, safety or threat to destroy evidence where existing procedures would not have been adequate (see, for example here, Serbian law).

A more radical proposal is that a whistleblower should be always be protected if he/she discloses information publicly where he/she has reasonable grounds for believing that the disclosure is in the public interest, and that it does not matter

[85] see for example the Public Interest Disclosure Act

whether alternative or cumulative internal or external routes have first been tried, that is without being obliged to choose internal whistleblowing initially. (This appears to reflect the proposal of the Green MEPs). This clearly gives more freedom to whistleblowers, but this appears to be a more liberal approach than current ECtHR standards and is likely to be very challenging for more conservative countries. What is desired is at the very least, set in place a reasonable set of minimum set of standards for the protection of public interest whistleblowers.

Following on from the proposal of the Green MEPs referred to above, and after a recent public consultation, the Council of Europe Parliamentary Assembly in a recent resolution[86] followed by a recommendation[87], adopted on 27 June 2017, encouraged Member States to provide "adequate protection to whistleblowers". The resolution - adopted on the basis of a report by Gülsün Bilgehan (Turkey) - calls on national parliaments to "*Recognise a right to blow the whistle in all cases where information is disclosed in good faith and is clearly in the public interest; Define the right to blow the whistle as an objective criterion for exemption from criminal liability; Introduce a reporting line at national level to enable whistleblowers to disclose information in a confidential or anonymous way*."

As far as whistleblowers are concerned, however, from the perspective of a journalist, sources are very valuable to the flow of information and helpful in holding government and power to account. Journalists have a moral and ethical duty to protect their confidential sources. However, this ethical confidentiality protection does not necessarily shield publications and journalists from liability, even where it does assist sources to avoid identification. The significance of this is that where there are no other protections to complement confidentiality protection, there can nevertheless be a chilling of disclosures of public interest information[88].

6.2.4 Inchoate offences

The CP contains a proposal that offences under the OSA 1989 should be re-formulated as inchoate offences, for which a result-based fault element is prescribed. The CP proposes the following two alternative mental elements for offences under a new regime:

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86 <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzkzMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIzOTMy

87 <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzkzMyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIzOTMz>

88 Posetti, J : Protecting Journalism Sources in the Digital Age UNESCO Series on Internet Freedom, Report April 2017

A person commits an offence if he or she intentionally makes an unauthorised disclosure of information relating to security and intelligence, defence or international relations knowing that that disclosure is capable of damaging security and intelligence, defence or international relations.

A person commits an offence if he or she intentionally makes an unauthorised disclosure of information relating to security and intelligence, defence or international relations having reasonable grounds to believe that that disclosure is capable of damaging security and intelligence, defence or international relations.

The suggestion in the CP of introducing a mental "fault" element into any new "insider" offence would appear to be sensible and could be presented as a narrowing of the scope of the offences under the existing OSA 1989 regime, which does not provide for an express mental fault element. However, the impact of such a provision is limited in practice by the effect of the decision of the Court of Appeal in *R v Keogh* [2007] 1 WLR 1500. Here the OSA 1989 was construed so as to place the burden on the prosecution to prove that a defendant knew or had reasonable cause to believe that the document in question related to the particular category or that its disclosure would be damaging. This was notwithstanding that a literal reading of the OSA 1989 indicates that this component forms part of a defence under the act such that the burden would be placed on the defendant.

This proposal could been seen as giving partial redress to concerns identified in this submission that a number of the proposals in the CP are likely to increase the scope for prosecution of journalists. The element that the Crown would have to prove falls some way short of the existing conditions that (a) a disclosure be damaging and (b) defendant knew, or had reasonable cause to believe, that the information, document or article in question related to the type of information in question or that its disclosure would be damaging. Explicitly incorporating a fault element into other parts of the statute would be consistent with case law and broader practice. Similarly the inchoate offence model is, in principle, inoffensive.

There is, however, a troubling lack of recognition within the CP that offences under the OSA 1989 are not directly comparable with general criminal offences. The reference to the Fraud Act is apposite. The CP states that the Fraud Act provides a precedent for the inchoate model (see CP p 82 / 3.156) but disclosure offences must start from a different basis. There is a compelling public interest in open and transparent government. While it is not in dispute that countervailing considerations will, on occasion require derogations from that starting point, it must nonetheless remain the fundamental principle underlying policy design in this area. The criminalisation of the disclosure of government information must therefore only be permitted where the disclosure of actual or potential harm to a compelling interest exceeds the public interest in transparency. The revised model proposed by the CP is irreconcilable with this

view, as it would permit prosecution for a disclosure where there is no actual damage to the relevant interest and only a remote a priori possibility of damage. This runs counter to the current state of affairs in many countries round the world - see below. The eminent Australian Judge, Justice Finn, in a different context in *McManus v Scott-Charlton*[89] said: "[Derogation from the general principle] needs to be carefully contained and fully justified". The CP's proposals in this regard are neither.

Moreover, it should not be thought that introducing a fault element into the offence is a sufficient quid pro quo for removing the requirement to prove actual damage. There is a recognised societal harm where a journalist's conduct is criminalised. The special protection to be afforded to journalists requires proper protection which is not afforded simply by the introduction of a fault requirement.

6.2.5 The lowering of the requirement to show that a disclosure is "damaging" (as provided for in respect of many of the offences under the OSA 1989).

While the CP states that the Law Commission is "keen to ensure that the threshold of culpability that must be crossed before an individual commits an offence ... is not lowered" [CP p 82 /3.156], this does appear to be exactly what would be achieved if this proposal is carried out. The removal of this requirement and its replacement with a lower standard of "reasonable belief" that conduct "might prejudice" "national security" (para 3.146) is likely to significantly to increase the scope for the risk of prosecution of journalists.

In its White Paper[90] preceding the enactment of the OSA 1989, the government explained that

> "*So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.*"

Sections 1, 2 and 3 set out the criteria for determining when a disclosure is damaging. These are in themselves very wide ranging. The proposed change to this test, therefore goes to the heart of the main section which provided any sort of opportunity of a "public interest" argument. It is cliched to say that in practice the test that editors tend to apply in these circumstances when considering whether to publish information that falls within the scope of the OSA/DA-Notices, "is this information damaging or is it embarrassing". This is a reasonably clear test. If the threshold in the OSA is to be reduced as proposed in

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[89] (1996) 70 FCR 16; (1996) 140 ALR 625

[90] (1998) Cm 408[62]-[63]

the CP, it will involve the introduction of a much less certain and more subjective test, which has the potential to make the editor's test much less clear cut. Although the Law Commission has suggested[91] that it has no proposals for revising the defence in section 5 OSA, the reality must be that any change to the definition of damage is likely to be reflected throughout the OSA, and that it will therefore impact on and substantially increase the risk of prosecution for journalists under sections 5 and 6, both of which contain damage requirements.

Although the OSA 1989 contains no public interest defence, the public interest is in practice a relevant factor in determining whether a disclosure is damaging for the purpose of the Act[92]. By way of example on this point, the prosecution of Derek Pasquill, a Foreign Office official who passed confidential documents to the New Statesman and Observer in 2005 and 2006 concerning the government's views on secret CIA rendition flights, was abandoned in the light of reports that government ministers had expressed the view that the subsequent articles were in the public interest.

During the Edward Snowden disclosures, it was suggested that section 6 OSA 1989 might catch the GCHQ material that had been shared by the UK government with the US government and then disclosed by Snowden, who was an employee of a US government contractor, without the authority of the US government. For this offence to have been be committed, however, any disclosure by the Guardian would have needed to be damaging. Under the current wording of OSA 1989, it would need to have been proved (beyond reasonable doubt) that the disclosure had damaged the work of the intelligence and security services. It was notable that in this case, the Crown had not even tried to get an injunction to prevent publication, let alone undertake any criminal prosecution, and it is likely that was because what was published was in the public interest and not damaging.

There is also already an existing mens rea defence available for journalists under section 6 OSA, which would have been available to the Guardian, which is that it did not have reasonable cause to believe that the (small amount of) information it very carefully published, would be damaging. It is therefore not sufficient for the prosecution to prove that that there were reasonable grounds to believe that the disclosure might endanger British interests abroad, or even that this was a possibility. The prosecution must prove that there were reasonable grounds to believe it would be likely to endanger British interests.

