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Abstract

The unauthorised disclosure of official information has caused embarrassment to successive governments regardless of political affiliation. At times, the disclosure of highly important documents pertaining to national security has reportedly caused immeasurable harm to the defence of the realm and damaged international cooperation. The protection of national security may however be used as a shield behind which malpractice can occur. Use of the Official Secrets Acts to prosecute Crown Servants for the unauthorised disclosure of information damaging to the reputation of government has proved controversial. Crown servants operate in an environment whereby a relationship of trust and loyalty is paramount to the running of government in a democratic society. Crown servants, however, remain in a unique position to witness acts of malpractice or maladministration. When other checks and balances fail, the Crown servant is faced with the unenviable prospect of allowing the malpractice to continue or to blow the whistle.

This thesis provides an assessment of the existing officially prescribed mechanisms for Crown servants to blow the whistle and the position of the Crown servant as a journalistic source. It considers Crown servants in the Civil Service and is extended to provide two distinct case studies of servants in the UK intelligence community and members of the UK armed forces.

This thesis critically evaluates the available whistleblower procedures alongside the current mechanisms used to hold the government and its departments to account, concluding that there are significant gaps in the current processes. Comparative analysis of other jurisdictions is used to bolster understanding with the objective of providing a number of key recommendations to provide strong, viable, alternatives to unauthorised disclosures.

Crown Servants and Unauthorised Disclosures: Whistleblowing, Executive Accountability and the Public Interest

Ashley Christian Savage

A Doctoral Thesis Submitted to Durham University in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy

March 2012.

Abstract

The unauthorised disclosure of official information has caused embarrassment to successive governments regardless of political affiliation. At times, the disclosure of highly important documents pertaining to national security has reportedly caused immeasurable harm to the defence of the realm and damaged international cooperation. The protection of national security may however be used as a shield behind which malpractice can occur. Use of the Official Secrets Acts to prosecute Crown Servants for the unauthorised disclosure of information damaging to the reputation of government has proved controversial. Crown servants operate in an environment whereby a relationship of trust and loyalty is paramount to the running of government in a democratic society. Crown servants, however, remain in a unique position to witness acts of malpractice or maladministration. When other checks and balances fail, the Crown servant is faced with the unenviable prospect of allowing the malpractice to continue or to blow the whistle.

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This thesis is dedicated to the memory of Gordon William Jowitt and Mary Hilda Jowitt

CHAPTER ONE

INTRODUCTION

> "[Freedom of expression] serves a number of broad objectives. First it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill) 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."[1]

This study considers the role of Crown servants who leak information which they believe to be in the public interest. The term 'Crown servant' is taken from s.12 (1) (c) and (d) Official Secrets Act 1989 (OSA) which extends to 'a minister of the Crown, any person employed in the civil service of the Crown.' Particular focus is given to Civil Servants because they closely serve the government of the day.

This thesis will also provide two case studies. The first study considers the position of employees in the Security and Intellience Services who do not have access to the Public Interest Disclosure Act 1998 (PIDA). The second case study will consider members of the Armed Forces who are incorporated into section 12 (1) (d) OSA 1989.

The purpose of this first chapter is to consider the theoretical justifications for freedom of expression with the aim of creating a theoretical model for whistleblowing. The first part

[1] *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337, per Lord Styn.

of the chapter will concentrate on theoretical arguments. It will start by providing an overview of the most identifiable justifications for freedom of expression, encapsulated in the aforementioned dicta of Lord Styn, before proceeding to consider theoretical justifications for restricting expression and for keeping information private/ secret. Focus will then narrow to consider existing theoretical concepts of whistleblowing. The first part of the chapter will end by considering theoretical concepts of necessity and civil disobedience in order to contribute to understanding circumstances whereby an unauthorised disclosure of information results in the committal of a criminal offence.

The second part of the chapter will place emphasis on the legal, rather than theoretical justifications for whistleblowing. It will start by providing reference to the jurisprudence of the European Court of Human Rights, placing particular emphasis on political expression cases. The chapter will then consider what information should be disclosed in the public interest. Focus will be given to traditional common law principles arising from breach of confidence cases before

1.1. Part I: Theoretical Arguments

1.1.1 Moral Autonomy

The argument from moral autonomy advocates that all matters of moral choice must be left to the individual.[2] Autonomous individuals must have access to all median without restriction and an unfettered right to free expression. Essentially, it is the right to be one's own person, to do what one wants to do and to say what one wants to say based upon their own assessment of what is right or wrong. The argument from moral autonomy may not easily cohere with some of the realities of life in modern democratic society.

[2] H.Fenwick and G.Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford, 2007) 304.

Individuals in society would be unable to co-exist without some form of compromise to benefit society as a whole.

Individuals may be restricted from access to extreme forms of pornography; they may be prevented from viewing material which outrages public decency or incites racial hatred.[3] An individual's right to free speech may be restricted and or he may face prosecution if that person is deemed to have overstepped societal norms by communicating ideas or ideals that are seen to be in direct conflict with values.[4] An employee of an organisation may find it difficult to exercise his right to moral autonomy in the work place and to remain in employment for doing so. An employee upon entering employment may agree to terms which may restrict his right to certain forms of expression to maintain discipline in the workplace.[5] The argument from moral autonomy does however provide a strong theoretical basis for an employee who wishes to raise a concern because he may consider a matter or course of action before him to be in conflict with his own moral code.

1.1.2 To enhance the individual

The argument that freedom of expression enhances the individual may provide a more reasoned justification for individuals in modern democratic society. Barendt identifies that to restrict what an individual is allowed to say or write, hear, and read, is to inhibit

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[3] A person may commit the Common Law offence of 'outraging public decency' if: the act was of such a lewd character as to outrage public decency and it took place in a public place and must have been capable of being seen by two or more persons who were actually present, even if they had not actually seen it. For a contemporary interpretation see *R v Hamilton* [2007] EWCA Crim 2026.

[4] The Equality Act 2010 provides a useful example. It aims to protect discrimination of a number of 'protected characteristics' including: sex and sexual orientation, race, religion or belief, age, gender reassignment and disability. See in particular ss.4-12 Equality Act 2010.

[5] This so-called waiver of freedom expression rights is considered further below.

their personality and development.[6] Fenwick argues that the right to individual moral autonomy and the argument from individual self-fulfilment are separate and distinct concepts.[7]

The argument may be identified as separate and distinct to the argument from moral autonomy, however in exercising his right to moral autonomy it is submitted that the individual is exposed to the benefits that the right confers. Mason argues that freedom of expression may be seen as serving the private interests of the individual, enabling the citizen to lead his life as an 'autonomous individual in society,' thus allowing him to contribute to the 'formation of public opinion,' to 'participate directly' or 'indirectly in the political process' and to 'oppose actions and policies which may be detrimental to his interests.'[8]

Barendt opines that the arguments associated with individual self-fulfilment are hard to distinguish from general libertarian or moral autonomy claims.[9] Moreover, the concepts share similar difficulties. The argument from self-fulfilment does not allow for an assessment of the content of the speech or consideration of potential harm caused by the speech to others and the effect such speech may have on another individual's development. Conversely, the argument does not allow for consideration of the benefit of the speech to society as a whole.

[6] E.Barendt, *Freedom of Speech* (OUP, Oxford, 2005) 13. Similarly Vickers identifies that the right to communicate and develop ideas on moral and political issues is fundamental to individual development, L.Vickers, *Freedom of Speech and Employment* (OUP, Oxford, 2002) 49.
[7] *Above*, n 2.
[8] R.Mason, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP, Oxford, 2000), Eds J.Beatson and Y.Cripps, 237.
[9] Above, n 6,14.

2.1.3 To enhance the public good

Protection of an individual's right to freedom of expression may also be beneficial to the wider public good. Raz argues that the benefits to others are the result of the benefit the right brings to the right holder rather than merely a coincidental independent effect. Thus the respect for the interest in one person's rights sometimes essentially serves the interests of others as well.[10] He identifies the argument that a person's right to freedom of expression is protected not in order to protect him, but in order to protect the public good, a benefit which respect for the right of freedom of expression brings to all those who live in the society to which it is respected, even those who have no personal interest in their own freedom.[11]

In contrast, Schauer suggests that the recipients of the speech are the primary object of the justification for free speech. The speaker is afforded derivative rights in order protect and enhance the recipients' right to information.[12] Barendt is critical of this assertion believing that in reality a court deciding a free speech case would assume that although the right of the recipient may attach equal or slightly more weight than it does to the speaker, it would be wrong to uphold a case that did not respect the speaker's interest in the ability to communicate or share his ideas or information.[13]

The argument that freedom of expression is necessary to enhance the public good provides a strong justification for the communication of 'whistleblowing speech.' It may be observed that the Public Interest Disclosure Act 1998 was enacted in response to a

[10] J.Raz, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP, Oxford, 2000), Eds J.Beatson and Y.Cripps, 305.
[11] *Ibid*
[12] F. Shauer, *Free Speech: A Philosophical Enquiry* (CUP, Cambridge, 1982) 105.
[13] *Above*, n 6, 27.

number of incidents during the 1980s and 1990s including the Clapham Rail Crash, the Piper Alpha explosion, the Zebrugger Ferry tragedy and the Maxwell pension's scandal. The Act covers a number of broad categories whereby the disclosure of information may qualify for protection, including: a breach of health and safety, damage to the environment, a miscarriage of justice or a breach of a legal obligation. It is submitted that the number of qualifying disclosure categories contained within the Act identify the underlying purpose of the legislation; to encourage the raising of concerns beneficial to the public interest.