The CP does not provide any robust analysis as to why the current damage test, in addition to the ability to derogate from open justice, are not cumulatively sufficient to address the identified difficulties (see CP p82 / 3.256,7,9). Indeed the CP lacks any principled foundation for this suggestion. It appears to accept, uncritically and without attribution, a view derived from "preliminary consultation with (unidentified) stakeholders" - presumably contained within

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91 at the roundtable with media organisations on 27 June 2017

92 see para 61 of the 1988 White Paper

working papers submitted to the Law Commission by the intelligence and security services - that "the damage element of the offences can pose an insuperable hurdle to bringing a prosecution" (see CP p 79 / 3.143/8). The CP accepts that its "research stands in contrast to those commenters [Geoffrey Robertson QC] who expressed the view that the damage requirement would be easy to satisfy" but concludes "[p]ractical experience has demonstrated that is not the case": (CP p80, 3.143). Presumably these unnamed stakeholders are on the prosecutorial side of the fence but it is surely questionable to simply accept, as the CP appears to do, their position as accurate. Further no examples or evidence is provided.

Going from a damaging disclosure to being 'capable' of damaging is a significant weakening of the test. It means that a disclosure which is *unlikely* to cause damage may nevertheless be an offence because in circumstances that are highly unlikely to ever arise, it *might* cause damage. This may mean that if you have been told by an official that a disclosure would be damaging, but have good reason not to believe it, you might still commit an offence - because having been *told* you may now have reasonable cause to believe that it is 'capable' of being so.

The Law Commission seems entirely unaware that FOI tribunals deal, on a daily basis, with the question of whether disclosures are 'likely' to harm defence, international relations, law enforcement - without causing the enormous harm they see as inevitable. The CP proposals would also create a direct conflict with the FOIA in terms of the sort of information that can legitimately be obtained. The tribunals of course go into closed session to discuss why disclosing the specific information would be harmful. The courts would do the same under the OSA. Where is the 'insurmountable' problem? If these changes are made it would increase the risk that someone could be imprisoned for disclosing (or publishing) information to which the public has a right of access under the FOI Act. This is because the FOI exemptions for defence, international relations, law enforcement etc apply *only* where disclosure is (a) 'likely' to cause prejudice (not merely is 'capable' of doing so) and (b) even then disclosure may be *required* on public interest grounds. There is no corresponding public interest defence to an OSA charge. So the same information may have to be disclosed if requested under FOI but involve an offence if leaked/published by some other route.

The CP identifies an alleged flaw with the current model – namely that requiring "public confirmation" of damage to a sensitive interest has the potential to compound the damage caused (see CP p 79 / 3.139). Yet in practice that is not a problem – either the court accepts general evidence of harm (see what happened in Miranda, below) – or it sits, as it has power to do, and has done (e.g. in the Keogh and O'Connor cases) in closed session to hear such evidence (see section 6.2.10 below). Further, there is already an alternative test – namely that the information is of a class of information likely to cause damage.

In February 2014, the Divisional Court of England and Wales, gave a judgment in the case of *David Miranda v the Secretary of State for the Home*

Department and others[93]. In the course of their ruling, the court referred to evidence given by Mr Oliver Robbins, the former Deputy National Security Adviser for Intelligence, Security and Resilience in the Cabinet Office, and now current Permanent Secretary of the Department for Exiting the European Union[94]. His evidence suggested that release or compromise of such data would be likely to cause very great damage to security interests and possible loss of life. At paragraph 52 of the ruling the court said:

> *52. … It is plainly to be inferred that in describing the actual or potential damaging effects of the dissemination of this material Mr Robbins has been as specific as open evidence allows. It is necessary to cite some of his testimony, taken from his second witness statement of 24 September 2013:*
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> > *"15. Since my first witness statement, there have been further damaging reports based on stolen classified material. It is obviously not possible in an open statement to go into detail about the real and serious damage already caused by the disclosures based on Mr Snowden's misappropriations, nor about what further damage may follow. However, given the volume of media reporting published over the past three months, and public statements from the UK and US Governments, I can say with confidence that the material seized is highly likely to describe techniques that have been crucial in life-saving counter-terrorism operations, the prevention and detection of serious crime, and other intelligence activities vital to the security of the UK. The compromise of these methods would do serious damage to UK national security, and ultimately put lives at risk. Following the article jointly published by the Guardian, New York Times and ProPublica on 5 September, for example, the US Office of the Director of National Intelligence said on the following day that the article revealed 'specific and classified details about how we [ie, the US] conduct this critical activity', and that it provided a 'roadmap to our adversaries' about surveillance issues."*
>
> *There are other important passages in Mr Robbins' evidence, which should be read as a whole; a comprehensive account would unduly lengthen this judgment. As regards risk to life, I would note one particular sentence in paragraph 19 of his first statement: "It is known that contained in the seized material are [sic] personal information that would allow staff to be identified, including those deployed overseas".*
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> *53. Detective Superintendent Caroline Goode of the Metropolitan Police, attached to SO15, has also described the concerns arising from the theft*

[93] [2014] EWHC 255 (Admin) http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2014/255.html&query=(DAVID)+AND+(MIRANDA)

[94] https://www.gov.uk/government/people/oliver-robbins

of the 58,000 documents. At paragraph 15 of her statement of 27 August 2013 she says:

> *"The material needs to be examined as a matter of urgency to identify the nature of the material stolen in order to enable the MPS to mitigate the risks posed by the theft, the unlawful possession and disclosure of this material. For example, should the identity of individuals working for HMG be revealed their lives and the lives of their families could be directly at risk. Similarly should details of ongoing/historic operations and/or methodology be revealed the operation itself could be rendered ineffective. This will consequently put the lives of the general public at risk as we would be less able to counter the threat from terrorism. If the MPS was able to identify what identities and information are contained within the material we would be able to mitigate the risk posed to those individuals, those operations and the general public at large by putting appropriate measures in place."*

Evidence was also cited from Detective Supt Stokley, of SO 15, the Counter-Terrorism Command in the Metropolitan Police who said:

> *"I believed that the information in [the claimant's] possession could potentially compromise the UK's ability to monitor terrorist networks, posing a threat to the safety of the public… In particular, I considered that the release of information about PRISM technology into the public domain was of use to terrorists. My understanding of the technology from material in the public domain is that it enables security and intelligence services to monitor email traffic. Accordingly, I considered that if nothing was done to try to prevent further damaging disclosures which could directly benefit terrorists, the MPS and I personally would be failing in our obligation to prevent the loss of life, safeguard the public to [sic] prevent and detect crime. For all these reasons I considered that the use of a Schedule 7 stop was proportionate."*

The court accepted at face value these very wide ranging and generalised statements as to the possible risks, even though there was little, if indeed any, evidence produced of any actual harm. Much of what was said as to harm was purely speculation. No actual evidence of how harm might occur was given. There was no evidence of the degree of danger allegedly posed by the possession of the material.

The case demonstrates how vital it is that any risk to security – or to life – must be shown to a very high standard if state interference with journalistic freedom is to be justified. Any watering down of the test of the risk will seriously impede legitimate journalism in the public interest. As counsel for David Miranda, Matthew Ryder QC argued, journalists have an important role in a democratic

state to scrutinise actions by governments and to hold them to account. The function of the free press will be seriously inhibited if too low a test of harm is set – this is because by its very nature – as evidenced by the statements of the witnesses above – such evidence is often only ever going to be subjective, hypothetical, generalised and unspecific

If the damage test is to be so watered down as proposed in the CP, there must be an appropriate increase in the level of damage or harm that "might" be caused, ie it must be substantial damage or serious harm.

There is a balance to be struck in the security field, between the responsibility of government and the responsibility of journalists. No one is seeking to argue that there are not occasions when national security concerns should trump freedom of expression, that serious qualification is expressly acknowledged in Article 10(2) of the ECHR, but room must be left for legitimate journalism in the national security arena. Draw the tests too wide and a serious democratic deficit is created and journalism will be stifled. Worryingly, in their judgment in *Miranda,* the divisional court dismissed these propositions as conferring [71]

> "on the journalist's' profession a constitutional status which it does not possess. ...Journalists have no such *constitutional* responsibility. They have, of course, a *professional* responsibility to take care so far as they are able to see that the public interest, including the security of the state and the lives of other people, is not endangered by what they publish. But that is not an adequate safeguard for lives and security, because of the "jigsaw" quality of intelligence information, and because the journalist will have his own take or focus on what serves the public interest, for which he is not answerable to the public through Parliament. The constitutional responsibility for the protection of national security lies with elected government: see, amongst much other authority, *Binyam Mohamed* [2011] QB 218 *per* Lord Neuberger MR at paragraph 131".