2.1.4. Truth

Freedom of speech is essential because speech leads to the discovery of the truth. In his seminal work, On Liberty, John Stuart Mill developed the proposition from Milton's Areopagitica. Mill identified that opinion which is suppressed on the grounds of falsehood may later be found to be true, or alternatively the speech suppressed may contain a 'portion of truth.'[14] The consequences of suppression of speech on this basis, Mill argued, are that truth is not established or it is replaced by falsity. The vision, as Schauer identifies, is a marketplace of ideas whereby the allowance of argument and opinion leads to increased knowledge which in turn contributes to the enhancement of society as a whole.[15]

The inherent difficulty with Mill's argument stems from the fact that Mill suggested that the discovery of truth need not be immediate but may be disseminated over a period of

[14] *On Liberty*, Chapter 2.
[15] Above, n 12, 15.

time.[16] In modern democratic society, the population may require access to true information in order to participate in a particular issue. Fenwick argues that this rationale provides a strong argument against secrecy and, in particular, against:

> "the propensity of UK governments to attempt to conceal political secrets until revelation would no longer have a damaging effect on their interests."[17]

The discovery of truth is of most importance where the public has been presented with false information on key government policy, where misconduct has been covered up, or where true information has been 'spun' in such a way as to mislead. Delay or refusal to disseminate the truth leads to suspicion of authority. Freedom of information requests may take a considerable length of time to be answered, may be redacted, refused or vetoed. The mechanisms used to hold government to account may take several years of investigatory processes to discover the truth and may extend beyond the life of the Parliament and the administration it concerns. Secrecy fuels mistrust in authority. In the modern technological age as Dean suggests, 'techno culture materialises the belief that the key to democracy can be found in uncovering secrets.'[18]

The argument from truth provides a strong theoretical argument for the need for whistleblowers in Crown service. Crown servants may be placed in a unique position within the confines of government departments to witness the truth of executive action. Where the public has been misled about the government's immigration policy or has not been informed about the illegal bugging of sovereign states, a Crown servant may be best placed to provide the public with the truth. Moreover, the emergence of online facilities such as *Wikileaks* or *OpenLeaks* provide platforms for the swift dissemination of information.

[16] *Above*, 14.
[17] *Above*, n 2.
[18] J.Dean, *Publicity's Secret* (2009) Political Theory 29 (5) 646.

1.1.5 Participation in a Democracy

The argument from democracy is closely linked to the argument from truth. It comprises of two essential ideals. First is the notion that citizens as active participants in the democratic process require information on political issues to engage in open debate and to make informed decisions, thus government should be accountable. Second, in a democracy the government serves at the will of the people. It is therefore vital that citizens have the opportunity to freely communicate their wishes to the government of the day so that its actions accurately reflect the will of the people.

According to Barendt, the argument from democracy is centred on the rights of citizens who have an equal right to engage in public debate and exchange information and ideas.[19]Schauer believes a democratic system acknowledges that 'ultimate political power resides in the population at large, that the people as a body are sovereign, and that they, either directly or through their elected representatives, in a significant sense actually control the operation of the government.'Schauer's reasoning is a development of the principles first considered in the work of Alexander Meiklejohn.

Vickers is critical of the sovereignty argument, suggesting that if the justification is 'the need to do the sovereign will of the electorate' this does not 'automatically guarantee free speech.'[20] She identifies that if this were indeed the case; the electorate could 'chose a government which does not uphold free speech' or choose to 'suppress the speech of a

[19] *Above* n 6, 36.
[20] *Above*, n 6,24.

minority.'[21] She suggests that the solution to this limitation is to allow government decisions to be 'debated widely' because the issues involved in the decision making process are 'rarely clear cut.' Vickers further opines that the right to freedom of speech 'in relation to government actions and policies' acts 'a form of accountability on the state.'[22]

It is submitted that the argument from democracy creates a strong justification whistleblowing. Again, Crown servants may be best placed to raise concerns about government actions or policy, particularly where the traditional mechanisms of holding the executive to account have failed. Regardless of the veracity of the sovereignty argument it is clear that citizens elect politicians to govern on their behalf and do so on the understanding that the individuals concerned will have their best interests at heart. It is therefore vital that citizens are provided with sufficient information to engage in and enhance political debate, to decide who to elect based upon clear and informed decision making, and ultimately, so that they can be aware on what actions are taken in their name.

1.1.6. Right of access to information

Arguments justifying a right of access to information have close links with the arguments from truth and from democracy. Access to official information can further enhance an individual's knowledge of political issues, assisting informed participation in political debate leading to an enhanced society as a whole. According to Sedley, the mechanisms of fact holders are almost always self interested – driven not by an

[21] *Above*, n 6,24.
[22] *Above*, n 6, 25.

acknowledged right in others to know what the organisation knows but what suits the organisation that others should know.[23] Neocleous notes that the publicity of official deliberations ensures the connection between 'private citizens as voters and public officials as representatives.'[24] Birkinshaw identifies that 'disasters are avoided, accidents prevented and sustenance provided' by allowing access to the information.[25] An individual's 'moral and ethical evaluation,' he opines, depends upon information 'acquired by our own and our predecessor's experiences.'[26]

Birkinshaw develops a theoretical framework for the right to information based upon Habermas' 'ideal speech theory.'[27] The theory requires all participants to have the 'same opportunity to debate and justify without external pressure or domination.' Birkinshaw argues that freedom of information is an 'essential component,' in order to ensure that individuals who participate in debates have access to the truth so that if others are trying to deceive them they will be able to distinguish between truth and lies. Birkinshaw however identifies that the pursuit of 'secrecy or confidentiality or the quest for privacy' is 'essential to full human development.' Thus he suggests that there are areas of life which are a legitimate object of secrecy, such as intimate personal relationships, medical facts, prolonged negotiations and investigations in the public interest.[28]

It is submitted that the right of access to information provides a strong justification for whistleblowing. It will be illustrated later in this thesis that despite the introduction of the Freedom of Information Act 2000, members of the public are faced with a number of

[23] *Above*, n 10, 241.
[24] M.Neocleous, Privacy, Secrecy, Idiocy (2002) Social Reseach 69 1, 87.
[25] P.Birkinshaw, *Freedom of Information: the Law the Practice the Ideal* (Butterworths, London, 2001) 16.
[26] *Ibid.*
[27] *Ibid*, see further: J.Habermas, *Toward a Rational Society* (Beacon Press, London, 1971), Ch 5 and 6.
[28] *Above* n 25.

barriers to the disclosure of information. A whistleblower may be best placed to provide the public with information that they would otherwise be unable to obtain through legally prescribed means. It will be indentified that there are circumstances where the right of free expression may be curtailed in order to prevent harm. The next section considers the theoretical justifications for limiting expression rights and the right of access to information.

1.2.1. Justifications for the Limitation of Expression Rights and the Right to Access Information

J.S. Mill argued that the only legitimate justification for the limitation of an individual's free speech rights is the prevention of harm to others.[29] Barendt states that a free speech principle may not confer absolute protection but the principle does mean that governments must show strong grounds for interference.[30]Dworkin suggests that limitation to the right to freedom of expression may be justified if the state demonstrates 'a clear and substantial risk' that the exercise of the right will do great damage to the person or property of others.[31]

Shauer correctly identifies that speech can and frequently does cause harm, thus by an individual saying something to a group of people may cause them to be harmful to society by disobeying the law.[32]Such reasoning can be transposed to the unauthorised disclosure of information harmful to national security. A leak of information may be useful to the 'enemy,' it may also provide encouragement to colleagues working in the same environment to also leak information. It may be argued therefore that the existence

[29] *On Liberty*, Chapter 2.
[30]*Above*, n 6, 7.
[31] R.Dworkin, *Taking Rights Seriously* (Harvard University Press, New York, 1978).
[32]*Above*, n 12, 10.

of an Official Secrets Act which limits the freedom of expression of the Crown employee is necessary to protect the information concerned and to act as a deterrent effect.

The United States Supreme Court in *Schenke v United States* developed considered when the restriction on freedom of expression would be justified, resulting in the formulation of a 'clear and present danger' test:

> "Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances a to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done."[33]

The subsequent decision of *Abrams v United States*[34] adopted a 'bad tendency' principle, which enabled the restriction of speech by government if it believed that it had the sole tendency to incite or cause illegal activity. Oliver Wendel Homes, dissenting, opined that regardless of whether the speech in question had been communicated in a time of war or any other time the principle would be 'always be the same.'[35] Thus, he opined that Congress could 'only limit the expression of opinion' whereby the 'present danger of immediate evil or intent to bring it about warranted the intervention.'[36] The reasoning is significant. Holmes advocated that such a restriction should only be warranted where the threat is immediate, and that the decision should be made by Congress rather than government.

The decision in Abrams was overturned following *Brandenburg v Ohio*. The court adopted a new standard of review which authorises the restriction of speech whereby the circumstances give rise to 'imminent lawless action.' Mr Justice Douglas, concurring,

[33] [1919] 249 US 49, 51.
[34] [1919] 250 US 616.
[35] *Ibid*, 628.
[36] *Above*, n 33, 628.

was critical of the 'clear and present danger' test. He suggested that the application of the principle could result in decisions where 'the threats were often loud but always puny' and 'made serious only by judges so wedded to the status quo that critical analysis made them nervous.'[37]

It may be identified from the aforementioned decisions and theoretical reasoning that in order for the state to restrict the expression of a citizen it must first establish an overriding justification, such as the prevention of harm or the security of the state. A court must have the opportunity to test this justification based upon a pre-determined analytical framework. Article 10 of the European Convention on Human Rights provides for such a framework. Article 10 (2) provides a number of potential restrictions on the right to freedom of expression provided that they are 'prescribed by law' and 'necessary in a democratic society.'[38]Barendt argues that 'necessary in a democratic society' can only be determined in the light of all the circumstances. The process therefore does not only require judges to determine the importance of the relevant state interest and the degree of danger threatened by the expression but further enables them to examine the 'precise character of the speech.'[39] Based upon this reasoning, it is suggested that it is insufficient for the government of the day or an executive department to argue that speech ought to be restricted because it relates to national security, or is necessary to prevent crime. It must provide a justification, as to why, in the particular circumstances complained of, the speech would cause harm. A court must then be provided with the ability to rigorously test this justification. It will be argued later in this thesis that the Official Secrets Act 1989 and the harm tests associated with it do not allow for such analysis. The next section will consider the theoretical justifications for secrecy

[37] [1969] 395 US 444.
[38] Full consideration of Article 10 ECHR and related jurisprudence is provided below.
[39] *Above*, n 6, 20.

1.2.2. Theoretical concepts of secrecy and security

According to Simmel, all relationships of people to each other rest, as a matter of course, on the pre-condition that they know something about each other.[40] As citizens elect politicians to act on their behalf they bestow the executive with the power to make decisions for the good of the state. Neocleous argues the tendency towards secrecy is endemic to all states.[41] Thus, if a situation arises whereby the ideal course of action is to preserve the state it is the statesman's task to discern this course and as a consequence determine which information should be suppressed in the public interest.[42]

Bok suggests that the conflicts over secrecy between state and citizen are conflicts of power. It may be argued that the citizen's acceptance of state secrecy, and as a consequence state power, is a natural extension of Hobbes' concept of the social contract – the surrender of natural rights to accept the jurisdiction of the sovereign.[43] Part of a citizen's acceptance of secrecy - or the government's justification for it - may the inability for the public to adequately assess and understand information. Bok suggests we are limited by our 'capacity to perceive and remember' and that if provided with information our capacity to make judgment is 'severely limited' and is 'subject to bias from all directions.'[44]

Similarly, in discussing justifications for secrecy in contrast to arguments for publicity,

[40] G.Simmel, *The Sociology of Secrecy and of Secret Societies*, American Journal of Sociology (1906) 441.
[41] *Above*, n 24.
[42] *Above*, n 24, 97.
[43] T. Hobbes, *Leviathan*, 1651, Ch 14, I. Mcleod, *Legal Theory* (5th Edition, Palgrave: Basingstoke, 2010), 53.
[44] S.Bok, *Secrets: on the Ethics of Concealment and Revelation, (*Vintage, New York, 1989) 104.

Dean identifies Bentham's proposition that some individuals may 'defend government secrecy' on the basis that the public' lacks of capacity for judgment.'[45] Dean further develops Bentham's reasoning, suggesting that the public is split into three classes. The first, those 'who do not have time for public affairs;' the second, those who 'believe through the judgements of others,' and the third 'few' who 'judge for themselves on the basis of the available information.'[46] Dean suggests that it is the second class – those who believe in the judgment of others – who most require publicity to ensure that they are not misled.

Part of the difficulty is the requirement to keep a check on government control of secret information. Neocleaous identifies that civil society lacks a 'sense of equality' or 'reciprocity' with the state as it has 'no spying machine.' The best it can hope for is some kind of 'left opposition' to keep tabs on it but it will always be at a 'serious technical and organisational disadvantage.'[47] However, whilst Neocleous suggests that the way to combat secrecy is to combat the state collectively, Szikinger is highly critical of this assertion identifying that it would most likely result in the collapse of the state itself.[48] Moreover, he suggests that if such action were to succeed, greater openness based on 'collective knowledge' and 'collective efforts' would not result in 'challenging' the 'oppressive tendencies of the state.'

Fenster considers the notion of transparency by providing a modern interpretation of Bentham's Panopticon, a means of allowing the public to view the actions of their

[45] *Above*, n 18, 649.
[46] *Ibid.*
[47] *Above*, n 24, 86.
[48] I. Szikinger, *Privacy, Secrecy, Idiocy: A Response to Mark Neocleous*, Social Research (2002) 69 1

political rulers.[49] In doing so he identifies that the motivation for such a design is to create a structure whereby the subject is unable to recognise when he is being watched. This creates a feeling of 'permanent surveillance' leading the subject to regulate 'discipline and organise behaviour and thought.'[50] Fenster argues that a truly 'panopticised state' would be difficult to achieve but serves as a metaphor for transparency and open government.[51]

It is submitted that the benefits associated with a 'panopticised state,' namely that executive malpractice is less likely to occur for fear of the wrongdoer being found out, should be contrasted with the potential damaging consequences of transparency controlling behaviour. The principles of collective Cabinet responsibility and candour have been developed to ensure that members of the Cabinet may speak freely without fear that their words may result in future criticism and so that Civil Servants can provide full and frank advice. The 'panopticised' ideal, if implemented, could have a detrimental impact on the machinery of the state resulting in delayed or hesitant decision making or decisions made which do not best serve the public interest. Conversely, Bok identifies that the notion of 'collective secrecy' can diminish the sense of 'personal responsibility for joint decisions' resulting in 'skewed' or 'careless judgement' and the taking of 'needless risks.'[52]

1.3 Theoretical Perspectives on Whistleblowing

According to J.S. Mill:

> 'A person may cause evil to others not only by his actions but by his inaction, and

[49] M.Fenster, *Seeing the State: Transparancy as Metaphor* [2010] Admin.L.Rev. 62 669.
[50] *Ibid.*
[51] *Ibid.*
[52] *Above,* n 43, 109.

in either case he is justly accountable to them for the injury.'[53]

The recent *Wikileaks* revelations highlight an inevitable tension between the need to maintain national security and a duty of confidence to the employer on the one hand, and the burning moral obligation to have the perceived wrongdoing addressed. Unauthorised disclosures may be a product of an overbearing and outdated regime to protect official secrecy and a failure of the existing oversight mechanisms to hold those in power to account. Conversely, a leak to the wider public domain by a disgruntled or disaffected employee may be identified as a disproportionate response to a matter which could have been dealt with internally.

Bok provides a detailed philosophical analysis of whistleblowing. She identifies that unauthorised disclosures, or leaking of information and authorised whistleblowing bear similarities. She suggests that both forms of expression can be used to challenge 'corrupt or cumbersome systems of secrecy,' however whilst they may 'convey urgent warnings' the information concerned may be false and may contain 'vicious personal attacks.'[54] Bok therefore recommends that society should draw distinctions between the types of information communicated; ultimately asking whether the matter communicated is relevant to the public interest.[55] She proposes that individuals who are contemplating blowing the whistle must consider whether the information in question is something to which the public is entitled to know 'in the first place' or whether it 'infringes on personal and private matters' that 'no one should invade.' Conversely, she argues that those who raise matters relating to an individual's private life as 'a threat to the public'

[53] J.S.Mill, On Liberty, Chapter 1.
[54] *Above*, n 44, 219.
[55] *Ibid.*

voice their own 'religious or political prejudice.'[56]

Bok, suggests that it may be 'disloyal' to colleagues and employers and a 'waste of time for the public' to raise concerns to the public first. She recommends that raising concerns internally first can often 'uphold both sets of loyalties and settle the problem without going outside of the organisation.'[57] Bok considers that raising concerns directly to the public should remain a last resort, where other options have been considered and rejected. Bok suggests public disclosure may be considered where the other options 'do not apply to the problem at hand,' where there is 'no time to go through routine channels,' or when the organisation is considered 'so corrupt or coercive that steps will be taken to silence the whistleblower' if regular mechanisms are used.[58]

It is submitted that Bok's approach to the subject of whistleblowing provides a strong foundation with which to construct a theoretical framework for the purposes of this thesis. Just as Bok aims to distinguish between the values of different types of information, it can be observed that the European Court of Human Rights and domestic courts have taken a similar approach. However, Bok's recommendation that society should draw distinctions between the types of information communicated is not without difficulty. According to the aforementioned perspective of Dean, society may not be equipped to make the critical distinction between the types of information communicated. Taking Dean's conception of society, those who 'believe through the judgments of others,' and the 'few' who 'judge for themselves on the basis of the available information,[59] may encounter the most difficulty.

[56] *Above,* n 43.
[57] *Ibid,* 221.
[58] *Ibid.*
[59] *Above* n 45.

Faced with leaked information which purportedly originates from a government department, society cannot make an adequate assessment of the value of the speech communicated or the motivation behind the disclosure unless they understand the information communicated to them. Traditionally the public have been reliant upon traditional media outlets to report on such material. Technological advancements have meant that vast quantities of official documents can be made readily accessible by organisations such as *Wikileaks*. Despite these developments it will be illustrated in chapter two that traditional media outlets are still utilised a means to present and explain the material to the public.

Potential difficulties occur when the information is provided to a journalist via a conduit, creating further distance between the source and journalist than ever before. How can journalists be certain that they are not being fed with false information without having access to the source to test his motives? One must consider whether society can reach informed conclusions as to the value of the information communicated without knowing the identity of the source.

Bok does identify that those who take 'openly accepted responsibility' for blowing the whistle should be preferred to anonymous leaking.[60] Open whistleblowing can allow for the information to be 'easily checked,' for the 'source's motives to be challenged,' and for the information concerned to be 'tested.'[61] Bok argues that anonymous leaking is 'safer' and can be 'kept up indefinitely' whereas in comparison the person who reveals

[60] *Above*, n 43, 223.
[61] *Above*, n 43, 223.

his identity 'shoots his bolt by going public.'[62] Unauthorised leaking, Bok suggests, means that the messages conveyed in the leaks may be lost, because the leaker cannot explain their messages. Moreover, the information often 'passes through several intermediaries' before being printed, meaning that the information may be changed or may not be printed in its entirety.[63] Ultimately, Bok opines that:

> "…Unless the information is accompanied by indications of how the evidence can be checked, the source's anonymity, however safe, diminishes the value of the message."[64]

Rains and Scott provide a theoretical model of receiver responses to anonymous communication in which they identify that many whistleblowers elect to remain anonymous so that they may avoid personal or legal retribution for their actions.[65]In organisations where mechanisms are provided for anonymous concern reporting, they suggest that such communication has 'raised concerns about the perceived credibility of claims' and 'the ability of the accused to take action' to counteract the claims made against him.[66] Ultimately, they identify that understanding a 'source's qualifications' and 'trustworthiness' are 'central to evaluating his or her message.'[67] The authors propose that whilst whistleblowing can be considered a 'pro-social act' some receivers of the information may desire to know the identity of the source. They argue that the identity of the source could be of 'integral importance to assessing the veracity of his or her claims' – the 'inability to ascertain the identity of the source', they opine, 'may explain the relative ineffectiveness of anonymous whistleblowing and the negative reactions of message receivers to such forms of communication.'[68]

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[62] *Above*, n 43, 223.
[63] *Ibid*.
[64] *Ibid.*
[65] S.Rains and C.Scott, *To Identify or Not to Identify: A Theoretical Model of Reciever Responses to Anonymous Communication* [2007] Communication Theory 1, 74.
[66] *Ibid*, 67.
[67] *Above*, n 64 74.
[68] *Above*, n 64, 83.