The divisional court's judgment was appealed. The court of appeal accepted that the evidence of Det Supt Stokley, Mr Robbins and Det Supt Goode was "compelling" and that there was no reason to disagree with their assessment of the risk. The court added [82] "Indeed, the court is ill equipped to [assess the risk]. The police and the Security Service have the expertise and access to secret intelligence material which rightly make it very difficult to challenge such an assessment in a court of law." The court accepted that while the schedule 7 Terrorism Act stop of Mr Miranda at Heathrow was an interference with press freedom, the "compelling national security interests clearly outweighed Mr Miranda's Article 10 rights on the facts of this case". Nonetheless, the court went on to find that the schedule 7 stop power, if used in respect of journalistic information or material, was incompatible with Article 10 in that it was not "prescribed by law" as required by Article 10(2).

In overturning that part of the divisional court's judgment, the court of appeal referred to the grand chamber decision in *Sanoma Uitgevers v The Netherlands*[95] and the need for proper procedural safeguards for protecting journalistic sources, included the guarantee of ***prior*** or (in an urgent case) immediate *post factum*, review by a judge or other independent and impartial decision-making body of any requirement that a journalist hand over material concerning a confidential source.

At paragraph 113, the court said "disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect Article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important."

Any proposal to remove the requirement to show that a disclosure *is* damaging, needs to be given the most careful scrutiny, as the ramifications of such a change would pose a serious threat to freedom of expression. As the eminent Australian Judge, Justice Finn, in a different context in *McManus v Scott-Charlton*[96] said: "[Derogation from the general principle] needs to be carefully contained and fully justified". The CP's proposals in this regard are neither.

6.2.6 The need for a public interest defence

The current damage requirement in the OSA 1989, has meant that, in effect, most of the OSA 1989 offences implicitly include an element of public interest. If that is to be removed or diminished, then express provision must be made for a public interest defence, at least to those offences in sections 5 and 6 that could be committed by journalists. Even if the current test remains unchanged, consideration should still be given to the compelling arguments for the inclusion of an express public interest defence in the existing legislation.

The CP dedicates almost two chapters to this issue. Chapter 6 considers the relevant freedom of expression issues (see CP pp 141-159), and after reviewing domestic and European law, concludes that the absence of a statutory public interest defence is not indicative of non-compliance with the ECHR. Chapter 7 then considers various models of a possible public interest defence. It concludes that as far as a statutory public interest defence is concerned, the problems outweigh the benefits (see CP p 175 / 7.66).

The CP sets out three criticisms of the statutory public interest defence, including the classic "floodgates" argument that virtually anyone who wishes to raise the defence could do so (see CP p 174 / 7.63). GNM considers this argument to be wholly misconceived: the fact that anyone can plead insanity as a

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95 [2011] EMLR 4 at paras 88-92

96 (1996) 70 FCR 16; (1996) 140 ALR 625

criminal defence does not mean that everyone does, nor that the entire criminal justice system has been undermined.

The CP also relies on the safeguards contained in the guidelines promulgated by the DPP (see CP p 176 / 7.74). While it is correct that generally speaking prosecutions brought by the CPS against journalists are subject not only to the standard public interest test set out in the CPS Code for Crown Prosecutors but also to a specific public interest test as set down in the September 2012 guidelines for prosecutors on assessing the public interest in cases affecting the media[97] which acknowledge that prosecutors are required to take freedom of expression and the right to receive and impart information into account when making decisions which may affect the exercise of these rights. However this is only a voluntary code. It has no legal status. It is not enshrined in law. It is furthermore a discretionary code and is only applied after the Code for Prosecutors has been considered. While its usefulness is not to be diminished, it is far more preferable in terms of certainty and the avoidance of the "chilling effect", to have an express public interest defence in the statute.

Furthermore, that guidance specifically acknowledges that:

> *"22. Although the provisions of the Official Secrets Act 1989 are primarily aimed at individuals who are subject to the Act or Crown servants, they may be relevant when prosecutors are considering cases involving journalists or those who interact with them. The common law provides for secondary participation in crime, and sections 44 to 46 of the Serious Crime Act 2007 create offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed.*
>
> *23. The Courts have given clear guidance that the public interest has little or no application in relation to sections 1(1)(a) and 4(1) and (3)(a) of the Official Secrets Act 1989 (R v Shayler [2002] UKHL 11)[98]. Therefore prosecutors should proceed on the basis that there is no public interest defence available to a suspect who is charged under these sections."*

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http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/

98 In *R v Shayler* [2003] 1 AC 247, Lord Bingham said, p 266, [20] "It is in my opinion plain, giving sections 1(1)(a) and 4(1) and (3)(a) their natural and ordinary meaning and reading them in the context of the OSA 1989 as a whole, that a defendant prosecuted under these sections is not entitled to be acquitted if he shows that it was or that he believed that it was in the public or national interest to make the disclosure in question or if the jury conclude that it may have been or that the defendant may have believed it to be in the public or national interest to make the disclosure in question. The sections impose no obligation on the prosecution to prove that the disclosure was not in the public interest and give the defendant no opportunity to show that the disclosure was in the public interest or that he thought it was. The sections leave no room for doubt, and if they did the 1988 White Paper quoted above, which is a legitimate aid to construction, makes the intention of Parliament clear beyond argument."

This guidance seems to have little practical application and offer little reassurance as far as journalists are concerned in the OSA arena.

Concern is expressed in the CP that a public interest defence would be unworkable as it is hard to define (see CP 7.51). However this appears to be overstated. There is a public interest defence in the Public Interest Disclosure Act 1998. A public interest defence has regularly been applied to pre-publication injunctions by courts and the Editorial Standards Codes of IPSO and IMPRESS both contain a public interest test, which are regularly referenced and applied.

The CP also notes that any protection for journalists "could be considered to be arbitrary, given that there are other professionals who might violate the criminal law in the pursuits of the legitimate activities" (see CP p 177 / 7.76). However this fails to take into account the acknowledged "special role" that journalists have in the receiving and imparting of information. It remains of concern to the media that there has been and remains no place for a public interest defence where national security issues are concerned.

This section of the GNM response focuses on the need for a public interest defence from the perspective of the journalist. However, it should not be forgotten that there are compelling reasons, in accordance with international standards, and acknowledged by the ECtHR, why sources and whistleblowers also need to be protected (see 5.4 above). There is a natural tension between how the state sees a whistleblower and how the media views them. To one side they may be regarded as disloyal employees who undermine confidence and trust, sometimes for personal motives, to the other they can be a source of legitimate public interest information. From a journalism perspective, public interest whistleblowing is a source of many important stories, stories which inform the public about how their governments and intuitions work and are accountable. These two tensions will never be resolved, although it has long been recognised that public interest leaks should be protected.

As far as a potential whistleblower is concerned, the CP proposes (CP 7.98) an independent statutory commissioner scheme whereby whistleblowers can go to a commissioner who can conduct an investigation and report. However this takes no account of the key and acknowledged role of the media in receiving and imparting information in the public interest. It also flies in the face of a transparent and accountable government.

GNM submits that there should in any event be a proper express public interest defence for responsible journalists (regardless of the outcome regarding damage). This would have the benefit of certainty for journalists, it would prevent the risk of information being put out on the margins, where there is no filtering or curating, it would recognise and protect the important role that public interest journalism can play, which is all the more important in the current political and economic climate. There is a very real risk that if proper safeguards are not included, that this sort of journalism will die on the vine. Such a defence would still ultimately allow a court to determine whether a

publication was in the public interest and had been dealt with responsibly.