It is submitted that the theoretical perspectives of Rains and Scott are consistent with the work of Bok. Anonymous whistleblowing may cause suspicion of not only the motivation behind the disclosure but of the information itself. To the whistleblower, however, anonymous leaking may appear to be the only 'safe' option. Perry suggests that the fate of whistleblowers is 'characteristically bleak' – 'if they have not already decided to resign' they can 'expect to be dismissed from their employment' following the making of the disclosure.[69] Whistleblowing, he suggests, may be classified as a form of 'occupational suicide.'[70] Consistent with this approach, Mansbach suggests that whistleblowing is a form of 'fearless speech' – even though wrongdoers are in a position to hurt the individual for raising the concern - the individual chooses to do it anyway.[71] Anonymous whistleblowing, however, may be a way of limiting the potential damage caused by the act.

One must further consider whether there may be circumstances when the value of the information in question outweighs the fact that it has been communicated anonymously. Moreover, the whistleblower may be motivated by spite or revenge, but the information communicated may still be of a high value to society. This, it is suggested, supports the argument that freedom of expression can enhance the public good. It will be identified later in this discussion that the European Court of Human Rights, and the domestic UK courts have sought to distinguish between the requisite value of different forms of speech and that a whistleblowing model which supports anonymous communication should be consistent with a framework which provides an assessment of the circumstances in which

[69] N.Perry, *Indecent Exposures: Theorizing Whistleblowing* [1998] Organization Studies 19/2, 237.
[70] *Ibid*, 241.
[71] A.Mansbach, *Whistleblowing as Fearless Speech: A Radical Democratic Practice*, paper delivered to International Whistleblowing Research Network Conference, London 2011, 1.

the disclosure was made and the value of the speech communicated.

Mansbach likens the act of whistleblowing to Michel Foucault's notion of Parrahesia, a form of truth telling originally practiced in ancient Greece. Mansbach defines workplace whistleblowing as 'the disclosure by a person working within an organisation of acts, omissions, practices, or policies by that organisation that wrong or harm a third party.' It is submitted that this widely framed definition would cause difficulties for the Crown servant as whistleblower. Whilst it can be acknowledged that certain actions or the failure to act may cause harm to an individual, Mansbach's focus upon the impact of organisational policies on a third party needs careful consideration. A secret policy on extraordinary rendition and torture, the practice of which may be illegal under both domestic and international law may be distinguished from a policy to raise the retirement age or a policy to reform the benefit system. All of the aforementioned policy examples would have a likely impact upon a third party. The consequences for the individuals concerned if such policies were implemented may be very different. This distinction identifies the importance of being able to categorise the value of the speech communicated by the whistleblower.

The unauthorised disclosure of a government policy document, which may be politically controversial but not illegal, could be a justifiable form of political expression. Yet the act of communication, depending on the content of the information concerned, may be more beneficial to the communicator, allowing him to be an active participant in the political process, than the recipient public. Moreover, the information concerned may only benefit a narrow group of the population. However, there may be circumstances where the information communicated may not disclose an illegal or highly controversial

policy, but the disclosure of the information could still be of benefit to the electorate. If the contents of a policy have been deliberately concealed or misrepresented to Parliament, the disclosure of the information highlighting the act of concealment may assist the electorate in determining the conduct of those in power. Consistent with the premise that the disclosure certain types of information may be more justifiable than others, the discussion will now progress to consider the theoretical justifications for releasing information out of necessity.

1.4 Necessity and Duress of Circumstances

In a report entitled 'Leaks and Whistleblowing in Whitehall.'[72] The Public Administration Select Committee identified that unauthorised leaks of information undermine the relationship of trust between servants and ministers but stated that there are exceptional circumstances in which leaking could be justified in order to expose serious wrongdoing. Such circumstances would require a 'failure of proper channels both of disclosure and challenge within government.' [73]

The following two sections place emphasis upon circumstances whereby the unauthorised disclosure of official documents may result in the committal of a criminal offence and whether such an act may be justifiable in the circumstances. It is necessary to distinguish between the concepts of necessity and civil disobedience. Necessity, according to Brudner, most commonly refers to circumstances whereby someone chooses to break the law in order to avoid a greater evil.[74] The evil, it is suggested, must

[72] PASC, *Leaks and Whistleblowing in Whitehall*, 2009, HC 83 http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf (accessed 01/05/10).
[73] *Ibid.*
[74] A.Brudner, *A Theory of Necessity* [1987] OJLS 7 3, 340.

present an immediate threat of harm to the communicator or to others. In the context of whistleblowing, such speech would be consistent with the arguments from autonomy and to benefit the public good. In contrast, civil disobedience provides the means for an aggrieved individual to object to a particular law or policy to which he does not agree. Determination of the appropriate circumstances whereby either concept will be applicable is highly subjective.

With regards to the defence of necessity, Lee suggests that it is not enough that the commission of an offence resulted in 'a lesser evil than the evil avoided through the violation' – it must have been the 'only option the individual had available to address the choice of evils he was facing.'[75] The defence, it is suggested, requires an individual to make the decision to break the law based upon an overriding imperative. Howard Dennis claims that such action will be permitted by society because the act will result in a reduction of harm which would otherwise occur.[76] In an alternative view, Brudner suggests that necessity can be considered as a 'momentary aberration from, rather than an expression of, the accused's moral character' which if accepted should lead to acquittal. [77] It is submitted that regardless of whether either argument is accepted, Crown servants may be placed in a unique position, whereby the disclosure of information may be considered necessary because of a perceived duty of care owed to citizens. Determination of what constitutes the 'lesser evil,' the most proportionate course of action in the circumstances, requires careful consideration.

Brudner argues that necessity cannot be used as a justification where an individual

[75] Y.Lee, *The Defence of Necessity and Powers of the Government* [2009] Crim Law and Philos 3 133, 141.
[76] I. Howard Dennis, *On Necessity as a Defence to a Crime*, Possiblities, Problems and Limitations of Justification and Exuse [2009] Crim Law and Philos 3 1, 29.
[77] *Above*, n 74.

'imposes grave risks on the health of persons, regardless of the magnitude of the net saving of lives.'[78] Transposed to the circumstances of unauthorised disclosure of government documents, the release of information identifying that an illegal war is about to take place may be justified, but the whereabouts or identities of the soldiers may not. The Crown servant would be faced with the unenviable task of determining what disclosures of information would be justifiable and to whom. The difficulty of making such a determination is further complicated by the lack of an available codified legal framework; in particular a codified defence of necessity contained in the Official Secrets Acts.

Howard Dennis opines that the development of necessity as a defence should be restricted to two situations, firstly where there is an emergency situation, and second, where there is a conflict of duty; giving rise to a 'danger of death or serious injury.'[79] Howard Dennis suggests that where a situation concerns 'less serious harm' it should be for the legislature to 'regulate the ordering of harms with specific defences.' He suggests that it may also be appropriate to delegate the task of 'ordering harms' to the courts by providing general words in statutory provisions to allow the court to undertake such a task. It is submitted that this proposition further supports the need for a framework which categorises the value of speech communicated proportionate to the harm caused by the act of disclosure. This discussion will now turn to consider civil disobedience.

1.5 Civil Disobedience

Perry poses two objectives for disobeying law:

[78] *Above*, n 74, 365.
[79] Above, n 76.

> "first is to resist a coercive law to which one conscientiously objects – a law requiring one to do what one believes one may not do or forbidding one to do what one believes one must do. Second to achieve a greater good- a good greater than the evil(s) entailed by the disobedient act; for example to undermine those in power (Ghandi's objective), to change or at least focus serious attention on a law (e.g. racially discriminatory one) or policy (e.g., the deployment of cruise missiles), or simply to protect someone (e.g., a Salvadorian refugee illegally in the United States)."[80]

The act of civil disobedience will most notably arise when a Civil Servant chooses to break the law in order to raise his concern. The Crown servant may feel duty bound to engage in civil disobedience as a means of pursuing a greater good. This in effect becomes an overriding obligation to act.[81] The laws protecting official information are indentified in chapter four of this thesis which considers official information. The Official Secrets Act 1989 does not include a public interest test for unauthorised disclosures made directly to the public. Moreover, it will be identified that the harm tests provided in the various sections of the act are easily satisfied. The increasing use of the common law offence of Misconduct in Public Office as an alternative to prosecution under the Official Secrets Act has further widened scope for punishment of unauthorised disclosures of official information. Therefore, if a Civil Servant decides to disclose official information without information it is highly likely that he will break the law as a result.

Rawls contends that the act of civil disobedience is both public and political; it is neither covert nor secretive.[82] The act of civil disobedience generally requires the individual to provide an explanation as to why he chose to break the law and an explanation as to why he disagrees with a certain policy complained of. Civil disobedience may therefore be considered as a form of 'protest speech.' An explanation as to why the individual broke the law in raising a concern may be considered as significant as the information

[80] M.J Perry, *Morality Politics & Law* (Oxford University Press, Oxford, 1991) 114.
[81] H.D. Thoreau**,** *Walden, or, Life in the Woods; and On the duty of Civil Disobedience* (New American Library, New York, 1960) 288.
[82] J.Rawls, A Theory of Justice (OUP, Oxford, 2nd Edition 1999), 374.

disclosed. Consequentially, it would be very difficult for an individual to justify that his act constituted an act of civil disobedience if he chose to remain anonymous in raising the concerns. Disclosures made possible via an online outlet such as *Wikileaks* lack both the proximity between the whistleblower and the material communicated and furthermore do not provide an explanation as to why the individual disagrees with the information complained of, instead generally leaving the recipient audience with the task of drawing their own conclusions on the material.

Rawls identifies a concept of equal society. Civil disobedience may be regarded as a 'stabilizing device,' a 'healthy but illegal method of accountability.'[83] Thus allowing a civil servant to break the law to identify acts of wrongdoing or afford the electorate greater access to official information may be justified. This position is further enhanced by the justifications from truth or to enhance the public good, as the recipients of the information would benefit from such disclosures. The act of civil disobedience may also bear close similarities to the justification from moral autonomy and to enhance the individual. The justifications must be contrasted with a moral obligation to obey the law, regardless of whether it is considered to be unjust or bad. This stems from a duty to prevent risk to the legal system and the very principles that govern it.[84] Crown servants owe a duty of loyalty to the government of the day. Widespread civil disobedience may undermine the trust needed between Ministers and their Civil Servant counterparts.