A criticism that is often advanced in the context of a discussion about making express public interest defences available for journalists is that the term journalist is too vague and wide (see discussion at section 5.2 above for example). In fact, it has long been recognised by international law and standards that the question of 'who can be classified as a journalist' is significant, particularly as (a) certain rights and privileges flow from the title of "journalist"; and (b) certain individuals may be targeted by state and non state actors for occupying that role. A more detailed analysis of the definition of a journalist is set out in section 5.1 above.

Looking at the act of journalism rather than defining a particular type of person would appear to be a more consistent model, and provide certainty as well as providing a strong public interest basis for protection.

What GNM proposes therefore is that there should be an express public interest defence for responsible public interest journalism. Such a clause could be modelled on section 4 Defamation Act 2013 (publication on a matter of public interest) and section 55 of the Data Protection Act 1998.

The key elements of s 4 Defamation Act 2013 are worded as follows:

> (1) It is a defence to an action for defamation for the defendant to show that—
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
> (2) subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
> ...
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

S 55 DPA 1998, so far as relevant, provides

> .....
> (2) Subsection (1) does not apply to a person who shows—
> .....
> (d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

6.2.7 A defence of prior publication should be available only if D proves that the information in question was already lawfully in the public domain and widely disseminated to the public.

Under the existing OSA 1989 regime, prior publication could be taken into account in deciding whether a disclosure would be damaging: see para 63 of the 1988 White Paper. The CP's proposal rules out a 'prior publication' defence unless a two-part test is met. The information must (a) be *lawfully* in the public domain *and* (b) have been *widely* disseminated (see CP 15 / para 3.204). This test is problematic. It would seriously limit the availability of such a public domain defence, and potentially give rise to complex satellite issues as to (a) the lawfulness of any previous publication and (b) whether the information had been "widely" disseminated. "Widely" disseminated is a subjective and nebulous concept that would leave too much scope for judicial discretion and create uncertainty. If a minister has made an indiscrete and possibly harmful revelation at a press conference briefing (ie lawfully but unwisely has made information public) a civil servant who confirms that what the minister said is true could commit an offence, of the minister's comments haven't been widely disseminated, as could a journalist who relies on the civil servant. The adoption of a prior publication test is to be supported, but the test needs to be less stringent and more clear."

6.2.8 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?

The Law Commission proposes incorporating unauthorised receipt or disclosure of sensitive economic information relating to national security within the ambit of the revised offence.

A similar, but much narrower, proposition was made by the departmental committee under Lord Franks, in their report published in 1972 on section 2 of the Official Secrets Act 1911, concerning the leakage of official information. The report recommended that the criminal law should apply to disclosure of information relating to "foreign affairs, defence and internal security, *and currency and the reserves* when that information is classified "Secret" or above or, in the case of certain defence information, classified as "Defence—Confidential".

During Parliamentary debates in 1976, in response to the Franks committee proposal, the government concluded that it was necessary to draw a "clearer distinction between home and economic policy on the one hand and security and intelligence, defence and international relations on the other." The then Minister of State for the Home Office explained that the unauthorised disclosure of official information in the domestic area will generally only result in embarrassment for the government and not serious damage. The Minister went on to say that a criminal sanction is not justified in relation to economic information, on the basis that it was not appropriate to distinguish between certain types of economic information, and it was preferable to exclude economic information entirely rather than apply criminal sanctions to a wider economic category. Then Minister of State for the Home Office, Lord Harris of

Greenwich, set out recommendations of the Franks Committee that,

> *"the criminal law should apply to disclosure of information relating to foreign affairs, defence and internal security, and currency and the reserves when that information is classified "Secret" or above or, in the case of certain defence information, classified as "Defence—Confidential", and also to the disclosure of Cabinet documents, confidences of the citizen and certain information in the field of law and order, such as information that would facilitate crime. Information in these three last categories was to be protected regardless of any security classification.*
>
> *The government accept the committee's general approach to the problem, but in considering the categories of information that ought to be protected by the criminal law we think it right to draw a clearer distinction between home and economic policy on the one hand and security and intelligence, defence and international relations on the other. The unauthorised disclosure of any official information is wrong because it is unauthorised. But in the domestic area it will generally result in embarrassment to the government of the day and not in any serious damage to the national interest. In the fields of security and intelligence, defence and international relations on the other hand, such damage may well result.*
>
> *In the economic sphere the government have reached the conclusion that a criminal sanction is not justified. It is relevant that the Franks Report was prepared at a time of fixed exchange rates. In any case it would not, in the government's view, be appropriate to distinguish between currency and the reserves and, for example, domestic interest rates and monetary and fiscal policies. Faced with a realistic choice between applying criminal sanctions to a wider economic category and the exclusion of economic information from their ambit, it seems right to us that the criminal offence should not extend to economic information."*[99]

Further, this option is set out in vague terms in the CP, which expresses no view as to whether it should be adopted. The CP says that "a number of stakeholders" have suggested this, without at any point identifying who or why it was felt to be a useful addition. The CP asks, rhetorically, if "sensitive information relating to the economy [should] be brought within the scope of the legislation … in so far as it relates to national security". Or, it asks, would this limit on criminalising revealing official economic information be " too narrow".

We are not clear what this vague formulation of words means - it could include trade deals, leaks of the budget and so on. We believe that it must be envisaged to capture more that simply matters of straight national security, which are already picked up in existing definitions. We note the Government's previous

[99] http://hansard.millbanksystems.com/commons/1976/nov/22/official-secrets-act-1911

attempts to crack down on leaks of Brexit negotiations and we are concerned that the new powers would be used to stifle reports that are embarrassing to Government in relation to their European negotiations, such as the leaked May 2017 story about the Prime Minister meeting the European Commission President. We note too that, as we have already highlighted above, the current Permanent Secretary of the Department for Exiting the European Union has a track record of overstating and generalising the purported dangers of journalists reporting on official government documents. It would no doubt be convenient for senior civil servants that are negotiating the UK's exit from the European Union to have legal threats in place against any journalists that publish articles based on leaked material in relation to those negotiations. However, GNM strongly believes that the expansion of the law to cover economic information would have a dramatic impact on the role of the press to hold the government to account at a critical time in the history of our democracy.

The term "economic information" is one that appears to have been introduced via the Investigatory Powers Act 2016, where it is used on a number of occasions, without any clear definition. The use of an unclear definition in this context has the potential to significantly increase the scope to prosecute journalists, as well as give rise to troubling issues of legal certainty about what constitutes economic information.

6.2.9 The territorial ambit of the offences should be reformed

The CP proposes that the territorial ambit of the offences contained in the Official Secrets Act 1989 should be reformed to enhance the protection afforded to sensitive information by approaching the offence in similar terms to section 11(2) of the European Communities Act 1972 so that the offence would apply irrespective of whether the unauthorised disclosure takes place within the United Kingdom and irrespective of whether the Crown servant, government contractor or notified person who disclosed the information was a British citizen (see CP 3.215)

The CP's proposal is that the court's jurisdiction under the OSA 1989 would be extended to non-British citizens who commit relevant conduct outside the UK (although para 3.224 of the CD suggests that this will apply only where the D is a Crown servant, government contractor or notified person). Assuming the extended jurisdiction could also apply to a recipient of information such as a journalist this may also expand the scope for prosecutions of such individuals.

6.2.10 The dangers of imposing serious criminal sanctions against journalists

The CP concludes at 3.180-3.189 that the current maximum sentence of two years' imprisonment available under the OSA 1989 does not reflect the potential harm and culpability that may arise in a serious case. It cites, inter alia, as an example, that the maximum sentence for making an unauthorised disclosure under Canadian law, and the Security of Information Act 2001, is 14 years. They

say they do not propose such a maximum sentence and this is for context.

As set out above regarding applicable international standards and legal principles, both the Johannesburg Principles *and* the Tshwane Principles state that any person who discloses wrongdoing or other information of public interest should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures.