It is submitted, that the act of civil disobedience may be acceptable until it reaches the extent that respect for the law of the land and the constitution breaks down.[85] Civil disobedience may appear necessary in rare and individual circumstances, but it can also

[83] *Ibid.*
[84] J.Finnis, *Natural Law and Natural Rights* (Clarendon, Oxford, 2011) 383.
[85] *Above*, n 82.

undermine not only the purpose of the law in question (no matter how invalid it may appear at the time) but the rule of law as a whole.[86] As Thoreau contends the remedy of civil disobedience may be worse than the evil, an imbalance that should be rectified by the legislative.[87] The question of whether a Crown servant may be justified in disclosing official information without authority should therefore be dependent upon the content of the information itself and the benefits to which such disclosures may confer.

Dworkin identifies three types of civil disobedience. The first, he identifies, is 'integrity based,' where a citizen chooses to disobey the law when he feels that the law in question is immoral. The second is 'justice based,' where the individual chooses to act in order to assert a right to which he feels has been wrongly denied. The third is 'policy based,' where the citizen believes that a chosen policy is 'dangerously unwise.[88] Dworkin opines that this requires the individual to believe that the policy to which they oppose is 'bad for everyone, not just for some minority.'[89] Dworkin makes a distinction between persuasive and non-persuasive strategies. Persuasive strategies require the individual to attempt to convince the majority that the policy in question is wrong in order for it to 'disfavour the program it formerly favoured.'[90] In contrast, non persuasive strategies require the individual to 'make the majority pay so heavily for its actions without having been convinced' by the need for change.[91] In identifying the quandary that civil disobedience poses to majority rule, a recognised requirement in a democracy, Dworkin suggests that persuasive strategies have less of an impact because they do not challenge the principle of majority rule in a fundamental way. In comparison, he suggests that non-persuasive

[86] *Above,* n 81.
[87] *Above,*n 81, 289.
[88] R.Dworkin, *A matter of principle* (Harvard University Press, Cambridge MA, 1985) 107.
[89] *Ibid,* 110.
[90] *Above,* n 87.
[91] *Above,* n 87, 111.

strategies attack the 'roots and foundations' of the principle of majority rule, because to be successful, the act requires 'minority coercion' of the majority.[92]

Dworkin draws a significant distinction between different forms of policy protest. He suggests that the civil rights movement had persuasive force because of a 'rhetorical tradition' that had justice on its side. In a contrasting example he suggested that the trespass of Greenham Common in order to protest the deployment of nuclear missiles in Europe is a more difficult act to justify because the arguments for nuclear deployment are complex. Dworkin argues that such acts are going to make the general public 'pay less attention' to 'complex issues' because it will be motivated to follow the policy its leaders have adopted because any change to that policy would result in 'giving way to civil blackmail.'[93]Dworkin categorises such action as 'non-persuasive.' Dworkin identifies that there is a contrast between the types of policy and the justification for civil disobedience in which he believes that non-persuasive action taken to highlight bad economic policy may not be justified.[94]

It is submitted that Dworkin's concept of civil disobedience is most relevant to this thesis. Unauthorised disclosures by Crown servants may result in the disclosure of information detailing the information of what the servant considers to be a dangerous policy decision. It is submitted that such disclosures may be considered as non-persuasive. Anonymous disclosures such as those disclosed to the online website *Wikileaks* may provide the general public with information regarding bad policy decisions or even illegality. However, the difficulty associated with such disclosures is that the communicator does not identify himself to communicate to the audience why he opposes such a policy.

[92] *Above*, n 87, 111.
[93] *Above*, n 87.
[94] *Above*, n 87.

The mass disclosure of numerous documents which detail different policies is, by its nature, a non-persuasive act designed to prompt those in power to pursue a different course. The anonymous whistleblower, if exposed, may have difficulty articulating to the majority that his motivation for making an unauthorised disclosure was justified on civil disobedience grounds. It is submitted, that similar to the concept of necessity, the content of the information communicated and the method in which the communication takes place will be highly relevant to this consideration.

Part II Freedom of Expression and the Public Interest

This section will consider jurisprudence of the European Court of Human Rights and domestically. It will identify cases which justify the expression of political speech before discussing domestic common law principles which have attempted to define matters which may be deemed 'in the public interest.'

1.6 European Convention on Human Rights

Article 10 of the European Convention on Human Rights provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The protection of the right to freedom of expression constitutes one of the 'essential foundations of a democratic society.'[95] subject to the aforementioned limitations identified in subsection 2, 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.'[96]

1.6.1 Political Expression

The protection of political expression is of most relevance to this thesis. It provides a strong justification for the freedom of expression rights of individuals and has been afforded special protection at Strasburg. In *Sunday Times v UK* the case concerned a contempt of court action brought in respect of an article it published which detailed the risks posed by the use of the drug Thalidomide by pregnant mothers and criticisms against a company involved in ongoing litigation at the time.[97] The Court held that Article 10 guarantees not only the right of the press to inform the public but also the right of the public to be informed.[98] The families of the victims of the medical tragedy therefore had a 'vital interest in knowing all of the facts and the various possible solutions' particularly as they were unaware of the legal difficulties involved.[99] In *Jersild v Denmark*, the Court held that whilst the press must not overstep the bound set (identifiable in Art. 10(2) above) it is incumbent on journalists to 'impart information in

[95] *Handyside v UK* (1976) A 24, para 49.
[96] *Ibid.*
[97] (1979) A 30.
[98] *Ibid*, para 66.
[99] *Ibid.*

the public interest.'[100] If the press were restricted from doing so they would be unable to exercise their vital role as 'public watchdog.'[101]

The following cases provide examples of where the Court has protected the applicant's free expression rights for criticising authority whether it be the mechanism of authority as a whole or individual political figures. Such protection draws strong parallels with the theoretical justifications from truth and from democracy. With regards to the criticism of a mechanism of authority as a whole, In *Thorgeirson v Iceland*, a journalist had been prosecuted for writing newspaper articles detailing allegations of police brutality.[102] The Court noted that the journalist had not made allegations against particular officers but had written with the 'sole purpose' that the Minister of Justice would establish an independent body to investigate.[103] The articles were, it held, about a matter of 'serious concern.'[104] The journalist's conviction and sentence were therefore deemed capable of discouraging open discussion of matters of public concern.[105] Strasbourg later identified in *Castells v Spain* that 'In a democratic system the actions or omissions of the government must be subject to close scrutiny not only of the legislative authorities but also of the press and public opinion.'[106]

With regard to criticism of individual political figures, in *Lingens v Austria* the European Court of Human Rights ('ECtHR') identified that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for

[100] (1994) 19 EHRR 1, para 30.
[101] *Ibid.*
[102] (1992) 14 EHRR 843.
[103] *Ibid* para 66.
[104] *Ibid* para 67.
[105] *Ibid* para 68.
[106] (1992) A 246, 36

its process and for each individual's self-fulfilment.[107] Central to this, 'freedom of political debate' is at the 'very core of the concept of a democratic society which prevails throughout the convention.'[108] The case concerned the alleged defamation of a politician by a journalist. The court recognised that freedom of the press 'affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.'[109]The Court noted that a politician who was himself 'accustomed to attacking his opponents had to expect fiercer criticism than other people.'[110] Unlike private individuals, politicians knowingly lay themselves 'open to close scrutiny' of their 'every word and deeds' both by 'journalists and the public at large.' As a consequence they must display a greater degree of tolerance to criticism.[111]

Most importantly, in *Lingens* the Court identified that the matter at issues was not 'his right to disseminate information but his freedom of opinion and his right to impart ideas' subject to the restrictions in Art.10 (2).[112] The protection of political speech must therefore extend beyond the communication of pure factual information to include protection of expressions of opinion. The communication of opinion and ideas is central to the theoretical justification for participation in a democracy. However, it will be identified later in this discussion that the communication of opinion may be in conflict with the requirement for employees of the Civil Service to remain politically impartial.

Whilst the aforementioned cases identify that Art.10 may confer strong protection for free expression rights. It should be noted that where such expression extends to criticism

[107] *Lingens v Austria* (1986) 8 EHRR 103, para 41. See further below.
[108] *Ibid* para 42.
[109] *Above, n 106,* para 42.
[110] *Above, n 106,* para 37.
[111] *Above, n 106,* para 42.
[112] *Above, n 106,* para 45.

of an individual politician's conduct of a personal relationship the individual may not receive protection. Thus, it was held in *Tammer v Estonia* that criminal penalties imposed in respect of reporting of a sexual relationship between the Prime Minister and a political aid did not constitute a violation of Article 10.[113] The right to freedom of expression may justifiably provide a strong trump right, however, all rights under the qualification are qualified, not absolute. The right may be subject to other conflicting rights such as the right to privacy, contained in article 8. The Council of Europe has identified that the right to privacy afforded by art.8 should 'not only protect an individual against interference by public authorities but also against interference by private persons or institutions, including the media.'[114] This section will now progress to consider how the domestic jurisdiction has dealt with matters considered to be in the public interest. It will then consider how the courts have dealt with conflicting rights to privacy, post incorporation of the Human Rights Act 2000.

1.6.2 Contractual limitation of the Right to Freedom of Expression.

The Commission has stated that an individual may contract to limit his expression rights and as a consequence, enforcement of the restriction agreed to will not amount to an interference with his rights under Article 10(1).[115] Allen Crasnow and Beale argue that an employer and employee could agree to limitation of freedom of expression provided there was no improper coercion of either party and that the employer must show that such a waiver is made in full awareness of the right and the restriction did not interfere with other legal obiligations.[116] It is submitted that this reasoning is consistent with the

[113] [2001] 37 EHRR 857.
[114] Council of Europe Resolution 1165 of 1998.
[115] *Vereniging Rechtswinkels Utrecht v Netherlands Application* (11308/84).
[116] R. Allen, R. Crasnow and A. Beale, *Employment Law and Human Rights* (OUP, Oxford, 2nd Edition

approach taken by the Strasbourg court in a number of decided cases.