Wider context to this discussion can be provided by reference to a Comparative Law and Practice Paper on Penalties for Unauthorised Disclosure[100] submitted by The Open Society Justice Initiative as part of an Amicus Brief in the US Appeal case of *US v Manning*. That paper contains a detailed chart of the law of 32 democratic states on unauthorised disclosures. Amongst a number of pertinent points in that paper:

- while it is correct that the Canadian Security of Information Act makes it an offence, punishable by up to 14 years in prison, to improperly communicate special operational information, that Act also provides a public interest defence, which is currently absent from proposals in the CP.
- In many countries, the penalties for the unauthorised public disclosure of national security information are limited to five or fewer years' imprisonment in the absence of proof of espionage, treason, delivery to a foreign state, or intent to prejudice the country's security or defence. This is the case in Australia (2 years), New Zealand and Slovenia (3 years), Panama and Spain (4 years), Colombia and Norway (4.5 years), and Belgium, Mexico, Paraguay and Poland (5 years).
- The laws of several other countries provide for maximum penalties of up to ten years' imprisonment. These include France (7 years), and Germany and Israel (ten years). However, recent cases, including for multiple disclosures that caused grave harm, have resulted in penalties of less than 10 years in most cases.
- The most similar German case resulted in a penalty of eight years, including for two counts of treason and five counts of passive bribery; a case in Israel resulted in a sentence of 3.5 years' imprisonment for giving a reporter 2,000 files that included information that put Israeli soldiers and civilians at grave risk.
- In at least 11 of the 32 countries surveyed, a disclosure of classified information to the public would not result in any penalty in the absence of the demonstration of harm. Nine countries – Colombia, Czech Republic, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden – require the government to prove either actual or probable harm in order for any penalty to be imposed.
- An additional three countries – Denmark, France, and Hungary – allow the lack of harm to be raised as a defence or mitigating circumstance.

[100] Attached as Appendix B to the Amicus Brief submitted by the Open Society Justice Initiative, https://www.opensocietyfoundations.org/sites/default/files/us-manning-amicus-20160519.pdf

There are a wide range of circumstances in which activities engaged in by journalists in the public interest may expose themselves or their company to exposure under the criminal law. From a freedom of expression perspective, what needs to be remembered is that criminal laws have a practical impact upon the media and, therefore, upon members of the public, who have a right to receive information. Given the stigmatizing effect of the use of such powers in respect of journalists, the proportionality of their use will rarely be justified[101]. No restriction upon the right to freedom of expression should be imposed unless strictly necessary and proportionate.

The House of Lords communications committee enquiry[102] into the future of investigative journalism in 2012 summarised some of the difficulties facing the press:

> "The role and practices of investigative journalism have received unprecedented scrutiny over recent months. Its long history of exposing issues that are not in the public domain and speaking truth to power has come under the microscope as the phone-hacking scandal, perhaps the greatest political media scandal of a generation, has gradually unfolded, raising a plethora of questions surrounding the public interest, privacy and media ethics. .... this report explores the media landscape in which investigative journalism operates and argues that any changes should not be rooted in the past but should seek to enable responsible investigative journalism to flourish in the future. Responsible, high quality, investigative journalism matters; it is a vital constituent of the UK's system of democratic governance and accountability. At its best, it informs and educates us, enhances our democracy, and is a force for good. However, it has become clear during our inquiry that rapid economic, technological and behavioural change is creating profound economic, legal and regulatory challenges for investigative journalism and how it might be conducted in the future."

As stated above in the section on relevant law and legal principles, there has been a long line of cases in Strasbourg setting out the dangers of criminalising journalists' work. Criminal sanctions, when compared to civil remedies, carry a greater potential to generate a chilling effect on the media and on freedom of expression more broadly. In addition, criminal laws, such as the ones considered in the CP, which involve the exercise of state power and the use of state resources, are particularly prone to abuse in order to silence opponents and critics. Such sanctions can easily be used and abused by the state against journalists in retaliation to unwanted investigations or commentary. An issue in

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[101] See for example Sunday Times v United Kingdom (No 1), (1979) 2 EHRR 245 at [49].

[102] 3rd Report of Session 2010–12, Summary
https://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/256.pdf

respect of which GNM has significant concerns is the impermissible use by public authorities of criminal enforcement powers against journalists or those associated with them.

Care must be taken to ensure a regulatory framework that is balanced, and that reforms to impose serious criminal sanctions, do not chill genuinely responsible reporting by journalists of matters relating to the state, even when that may involve in extremis, leaked official government information.

Just as the very fact of a criminal conviction can in itself have a disproportionate effect on journalistic expression, so too can the use of criminal enforcement powers have such an effect. This is all the more so where the powers utilised are concerned with matters of national security or terrorism, given their potentially stigmatising effect in respect of journalists, their work and that of their news organisation. These effects are not to be underestimated and can have a very real impact in hampering or discouraging other journalists from engaging in research and investigation of such matters. There is an increasing trend for such powers to be utilised against journalists. It is submitted that, in light of the court's established jurisprudence, the use of such powers in respect of those properly engaged in journalism will almost invariably be significantly stigmatising and, in consequence, very rarely proportionate.

Introducing much higher custodial sanctions for breaches of any new Act – which would mean that journalists undertaking routine inquiries who breach its terms *unintentionally* could be sent to prison for a significant period of time – fundamentally changes the nature of the OSA in a way which is inimical to press freedom and undermines freedom of expression. Before such sweeping changes with potentially very damaging consequences can be justified, a clear case ought to be made out about whether there is sufficient mischief to warrant it, and why the present law or the application of it is inadequate. That case has not been made. As set out earlier in this response, if the case has been made to the Law Commission as part of this consultation process, it has been made orally and in writing by security and intelligence who have a clear interest in

Since the OSA 1989 was implemented, relatively few complaints have been raised on the basis of the Act, very few prosecutions have been brought to court. Only a handful of serious cases, all directed against the leakers rather than the journalists, have been brought forward. As we learnt through the prosecutions that followed the Leveson enquiry, when journalists are tried before a jury of their peers for publishing material that is leaked or confidential or even stolen – even where money changes hands - the public have convicted no journalist on the basis of the charges brought.

Of 34 journalists arrested and/or charged under the Met Police's Operation Elveden no convictions at trial stand. The only Elveden conviction of a journalist was a former Mirror and News of the World reporter Dan Evans, who admitted paying for stories in addition to phone-hacking and conspiracy to pervert the course of justice. Three journalists were initially found guilty of offences related

to payments to public officials, but all of those convictions were subsequently quashed on appeal. In April 2015, the CPS dropped a raft of cases after the DPP, Alison Saunders, abandoned the trials of nine reporters accused of illegally paying public officials for information, admitting there was little appetite among the public for journalists who expose matters of public interest to be jailed. By contrast, at least 29 public officials and their relatives, including former civil servants and police officers, were found guilty of accepting payments.

Despite this lack of clear public appetite to prosecute journalists, the Law Commission's proposals are so broad – catching legitimate investigative journalistic practices – that the threat of imprisonment would unacceptably restrict press freedom and the right to free expression.

There is no evidence that there is a clear public policy need to warrant changing the Act. The Law Commission has displayed no evidence in this CP to contradict this view, nothing to suggest that the problem *is* serious. The imposition of custodial sanctions which could be imposed on journalists is a response that appears to be disproportionate to the apparent size of the problem. If such sanctions are enacted, they would result in a serious "chilling effect" on investigative journalism. Journalists would adopt a "safety first" approach which would run counter to the public interest. Further, as set out above, the creation of the potential imposition of serious custodial sentence for breaches of the OSA might well fall foul of Article 10 of the ECHR – particularly in view of the fact that no "pressing social need" can be made out for such disproportionate penalties. This proposal clearly does not give enough weight to Article 10. If there is support for increasing the custodial sentences available, then there should be provision made for proper substantive defences for journalists, including those of pre-publication and public interest.

The right to obtain, impart and receive information should not be predicated on the ease with which the government, police, prosecution can increase conviction rates against a background where the CP has provided no evidence in relation to failed prosecutions and where the CPS guidance for prosecutors on assessing the public interest in cases affecting the media[103], 13 September 2012 did not criticise the current regime and raised no concerns over any alleged difficulty that is now said to exist.

Given the global aspect to most media operations, this sort of custodial regime would place the UK media at a considerable international competitive disadvantage. If increased custodial sentences are felt to be appropriate, these should only be available where there is a demonstrable real risk to life caused by any disclosure.

6.2.11 Hearings in open court

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http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/

Provisional Conclusions 19-21, and Chapter 5, examine a number of procedural matters relating to investigation and trial, including relating to open justice. PC 19 suggests that the power to exclude the public from court proceedings set out in section 8(4) of the OSA 1920, should be subject to a test of necessity. The CP at 21 considers whether the process currently available under the Justice and Security Act 2013 relating to Closed Material Procedure might be imported into the criminal trial setting, where in the wider context the trial involves national security information.

A fundamental common law principle is that trials should be conducted in public, and that judgments should be given in public. The importance of the requirement for open justice was emphasised by the House of Lords in *Scott v Scott* [1913] AC 417 and *Attorney General v Leveller Magazine* [1979] AC 440, 449H-450B. It was discussed by Lord Judge CJ in *R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, paragraphs 38-39, where he made two points[104]. First, "[t]he public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law." Second, that "[i]n litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself."

There is a very strong presumption in criminal cases both at common law and under Articles 6 and 10 ECHR and the Human Rights Act 1998, in favour of open justice. Both the common law and the Article 10 jurisprudence place great emphasis on the openness of legal proceedings. In the common law context, the principal (though by no means the only) justification for open justice was identified by Lord Toulson at [112] of *Kennedy v Charity Commission* [2015] AC 455 as follows:

> *"Society depends on the judges to act as guardians of the rule of law, but who is to guard the guardians and how can the public have confidence in them? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."*

The ECtHR has also emphasised for many years the importance of the media's right to freedom of expression in relation to the reporting of legal/judicial proceedings. The seminal judgment of the ECtHR in *Sunday Times v UK* (1979) 2 EHRR 245 contains the following passage at [65]:

> *"As the Court remarked in its Handyside judgment, freedom of*

[104] much of the content of the following paragraphs is extracted from the legal analysis of Lord Neuberger, in the Court of Appeal, in Al Rawi v The Security Service and others, [May 2101] [± 14-40].

> *expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (p. 23, para. 49).”*

These principles are of particular importance to the press. They are equally applicable the administration of justice, which serves the interests of the community at large and requires the cooperation of an enlightened public. There is general recognition that the judicial system cannot operate in a vacuum. As set out above, not only do the media have the task of imparting such information and ideas: the public also has a right to receive and interpret them.

Open justice therefore has long been acknowledged as, *“a principle at the heart of our system of justice and vital to the rule of law”*: *R (Guardian News and Media Ltd.) v. City of Westminster Magistrates’ Court and the Government of the USA* [2013] QB 618, per Toulson LJ at [1]. That strong presumption may only be rebutted in exceptional circumstances and following anxious scrutiny of the legal and evidential basis for such requests; and even then it will be necessary to provide open reasons as to why an exception must be made. Transparency of the process, and assuaging public concerns, is a central part of an effective criminal process.

Further, under the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*). As the Privy Council said in the context of a hearing which resulted in the dismissal of a police officer, “[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them” - *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337.

More recently, in *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, paragraph 5, Lord Bingham of Cornhill traced the history of the common law “right to be confronted by one’s accusers”. He explained how this right, having been abrogated during the 16th century by the Court of the Star Chamber, had been effectively established during the 17th century. He relied in particular on a civil case, *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532. In the following paragraph, he identified a couple of common law exceptions to the right, namely “dying declarations and statements part of the *res gestae*”, and certain statutory exceptions. He then explained that the right was one which was enshrined in the Constitutions of various common law jurisdictions, including the United States

and New Zealand. Turning to the specific issue before the House, Lord Bingham said that, although he appreciated the strong practical case for granting anonymity to prosecution witnesses in certain cases - [2008] 1 AC 1128, paragraphs 26-27 - he rejected the contention that the courts should sanction such a course, emphasising "that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant" - *ibid*. paragraph 34.

Another fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge's decision will be liable to be set aside if it contains no, or even insufficient, reasons. As Lord Phillips MR explained in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, paragraph 16, "justice will not be done if it is not apparent to the parties why one has won and the other has lost."

At least in the case of some of these principles, the common law has long accepted that there can be exceptions. Thus, in *Scott* [1913] AC 417, Viscount Haldane LC, while affirming, and applying, the open justice principle, made it clear that a court could sit in private where "justice could not be done at all if it had to be done in public", immediately went on to say, the court considering the issue "must treat it as one of principle, and as turning, not on convenience, but on necessity" – [1913] AC 417, 437-438. (see too per Lord Diplock in *Leveller* [1979] AC 440, 450B-F).

Similarly, in relation to disclosure, the courts have long recognised that some documents, while relevant, even crucial, to the issues between the parties, may be immune from disclosure on various public interest grounds. Thus, there is legal professional privilege (based on the public interest of people being able to seek legal advice) and "without prejudice" privilege (based on the public interest in parties settling their disputes), and, as already mentioned and particularly relevant for present purposes, there is PII. The development of the law relating to PII can be traced from *Duncan v Cammell Laird and Co Ltd* [1942] AC 624 (which contains a summary of the previous cases on the topic in the speech of Viscount Simon LC at [1942] AC 624, 629-636), through *Conway v Rimmer* [1968] AC 910, to *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274. PII has become particularly significant since section 28 of the Crown Proceedings Act 1947 removed the Crown's exemption from discovery in civil proceedings, while expressly recognising PII. As decided in *Conway* [1968] AC 910 and explained in *Wiley* [1995] 1 AC 274, it is then for the court to weigh, as Lord Simon of Glaisdale put it, "the public interest which demands that the evidence be withheld ... against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted" – *R v Lewes Justices ex p Secretary of State for the Home Department* [1973] AC 388, 407. On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed, unless the Government concedes the issue to

which it relates – see per Lord Hoffmann in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, paragraph 51. As Lord Woolf said in *Wiley* [1995] AC 274, 306H-307B, even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material "on a restricted basis".

When conducting the balancing exercise between the two competing aspects of the public interest, the court may, in an appropriate case, inspect the material before reaching a conclusion on the issue. In such a case, it has become accepted practice, at least where it is appropriate and fair to do so, for special advocates to be appointed to assist the court on the issue of whether the Crown's claim for PII should be upheld. As Lord Bingham of Cornhill explained in the criminal case of *R v H* [2004] UKHL 3, [2004] 2 AC 134, paragraph 22, even though there is "little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate" in such a case, "novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure the protection of a criminal defendant's right to a fair trial."

Statute has also mandated what has come to be known as a closed material procedure in certain specified circumstances. In addition to section 8(4) OSA 1920, other examples are to be found in schedule 1 to the Terrorism Act 2005, which deals with control orders, and schedule 7 to the Counter-Terrorism Act 2008. Closed material procedures are also mandated in other tribunals by legislation (for example rule 6 of the Parole Board Rules 2004, which specifically enables the Board to consider material which should be "withheld from the prisoner on the ground that its disclosure would adversely affect national security, the prevention of disorder or crime, or the health or welfare of the prisoner", (see *R(Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, paragraph 55); and rule 94(2) of the Employment Tribunals Regulations 2016, which permits a tribunal, if it considers it to be expedient in the interests of national security, to order, inter alia, that the whole or part of any proceedings before it are conducted in private, that the claimant is excluded from the whole or part of the proceedings and that all or part of the tribunal's reasoning is kept secret (see *Tariq v The Home Office* [2010] EWCA Civ 462)). The Justice and Security Act 2013 provides for the establishment of closed material procedures (CMP) in relation to certain civil proceedings and permits the making of court orders for the disclosure of what the government deems to be sensitive information.

As submitted above in connection with evidence of harm, it is often the case in national security cases, that courts are prepared to accept vague and unspecific, generalised assertions of harm, without any need to go into closed sessions (see discussion at 6.2.4 above, in the context of *David Miranda v the Secretary of State for the Home Department and others*.) Further, there are other routes that can be adopted before courts should consider going into closed session - for example the use of public interest immunity certificates (see below) and part

closures. Nonetheless, where there is concern that showing evidence of harm may itself comprise national security, section 8(4) OSA 1920 contains a power that permits a court to order the exclusion of the public from all or part of a hearing "on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the national safety", other than with regard to the passing of any sentence, which "shall in any case take place in public".