The ECtHR has indicated that appointment as a civil servant does not deprive the individual of the protection of Article 10[117] however; whilst the Court and the Commission have observed that a person's employment will not affect their freedom of expression, the existence of contractual obligations has indicated that limitations are evident in certain circumstances. In *Rommelfanger v Germany*[118] a Doctor working at a Catholic hospital had his contract of employment terminated after signing a letter criticising the church's stance on abortion. The Commission accepted that by entering into contractual obligations with his employer the applicant had accepted a 'duty of loyalty' towards the Catholic Church which 'limited his freedom of expression to a certain extent.'[119] Most importantly the Commission noted that similar obligations may also be agreed with other employers than the Catholic Church or its institutions and that the Commission permitted contractual obligations of this kind if they are freely entered into by the person concerned.[120]

In *Vogt v Germany*[121] the case involved the dismissal of a teacher who was a member of the German Communist party. The ECHR accepted that the dismissal was sufficient to constitute an interference with the teacher's right to freedom of expression. The decision

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2007) at 265.

[117] *Glasenapp v Germany* Application No. 9228/80, 49-50. The case involved a school teacher appointed with the status of a probationary civil servant. In undertaking the role she agreed (as required by German law) to uphold the free democratic constitutional system. It was later discovered after inquiries were made by the authority that she was not capable of upholding the principles she had agreed to and her employment at the school was terminated. Whilst the court agreed that there was not a right of recruitment to the Civil Service, it did however believe that members of the Civil Service maintained their right to Freedom of Expression basing their opinion on Articles 1 and 14 ECHR which stipulate that 'everyone within the jurisdiction of the Contracting States must enjoy the rights and freedoms in Section 1 'without prejudice on any ground.'

[118] (1989) D & R 151.

[119] *Ibid* para 53.

[120] *Ibid.*

[121] (1996) 21 EHRR 205.

did not deal explicitly with the position of employees, who 'contract out their free speech rights,'[122] this is effectively the premise that a person who chooses to undergo employment with a certain body, must then conduct themselves in keeping with the duties and needs of their employer. The cases of *Rommelfanger* and *Vogt* can be distinguished, in *Rommelfanger*, the employee of the hospital effectively gave a public display of disloyalty, whereas in *Vogt* membership of the German Communist Party constituted a personal expression of a differing viewpoint.

The European Court of Human Rights identified in *Ahmed v UK* that regulations designed to prevent local government officers from engaging in political expression would be a proportionate restriction of art.10 rights, particularly where the system of government in question is historically based upon the need for politically impartial advisers.[123] The reasoning in *Ahmed v UK* may be transposed to the position of Civil Servants working in Whitehall.

The Strasbourg Court identified that the restriction would be within the domestic authorities' margin of appreciation.[124] The Court held that the local government system was reliant upon a relationship of trust between council members and their officers, whereby council officers are politically neutral and are loyal to the council as a whole. Members of the public:

> "have a right to expect that those whom they voted into office will 'discharge their mandate in accordance with the commitments they made during an electoral campaign and that the pursuit of that mandate will not founder on the political opposition of their members' own advisers it is also to be noted that members of the public are equally entitled to expect that in their own dealings with local government departments they will be advised by politically neutral officers who are detached from

[122] See L.Vickers, *Freedom of Speech and Employment* (Oxford University Press, Oxford, 2002) 81.
[123] [1998] ECHR 78, para 63.
[124] *Ibid*, para 61.

the political fray."[125]

It will be identified later in this analysis that Crown Servants have obligations to be politically impartial; such obligations may inhibit the rights of those individuals to be active participants in democracy. Speech regarding disagreements on policy issues may give rise to accusations that the Crown servant is disagreeing with the decision taken for political reasons. By failing to carry out the wishes of the government of the day, the Crown servant may face accusations of disloyalty.

By becoming a Crown servant involved in national security matters, the individual effectively waives the right to freedom of expression, at least in the context of disclosing information relating obtained during his employment.[126] This was illustrated in a slightly different scenario to that of the 'whistleblower.' In *Hajianastassiou v Greece*[127] the ECHR considered the case of a Greek Air Force officer who had originally written a missile assessment, classified secret for the Airforce. Later, he wrote an assessment of another missile for a private defence contractor. He was convicted and sentenced to five months imprisonment for unlawfully disclosing military secrets, despite arguing that the information was already published in widely available scientific publications and that the second assessment contained no information derived in the first. The ECHR stated that the conviction was justified under Article 10 (2) ECHR as it was "necessary in a democratic society," this was regardless of the fact that the information had been published in scientific journals. It was considered sufficient that the first document had been classified as 'secret.' The information and nature of disclosure is irrelevant.

[125] Above, n 123, para 53.
[126] For an interesting comparison see: *Vereiging Rechtswinkels Utrecht v Netherlands* 46 DR 200 (1986) Application 11308/84 EComHR it was held that there would be no interference by the state where an individual has agreed or contracted to limit his freedom of expression.
[127] [2002] EWCA Civ 214.

The mere fact that the person entrusted with secret information makes an unauthorised disclosure is enough to make the person a future security risk. Where the employee owes a contractual duty of loyalty to his employer not to disclose information, the Court will be required to weigh up the competing interests. It will be identified in chapter four of this analysis that the Official Secrets Act 1989 does not provide sufficient scope for courts to accurately assess the public interest in disclosure against the public interest of non disclosure. Any disclosure of national security information is likely to be considered as damaging, regardless of the public benefit of the disclosure. This analysis will now turn to consider specific Strasburg jurisprudence relating to whistleblowing.

1.7 Whistleblowing and Article 10 ECHR

The question of whether 'whistleblowing' speech will be protected by Article 10 has been considered in recent decisions at Strasbourg. The case of *Guja v Moldova*[128] is most relevant for the purposes of this analysis as it involved the actions of a public servant.

The head of the Press Department of the Moldovan Prosecutor General's Office made an unauthorised disclosure of two letters to the press. The letters contained information suggesting that the Moldovan Parliament had asserted pressure on the Prosecutor General to discontinue criminal proceedings against four police officers. Shortly after the letter was received by the Prosecutor General the charges against the officers were dropped. Guja contended that the letters The Prosecutor General's Office dismissed Guja

[128] [2008] (Application no 14277/04).

on the basis that the letters were secret and that he had failed to seek prior authorisation before disclosure. Guja brought proceedings against the office seeking reinstatement on the grounds that the disclosure of the letters were not damaging, they were not confidential and had not been classified as secret. In conducting the proportionality test, the court developed a new framework for dealing with Article 10 claims involving whistleblowing. This framework will now be considered below.

1.7.1 Whether the applicant had alternative channels for making the disclosure

Firstly, the Court must ask whether the applicant had 'alternative channels for making the disclosure.'[129] Disclosure should therefore be made, in the first instance to the person's superior or other competent authority or body. Public disclosure will only be justified 'as a last resort' where it would be 'clearly impractical' to raise concerns using the aforementioned methods.[130] In conducting the proportionality test, the court must have regard to whether there were 'any other effective means of remedying the wrongdoing' which the individual intended to uncover.[131]

It is submitted that post *Guja v Moldova*, a Court, in conducting the proportionality analysis, must place significant emphasis, not only on the existence of internal procedures, but also the effectiveness of those procedures. Inclusion of this consideration is highly significant. In *R v Shayler*, which pre-dates the decision in Guja, the House of Lords identified that David Shayler had a number of authorised channels available to raise his concerns but did not seek to test the effectiveness of those channels.[132]

[129] *Ibid*, para 73.
[130] *Above ,n 127.*
[131] *Above, n 127.*
[132] Detailed treatment of the Shayler decision is provided in chapters four and six of this thesis.

The Council of Europe has argued that member states must have comprehensive arrangements for allowing employees to raise concerns and that these provisions should extend to members of the armed forces and security and intelligence services.[133] This thesis will later identify that the effectiveness of available mechanisms in the United Kingdom may be called into question.

1.7.2 The public interest in the disclosed information

The court must have regard to the public interest involved in the disclosed information. The damage suffered by the public authority must be weighed against the interest of the public in having the information revealed. The Court identified that, in a democratic society, 'acts or omissions must be subject to close scrutiny' not only of the legislative and judicial authorities but also of the media and public.[134] The interest of the public in the information concerned may therefore be 'so strong as to override even a legally imposed duty of confidence.'[135] The Strasbourg Court did not develop further what types of information may be considered in the public interest. Later in this section, the author will identify domestic jurisprudence which will be highly relevant to the proportionality analysis if conducted by a domestic court.

1.7.3 The authenticity of the disclosed information

The Court identified that the authenticity of the information disclosed will be relevant to

[133] Council of Europe, Resolution 1979 *'Protection of Whistleblowers'* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm (accessed 05/07/10).
[134] *Above*, n 127, para 74.
[135] *Ibid.*

the balancing exercise. The Court suggested that it was open to the competent State authorities to 'react appropriately and without excess to defamatory devoid of foundation or formulated in bad faith.'[136] Ultimately, the individual who chooses to disclose the information must 'carefully verify' its contents 'to the extent permitted by the circumstances' to determine whether it is 'accurate and reliable.'[137]

1.7.4 The detriment to the Employer

The Court identified that it must then weigh the damage suffered as a result of the disclosure in question and then must assess whether the 'damage outweighed the interest of the public of having the information revealed.'[138] The court identified that the 'subject matter of the disclosure' and the 'nature of the administrative authority' concerned may be relevant in this process.[139]

1.7.5 Whether the applicant acted in good faith

The Court found that it was important to establish that in making the disclosure 'the individual acted in good faith and in the belief that the information was true and in the public to disclose it.'[140] If the disclosure was motivated by a personal grievance or an expectation of personal advantage this would not justify a strong level of protection. Moreover, the Court held that it must consider whether 'no other, more discreet means of remedying the wrongdoing' were available.[141]

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[136] *Above,* n 127, para 75.
[137] *Ibid.*
[138] *Above,* n 127, para 77.
[139] *Ibid.*
[140] *Above,* n 127.
[141] *Ibid.*

1.7.6 Severity of the Sanction

Finally, the Court must consider the severity of the sanction imposed on the Applicant for making the disclosure.[142]

1.7.7 Application of the framework to the *Guja v Moldova* decision and subsequent influence

The Court found in favour of the Applicant. Guja's motivation for disclosing the letters had been to help combat corruption in Moldova. It noted that the President of Moldova had campaigned against political interference with the criminal justice system. The letters were genuine and their disclosure shed considerable light on an issue which the public had a legitimate interest in being informed.[143] The Court found that the decision to dismiss the applicant was a 'very harsh measure.'[144] The decision could also have a 'serious chilling effect' on other Civil Servants and employees from raising concerns in the future.[145] Most importantly, the ECtHR found that the Applicant did not have access to an effective alternative channel to make the disclosure.