GNM disagrees with the Law Commission's analysis of s 8(4) of OSA 1920 at paras 5.27-5.40 of the CP, and with "Provisional Conclusion 19", at para 5.41. While it is appropriate that the exercise of the power under s 8(4) should be made expressly subject to the condition provided for under the *Scott v Scott* line of case-law, the CP incorrectly formulates this test as one of necessity "to ensure national safety", whereas the power should be exercisable only if "necessary in the interests of the due administration of justice".

It is clear from the judgment of Lord Diplock in *Leveller* [1979] AC 440 that he considered that the common law test applicable to derogations from open justice, as expressed in *Scott v Scott*, also conditioned the exercise of the power conferred by s 8(4) OSA 1920. See p 451 of the court report:

> In the instant case the magistrates would have had power to sit in camera to hear the whole or part of the evidence of "Colonel B" if this had been requested by the prosecution; and although they would not have been bound to accede to such a request it would naturally and properly have carried great weight with them. So would the absence of any such request. *Without it the magistrates, in my opinion, would have had no reasonable ground for believing that so drastic a derogation from the general principle of open justice as is involved in hearing evidence in a criminal case in camera was necessary in the interests of the due administration of justice.* (emphasis added)

At para 5.36, the CP refers to an extract from the judgment of Lord Widgery CJ given when the *Leveller* case was heard before the Divisional Court ([1979] QB 31) in support of an suggestion that a test of necessity may not apply. This reasoning is incorrect for three reasons.

- First the judgment of the Divisional Court was overturned on appeal.
- Second the question here addressed by Lord Widgery CJ was an evidential, not a substantive, one. He was dealing with the question of whether evidence would always be necessary to establish that the relevant test was satisfied, not the prior question of whether the test applied at all. In fact it appears from page 44 of the report of the judgment in the Divisional Court that it considered that the *Scott v Scott* test would apply to the exercise of the power under s 8(4) ("In those circumstances the suppression of Colonel B's identity would not offend the principle of *Scott v. Scott* [1913] A.C. 417.")
- Third, in relation to references to paras 5.33-5.36 of the CP to the

judgment in *Incedal* [2016] 1 WLR 1767, the Court of Appeal endorsed the test identified by Lord Diplock in *Leveller*: see para 48.

Overall, while a necessity test (as defined above) is preferable to the existing test, the retention of the overall position of s8(4) is not supported. As set out above, open justice is fundamental, and processes should not be permitted, deployed or encouraged which favour secrecy over transparency. It is already the case in practice that courts show deference to the views of those in the security forces and government on the existence and assessment of risk (see our references to the *Miranda* case above). Courts should be slow to sit in private and should only do so were holding a hearing in public would pose a sufficiently real risk to national security. It is also noted that the language of PC 19 differs in some regards to the language of s8(4) (for example "ensure national safety" v "prejudicial to the national safety". It is not clear whether this is by design.

Finally, GNM would not support any proposal [PC 21] that would result in the availability of Closed Material Procedure in criminal courts. There is considerable disquiet about its use in civil proceedings, and it would be wholly inappropriate to introduce it to a criminal court context.

Guardian News & Media
July 2017

Appendix

The first story published by the Guardian based on the Edward Snowden documents was the Verizon story on Thursday 6 June 2013. This set out how top secret US courts had ordered the US telephone company, Verizon, to hand over data on millions of calls. This was published after discussions with the White House. The Washington Post published a similar story. On 7 June a further series of articles were published about a programme called Prism. Prism was a programme operated by the NSA, an intelligence agency of the United States Department of Defense, about the secret collection of data from Apple, Facebook, Google, Skype and others. The first UK focused story, which the Guardian published, was that the UK Government Communications Headquarters ("GCHQ") had been able to see user communications data from the American internet companies, because it had access to Prism. That story was published on Saturday 8 June[105].

Following a conversation between the Guardian and the DA-Notice committee on or around 14 June 2013, about media reports to the effect that a DA-Notice had been issued, The Guardian was sent a copy of a 'DA-Notice' issued on 7 June by the DA-Notice committee. After enquiries, it appeared this had only been sent to an email address at the Guardian that was not routinely checked. That DA-Notice sent is set out below:

From: Andrew Vallance
Sent: 07 June 2013 17:29
To: C4 News Desk; Guardian; Observer; Scotsman; Sun; Times; Jonathan Grun; Press Gazette; Daily Express; Foresight News; Daily Mirror; Financial Times; Daily Mail; Daily Star; Mail on Sunday; Evening Standard; Sunday Herald; Sunday Mirror; Glasgow Herald; Sunday Times; Independent; People; Allister Heath; Sunday Mail; Sunday Telegraph; Foresight News; Independent on Sunday; Press Association; Daily Record; Sunday Post; Evening Times; Daily Telegraph; Reuters; Tom Newton-Dunn; Caroline Wyatt; Mark Birdsall; Associated Press; Associated Press TV; Glenmore Trenear-Harvey; Telegraph Legal; Neil Chandler; ITV News Desk; Kevin Brown; BFBS Will Inglis; Will Gore; Tim Marshall; Doug Wills; Sean O'Grady; Adam Cannon; Tony Gallagher; Chris Evans; Matthew Bayley; Janet Maclay; Tom Savage; Guy Faulconbridge; Omar Erheny; Michael McManus; Assoc News Legal Dept; Times Newspaper Ltd; Louise Hayman; Independent Lawyers; Charlotte Dewar; chris wissun; Dan Rivers; David Leppard; Jonathan Collett; Jonathan Wald; Marcus Lee; Matt Chorley; Spark FM; Oliver Duff; Sara Winter; Temi Osoba
Subject: DEFENCE ADVISORY NOTICE
"Private and Confidential: Not for publication, broadcast or use on social media."

[105] See time line here : https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline

To all Editors,

There have been a number of articles recently in connection with some of the ways in which the UK Intelligence Services obtain information from foreign sources.
Although none of these recent articles has contravened any of the guidelines contained within the Defence Advisory Notice System, the intelligence services are concerned that further developments of this same theme may begin to jeopardize both national security and possibly UK personnel.
May I take this opportunity to remind editors that DA-Notice 05 advises, *inter alia*, that the following should not be published:

'..... (a) specific covert operations, sources and methods of the security services, SIS and GCHQ, Defence Intelligence Units, Special Forces and those involved with them, the application of those methods, including the interception of communications and their targets; the same applies to those engaged on counter-terrorist operations.'

If indeed, you are currently writing on this subject and would appreciate further advice, please do not hesitate to contact me on 07540 163698.

I would be most grateful for your consideration on this sensitive matter.
Geoffrey Dodds
Geoffrey CW Dodds
Brigadier
Second Deputy Secretary
Defence Press and Broadcasting Advisory Committee

On Monday 17 June, the Guardian ran a story that the UK had bugged the 2009 G20 Conference in London[106]. On 18 June, the then editor of the Guardian, Alan Rusbridger, had a conversation with Andrew Vallance, the then Secretary of the DA-Notice committee. On 21 June 2013, the Guardian published details of a different programme, Tempora. This was described as "a GCHQ programme to create a large-scale 'Internet buffer', storing internet content for three days and metadata [communications data] for up to 30 days". Tempora involved direct access by GCHQ to more than 200 fibre optic cables, enabling it to access both communications data and the content of the communications themselves. The Guardian published a number of additional stories after the DA-Notice was issued but there was never any suggestion from the DA-Notice committee that anything the Guardian had published was considered to be damaging or endangering to life or security.

From approximately 14 June, for several weeks, the Guardian's senior editors

[106] https://www.theguardian.com/uk/2013/jun/16/gchq-intercepted-communications-g20-summits

were in a dialogue with representatives of the government about how to ensure that what it wanted to publish would not be damaging to national security, or undermine the UK's intelligences services or otherwise damage the state. The DA-Notice committee was consulted about every UK security or intelligence services story except the first G20 summit one, which was considered to be very clearly not damaging. Alan Rusbridger consulted with experts from within and outside the Guardian's staff before publishing anything that could possibly be represented as having the potential to damage national security. Guardian staff were in an open dialogue with members of the government (and, via the White House, the US intelligence agencies) about whether any material that was proposed to be published might be damaging. They took every decision on what to publish very slowly and very carefully. In nearly four months they published a handful of stories about GCHQ. They did not publish a single GCHQ document in full**.** They quoted small portions of documents. They published ten partial documents from the material, redacting nine times. They also published two slides from the Prism programme - of a 41 slide set. On the rare occasion when they used part of a document, they took care to redact it. At the outset, Alan Rusbridger wrote out a set of guidelines for all Guardian journalists to operate by, before work was started. These guidelines covered security and reporting. On reporting it was a premise that nothing would be published or disclosed which was operationally damaging or in any way presented a risk to the safety of those involved in an operation. No names of people engaged in intelligence were to be used. Nothing was written about operations in Afghanistan or Iraq. No agents were named. These guidelines were shared with New York Times ("NYT") and ProPublica before any agreement to work with them was reached. In nearly all the stories published by the Guardian, the main storylines were put in advance to Downing Street, the DA-Notice system, the White House or agencies. Their responses were taken into account in any stories published.