The test in *Guja v Moldova* was later adopted in the case of *Heinisch v Germany*.[146] In Heinisch, the applicant worked in a home for the elderly. She had regularly attempted to raise concerns to management that they were short staffed and that this had had an impact on the level of care provided. After falling ill, the applicant made a criminal

[142] *Above*, n 127.
[143] *Ibid* para 87.
[144] *Above* n 127, para 95.
[145] *Ibid.*
[146] (2011) (Application no. 28274/08).

complaint via her lawyer prompting the public prosecutor to investigate. Heinisch was later dismissed the applicant citing her repeated illness as a justification.

The ECtHR identified that in conducting the proportionality test it must weigh up the employee's right to freedom of expression 'by signalling illegal conduct' or wrongdoing on the part of the employer against the latter's interests.[147] The nature and extent of the duty of loyalty owed by an employee to their employer in a particular case will impact upon the weighing of those conflicting interests. The Court reiterated that as a consequence, concerns should first be raised to a person's superior or other competent authority or body. It is only where this is clearly impractical that the information could be disclosed directly to the public.[148] In the instant case, the Court held that the no other, more discreet means of remedying the situation available to her. Upholding her complaint, the Court held that the public interest in having information regarding the poor provision of care for the elderly by a state owned company was 'so important in a democratic society that it outweighs the interest in protecting the employer's business reputation and interests.'[149]

1.8 Analysis of the ECHR approach to whistleblowing: Contribution to the Analytical Model

It is submitted that the proportionality framework developed for whistleblowing cases is consistent with the political expression cases outlined above. Communication of matters of 'serious concern' directly to the public will be justified, as previously identified in *Thorgierson v Iceland* and *Sunday Times v UK*. The position is less clear, however, when

[147] *Ibid*, para 65.
[148] *Ibid.*
[149] *Ibid*, para 90.

considering the communication of opinions or ideas, as per the justifications identified in *Lingens v Austria*. The communication of a policy decision which does not identify wrongdoing or illegality but is nevertheless a decision to which an employee does not agree, would be justified under the principles underlined in *Lingens v Austria* but may not be justified using the framework provided in *Guja v Moldova*. This is because the communication of such information may not be of a sufficiently high value to outweigh the competing interests of the employer.

Vickers draws a distinction between 'Watchdog Whistleblowing' and 'Protest Whistleblowing.'[150] 'Watchdog whistleblowing' requires the individual to disclose misconduct or wrongdoing whereas 'protest whistleblowing' allows for the disclosure of information relating to lawful policies, on the basis that the individual raising the issues has the necessary experience to provide an opinion that the policy complained of is the wrong course of action.

The difficulty with 'protest whistleblowing' is that it may lead to accusations that the individual concerned is engaging in an overtly political act. Employees of the United Kingdom Civil Service are required to be 'a-political' dependent upon their requisite level of employment. Those involved in 'industrial' and 'non-office' grades are identified as 'politically free' individuals, whereas those working in the politically contentious offices of Whitehall must follow the restrictions imposed by the Civil Service Management Code. Most importantly, for the purposes of this analysis, paragraph 4.4 requires Civil Servants to not 'speak in public on matters of national political controversy; expressing views on such matters in letters to the press, or in

[150] *Above*, n 6, 8.

books, articles or leaflets.'[151] Similarly, paragraph 14 of the Civil Service Code requires Civil Servants to be 'political impartial.' The restrictions are arguably consistent with the principles established in the *Vogt* and *Rommelfanger* decisions, in that Civil Servants upon entering employment must agree to a restriction, at least in part, of their art.10 rights.[152]

In discussing political speech, Vickers suggests that 'in order to serve its purpose of contributing to the democratic process' it 'requires publicity,' therefore, the 'only suitable channel for communication of the ideas will be external to the employer.'[153] The communication of protest whistleblowing may not be justified under the framework provided in *Guja v Moldova*, as the applicant is expected to use internal channels and to only communicate the information to the public directly 'as a last resort.' The Court will inevitably question whether the individual who disagreed with a policy position attempted to make his misgivings heard to colleagues or superiors before raising the concerns externally.

It is submitted that a solution is required to appropriately address the distinction between so-called 'watchdog whistleblowing' and 'protest whistleblowing.' Currently, the Public Interest Disclosure Act 1998 would afford protections to 'watchdog whistleblowers' but would not protect 'protest whistleblowers.' It is argued that 'watchdog whistleblowing' primarily concerns the expression of fact judgements. This reasoning is consistent with the requirement in the *Guja* decision that the applicant 'proves the authenticity of the information.' 'Watchdog whistleblowing' is consistent with the theoretical justifications

[151] The Code can be accessed at the following link: http://www.civilservice.gov.uk/about/resources/civil-service-management-code (accessed 04/01/12).
[152] See also: *Ahmed v Uk* [1998] ECHR 78, para 63.
[153] *Above, n* 6, 56.

outlined in the first part of this chapter, namely that such information may enhance the public good and may lead to truth. Whilst whistleblowing may be justified as an act of autonomy, it is submitted that it ultimately benefits the public interest.

In contrast, 'protest whistleblowing' primarily concerns the expression of value judgements. Proof of the authenticity of such information is not required. Whilst the opinion of an informed individual may be highly beneficial to some members of the public, it may not be of as much value to others. In applying the theoretical justifications, the act of protest whistleblowing may primarily serve the right to autonomy by allowing the individual to be an open participant in political debate.

One must consider whether it is appropriate to use the proportionality framework developed in the *Guja v Moldova* decision for assessing an act of 'protest whistleblowing.' It is submitted that, the Court should first identify the applicant's motivation for the speech. If the applicant was motivated by the desire to engage in political debate but not to raise an issue he believed to be wrongdoing, proportionality balancing using the established political expression cases should be used and counterbalanced against the competing interests of the employer. Where the applicant alleges wrongdoing the test in *Guja v Moldova* should be applied.

It is submitted that in 'watchdog whistleblowing' cases, domestic courts should now consider and apply the *Guja v Moldova* test as per the obligations indentified in s.6 Human Rights Act and the interpretative provision set out in s.2 Human Rights Act 1998. Whilst it should be noted that domestic courts are afforded a margin of appreciation when considering the jurisprudence of the ECtHR, it has been identified in

R (Ullah) v Special Adjudicator[154] that whilst decisions of the Strasbourg court are 'not strictly binding' domestic courts should identify special circumstances for not applying the principles.[155] In conducting the proportionality analysis domestic courts will need to consider whether the public interest in disclosure and counter arguments for non disclosure. Domestic courts are most likely to identify existing common law principles to assist in this analysis. The next session will consider domestic jurisprudence.

1.9 Domestic jurisprudence: What information may be disclosed the Public Interest?

Prior to the enactment of the Human Rights Act, defining what constituted the public interest proved problematical for the courts. In *B & C v A*[156] the Court of Appeal stated that it was impossible to provide a uniform definition as the 'Circumstances in any particular case under consideration can vary so much that a judgement in one case is unlikely to be decisive in another case.'[157]

The case of *Gartside v Outram* established that there is no confidence in the disclosure of iniquity.[158] This reasoning was further extended in *Lion Laboratories v Evans* and Others to provide that publication of confidential information would be acceptable in situations where it could be proved that there was a serious and legitimate interest in the information being disclosed to the public domain.[159] In *Bellof v Pressdram* the Court further attempted to define a defence of public interest in breach of confidence cases:

"…Must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of the law, including

[154] [2004] UKHL 26.
[155] Considered further in Chapter 3 of this thesis.
[156] [2002] EWCA Civ 337.
[157] *Ibid.*
[158] (1856) 26 LJ Ch 114
[159] [1985] Q.B. 526, para 534.

statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."[160]

In *Initial Services v Putterill* Lord Denning focussed upon the disclosure of information, noting the significance of the recipient of the information. He opined that the disclosure should be to a person who has a 'proper interest to receive the information.' He suggested that it would be appropriate to disclose a crime to the police and that also there may be 'some cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.'[161]

In *D v National Society for the prevention of Cruelty to Children*,[162] the plaintiff was subject to an inaccurate complaint lodged with the N.S.P.C.C. She sought disclosure of the identity of the complainant and any documents relating to the complaint with the aim of seeking damages against the N.S.P.C.C. In allowing the order Lord Diplock indicated that the private confidentiality agreement made between individuals must give way to 'the general public interest that in the administration of justice truth will out, unless by reason of the character of the informant, a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law.'[163]

In *Marks v Beyfus*[164] it was indicated that if the identities of police informant were able to be disclosed in a prosecution, the number of persons assisting the police with

[160] *Beloff v Pressdram Ltd* [1973] 1 All ER 241, para 260.

[161] *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396, 405-406.

[162] *Ibid*
[163] *Ibid* at 218
[164] (1890) 25 QBD 494.

information on criminal activity would be dramatically reduced, preventing the police from effectively performing their duties, contrary to the public interest.[165] However, it was later confirmed in *R v Agar*[166] that disclosure of a police informant's identity could be necessary in order to enable to defendant to argue that he had been set up by both the police and the informant. This was dependant on the nature of the defendant's defence in each case. Mustill L.J. drew emphasis on the fact that whilst there was a strong public interest in not revealing the identities of informants, there was a greater requirement in ensuring that the accused put forward his defence, although he did concede that the position might alter if the defence put forward was 'doomed to failure.'[167]

1.9.1 Private Information and the Public Interest

The right to an individual's freedom of expression becomes more difficult to justify when the information concerned does not appear to be in the public interest, but is rather of interest to the public. A conflict between the individual's art.10 rights and the art.8 rights of the subject of the information communicated is likely to arise where an individual chooses to criticise an individual in a position of authority, as opposed to criticising the conduct of an organisation as a whole. Rigorous analysis of the conflicting rights has been a necessary consequence of the emergence of a new area of law, the misuse of private information.