Whatever disapproval there may have been about the Guardian's reporting of these stories, it has been clear that what was published played a vital role in allowing and informing the debate on the amount of surveillance that the US and UK governments had carried out on their own citizens and foreign nationals. Widespread violations and abuse of the rights of citizens were shown to have been occurring without appropriate political or judicial oversight. Edward Snowden's point was that the US Congress itself was being kept in the dark, and with misleading statements. There was clearly, as there will always be, a tension between the state and the press over what material was needed in order to inform a debate which many people (including e.g. the President of the US, Sir Malcolm Rifkind and former NSA director Michael Hayden) conceded was valuable and necessary.

The Guardian was forced to defend itself publicly for publishing its Snowden stories: there were calls by some MPs and others for Alan Rusbridger and the editors and journalists involved to be jailed for treason or terrorism. On 22 October 2013, in a debate in the House of Commons, Julian Smith (MP for Skipton and Ripon) focused on what he described as "a narrower and darker issue: the responsibility of the editors of the Guardian for stepping beyond any

reasonable definition of journalism into copying, trafficking and distributing files on British intelligence and GCHQ. That information not only endangers our national security but may identify personnel currently working in our intelligence services, risking their lives and those of their families."

The Guardian's loyalty to the UK was continually questioned, journalists were threatened with jail and Alan Rusbridger was called before the home affairs select committee and asked whether he loved his country. The Guardian was eventually forced to allow intelligence service operatives to supervise the destruction of journalistic material that it held in the UK. The partner of Glenn Greenwald, then a columnist for the Guardian, was detained for nine hours at Heathrow and encrypted journalistic material that he was carrying confiscated. The Metropolitan Police implied the Guardian was under investigation - for what, and for how long was never made clear.

Despite much political rhetoric at the time, the Guardian's reporting of the Snowden revelations in 2013 was throughout responsible and in the public interest. It never had any intention to disclose or publish any material that might assist terrorism or endanger national security. What was published fell the right side of the line between embarrassing but not damaging information. In a Parliamentary debate on the Intelligence and Security Services on 31 October 2013, Dr Julian Huppert said:

> The hon. Gentleman is absolutely right to say that it would be irresponsible to publish hundreds of thousands of documents without having a look at them. That is why I am so glad that that is what *The Guardian* has explicitly not done. It has taken a responsible approach and managed to prevent that. We can imagine what could have happened if there had been a WikiLeaks-style publication. The hon. Gentleman should be concerned about the fact that a contractor was able to get hold of all the information, and that is a serious failure from the NSA and a great disgrace. If it cannot protect information to that level of security, it should be very worried. There are, I think, 850,000 people who could have had access to that information. Was the NSA certain that none of them would pass it on to a foreign power? Frankly, passing it on to *The Guardian* is probably about the safest thing that could have happened to it.[107]"

The Guardian, as a responsible newspaper, took great care to consider and consult and filter before deciding what to publish.

The then director of public prosecutions ("DPP") (who was also responsible for formulating the 2012 CPS guidelines on when the media should be prosecuted, see below), Keir Starmer QC, when interviewed in January 2014 by the BBC

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107 https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131031/halltext/131031h0001.htm

(after he had retired) about Snowden and the Guardian's reporting[108] said:

> Q: Is Snowden a whistleblower?
> KS: Yes, he's brought the world's attention to issues that weren't otherwise known.
> Q: Is he a criminal? There are accusations that the Guardian has aided and abetted terrorists?
> KS: I have to tread carefully here as there is a criminal investigation which began while I was still DPP, but just because someone is a whistleblower it doesn't mean they haven't done anything wrong. You have to look at whether what they've achieved is greater than what they've done wrong - almost every case involves some wrongdoing.
> Q: What about the role of the Guardian and journalists - should they face trial on anti-terror charges?
> KS: Not in a position to answer - but not seen anything the Guardian has published that would bring it anywhere near terrorist charges, but obviously there's an ongoing investigation. On the face of it I don't think anyone would be suggesting the Guardian should be prosecuted for offences.

There also followed, as a result of the Snowden disclosures, a plethora of legal challenges and independent reviews that questioned the existing legislation and intelligence practices, which were found to be seriously wanting[109]. For example, on 6 February 2015, the Investigatory Powers Tribunal held that British intelligence services acted unlawfully by accessing millions of private communications, as collected in bulk by the NSA in the US, prior to December 2013[110]. The decision was the first time ever that the IPT, the only UK court empowered to oversee GHCQ, MI5 and MI6, ruled against the intelligence and security services. On 18 February, in a separate IPT legal challenge involving Reprieve and Amnesty International, the Government conceded that the regime governing the interception, obtaining and use of legally privileged material violates the Human Rights Act. Subsequently a number of NGOs including Big Brother Watch, Open Rights Group and English Pen brought a legal challenge in Strasbourg based around a breach of Article 8, principally through the indiscriminate use of Prism and Tempora. Separately, Liberty brought a challenge against GCHQ, MI5 and MI6 in the Investigatory Powers Tribunal, on similar but wider grounds [ie Art6, 8 and 10] grounds to the BBW challenge including that there was an inadequate legal framework and what was done was not "in accordance with law." In June 2015, David Anderson QC, the UK's Independent Reviewer of Terrorism Legislation, published his Report, A

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[108] http://www.bbc.co.uk/iplayer/episode/b03p80j2/HARDtalk_Keir_Starmer_QC/

[109] Here: https://undercoverinfo.wordpress.com/2015/04/11/gchq-mass-surveillance-threatened-in-echr-legal-case/
courtesy of Undercoverinfo and the Bureau for Investigative Journalism, is a list of legal cases, as at April 2015, submitted in relation to UK surveillance. Some are still awaiting a hearing. Updates have been included where judgements have been made.

[110] http://www.theguardian.com/uk-news/2015/jun/22/gchq-surveillance-two-human-rights-groups-illegal-tribunal

Question of Trust – Report of the Investigatory Powers Review[111] covering the activities of all 600 bodies with powers in this field, including the security and intelligence agencies. The Report endorsed some of the recommendations of the *Intelligence and Security Committee* of Parliament ("Privacy and Security", March 2015). It also offering five principles and 124 recommendations to guide the development of a new comprehensive law on surveillance in the UK. The principles and recommendations aim to enable law enforcement and intelligence agencies to protect the UK while also ensuring that their powers are subject to limits in law and to compliance with human rights standards. In particular Anderson calls for a new legal framework to govern surveillance powers that will provide both capabilities and safeguards. A further Independent Surveillance Review, conducted under the auspices of the Royal United Services Institute (RUSI), was commissioned in March 2014 by the Deputy Prime Minister. The RUSI report [112] highlighted inadequacies in law and oversight and called for new legislation to provide a new democratic mandate for digital intelligence that provides "a clear and legally sound framework within which the police and intelligence agencies can confidently operate, knowing that at all times they will be respecting our human rights".

These cases and reviews overwhelmingly demonstrated the need for more transparency, scrutiny, oversight and reform. They resulted ultimately in the repeal of much of the Regulation of Investigatory Powers Act 2000 ("RIPA") and its replacement with the Investigatory Powers Act 2016, which is much more transparent about what the intelligence and security services did around data collection on UK citizens. These issues only came to light because the Guardian and its journalists (and other newspapers in the United States), were willing to challenge and scrutinise what was going on. None of this would have been possible without the whistleblowing of Edward Snowden.

111 https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/

112 https://rusi.org/sites/default/files/20150714_whr_2-15_a_democratic_licence_to_operate.pdf