The European Court of Human Rights recognised in the case of *Von Hannover v*

[165] *Ibid* at 498 per Lord Escher M.R. See also Y.Cripps, *The Legal Implications of Disclosure in The Public Interest* (Second Edition, Sweet & Maxwell, London, 1994).
[166] (1989) 90 Cr.App.R.318.
[167] *Ibid.*

Germany that public officials have a right to a private life.[168] The Court defined 'public figures' as 'all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or any other domain.' It identified that certain facts relating to the private lives of public figures, particularly politicians may be of interest to citizens, and as a consequence, may be legitimate for readers 'who are also voters,' to be 'informed of those facts.'[169]

The Court identified that it was necessary to balance the competing interests between the right to respect for one's private life and the right to freedom of expression. Most importantly, for the purposes of this study, the Court held that a 'fundamental distinction' needed to be made between reporting facts capable of 'contributing to a debate in a democratic society relating to politicians in the exercise of their functions' and reporting details of the private life of a person who does not exercise official functions.[170]

Whilst the Court placed emphasis on the fact that the applicant did not hold an official function, it identified that politicians would also be entitled to a private life. The Court held that a 'decisive factor' in balancing the competing interests of art.8 and art.10 should lie in the contribution that the published photographs and accompanying articles make to 'a debate of general interest.'[171] In the instant case, it considered that the photographs and articles related exclusively to the applicant's private life.[172]

[168] *Von Hannover v Germany* (2004) (Application no. 59320/00). Note that at the time of writing the decision was due to be heard by the Grand Chamber of the European Court of Human Rights.
[169] *Ibid*, 9.
[170] *Ibid*, 63.
[171] *Ibid*, 76.
[172] *Ibid*, 77.

It is submitted that domestic the domestic jurisprudence of most value to this study concerns individuals who are identified as 'public figures.' Particular reference is given to cases whereby the conduct of those individuals has been called into question, whether those individuals may be considered 'role models' and whether such information should be disclosed to correct a false impression.

Prior to the Human Rights Act 1998 coming into force, in *Woodward v Hutchins*, the case involved alleged sexual activities concerning a pop star travelling on a passenger plane. An employee who was subject to a confidentiality agreement sought to disclose the information to a newspaper.[173] Lord Denning identified that if a group of people aimed to seek publicity which is to their advantage they then 'cannot complain if a servant or employee of theirs afterwards discloses the truth about them, if the image which they fostered was not a true image, it is in the public interest that it should be corrected.'[174] Bridge L.J. further supported this position by suggesting that 'those who seek and welcome publicity of every kind so long as it shows them in a favourable light are no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.'[175]

In *Theakston v MGN Ltd*, a well known television personality had been photographed, without his consent, whilst attending a brothel. Following the visit Theakston received text messages informing him that prostitutes working at the brothel intended to go to the press and would do so unless he paid them money. [176] The prostitutes took their story to the Sunday People newspaper and Theakston sought an injunction to prevent publication

[173] [1997] 1 WLR 760.
[174] *Ibid* 763.
[175] *Above*, n 172,765.
[176] [2002] EWHC 137(QB).

of the details of his activities at the brothel and also the photographs. During the course of proceedings, Mr Justice Ouseley made a distinction between the different forms of relationships where sexual activity could occur, identifying marital relationships and unmarried but long term partnerships, to extra marital relationships, long and short term to one night stands and 'fleeting encounters with prostitutes.[177] Intimate physical relations, he opined, could occur in a range of places from 'a private house to a hotel bedroom, to a car in a secluded spot, to a nightclub or a brothel.'[178] Ouseley L.J. suggested that the nature of the relationship, the nature of the activity, the circumstances in which it took place, and the individual personalities engaged was significant to identifying the quality of confidence.

Ouseley L.J. identified that there was a 'real element of public interest' in publishing the details of Theakston's activities. Theakston was employed by the BBC as a presenter on 'Top of the Pops' which was made available to younger viewers. Ousley L.J. suggested that whilst he was not 'presented as a role model' the nature of his job in presenting programmes to a younger audience meant that his lifestyle would be generally considered 'harmless if followed.'[179] Theakston's activities, he stated, were likely to make his viewers and parents of views act differently towards him. Ousley L.J. held that the free press was entitled to communicate the information so that that the general public could make up its own mind. Ousley L.J. held that there was no public interest in the publication of the photographs which if published would constitute a 'deeply humiliating and damaging' intrusion into Theakston's personal life.

[177] *Ibid*, 39.
[178] Above, n 57.
[179] *Above*, n 57.

In *Campbell v MGN*, Naomi Campbell brought proceedings against the Mirror newspaper after it published photographs of the supermodel leaving a Narcotics Anonymous meeting alongside the headline 'Naomi: I'm a Drug Addict.' The Court identified that Campbell was a public figure who had made 'very public false statements' that she had not taken drugs, it was these falsehoods which the newspaper argued had made it justifiable for a newspaper to report the fact that she was addicted to drugs.[180] Lord Hoffman identified that had Campbell been an 'ordinary citizen' with a drug addiction the case would have been different. Campbell had sought publicity about various aspects of her private life.[181] He opined that whilst freedom of expression constitutes one of the 'essential foundations of a democratic society and one of the basic conditions do its progress and the self-fulfilment of each individual' there were 'no political or democratic values at stake' in the instant case.[182]

Baroness Hale identified that there are different types of speech which may qualify for protection, some of which are 'more deserving than others.'[183] She suggested that political speech was at the 'top of that list.' The 'free exchange of information and ideas on matters relevant to the organisation' of the 'economic, social and political life of the country' was crucial to democratic society.[184] Such political speech, she opined could include revealing information about 'public figures – especially those in elected office – which would otherwise be private but is relevant to their participation in public life.'[185] Baroness Hale identified that intellectual and educational speech was also important in society in order to aid an individual to develop 'to play a full part in society and

[180] [2004] UKHL 22, 36.
[181] *Above*, n 179, para 54.
[182] *Above*, n 179, para 117.
[183] *Above*, n 179, para 148.
[184] *Above*, n 179.
[185] *Ibid.*

democratic life. For similar reasons, she suggested artistic speech and expression was also important to foster individual originality and creativity for a 'free-thinking and dynamic society.'[186]

Baroness Hale identified that it was difficult to make any of the aforementioned claims in the instant case. The 'political and social life of the community' was not assisted by 'pouring over the intimate details of a fashion model's private life.'[187] The newspaper had sought co-operation with Campbell to run the story, however this was refused.[188]

Baroness Hale identified that the newspaper were justified in revealing the private information without Campbell's consent.[189] Campbell had presented herself to the public as a person who was not involved in drug taking. If Campbell was to be 'admired and emulated' as a role model then it was important to correct this false impression. The 'possession and use of illegal drugs' is a criminal offence and is 'a matter of serious public concern.' The press must therefore 'be free to expose the truth and put the record straight.'[190]

The Court, however, held that Campbell's right to privacy outweighed the right to journalist's right to freedom of expression. The publication of photographs clearly showing Campbell leaving a Narcotics Anonymous meeting in a well known area were considered to be unnecessary and intrusive. Had the photographs identified Campbell merely walking in a public place the outcome would have been different.[191]

[186] *Above,* n 179.
[187] *Above* n 179, para 149.
[188] *Above* n 179, para 150.
[189] *Above* n 179, para 151.
[190] *Ibid.*
[191] *Above* n 179, para 154.

In *Mosley v News Group Newspapers*[192], the News of the World published a front-page story alleging that Mosley had taken part in sexual activities with five prostitutes and alleged that there had been a 'Nazi' theme to the encounter. Various photographs of Mosley accompanied the article and an edited video of the event was also made available on the newspaper's website. The photographs and video had both been covertly recorded by one of the participants who had made a secret deal with the News of the World to sell the story. Mosley brought legal proceedings against News Group International, owners of the News of the World, for misuse of private information. He did not dispute that the sexual activities had taken place but contested the existence of the alleged Nazi theme. In addition, he sought an injunction to restrain the footage being made available on the newspaper's website.

Eady J identified that it had been recognised in Campbell that there could be a genuine public interest in the disclosure of the existence of a sexual relationship if such a relationship resulted in a situation giving rise to favouritism or corruption.[193] Yet the addition of 'salacious details' or 'intimate photographs' would be disproportionate and unacceptable and would be too intrusive even if they accompanied a legitimate disclosure of the relationship.[194] Public figures are entitled to a private and personal life, a notion of privacy which extends beyond sexual relationships to include personal relationships more generally.[195] People's sex lives are to be regarded as essentially their own business – provided at least that the participants are genuinely consenting adults and

[192] *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777.
[193] *Campbell v. Mirror Group Newspapers Ltd* [2004] 2 AC 457, para 60.
[194] *Ibid*, para 20.
[195] *Above* n 191, para 101.

there is no question of exploiting the young or vulnerable.[196]

With regard to the public interest in reporting the story, Eady J. noted that the Claimant, in his role as president of the FIA had to deal with many people of all races and religion and has previously spoken out against racism in sport.[197] Eady J. identified that there could be a public interest in the secret filming and subsequent publication of behaviour which involved 'mocking the way Jews were treated' or 'parodying Holocaust horror' where the claimant was accountable to an organisation and his behaviour could call his role into question.[198] Ultimately, he opined that where the law is not breached, the private conduct of adults is 'essentially no-one else's business.' The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or perverted did not give the media carte blanche.[199]

Eady J. found that the evidence did not support the conclusion that there was a Nazi theme to the event. He identified that the material had been properly checked for Nazi content and that the German dialogue in the footage had not been translated.[200] Eady J. found that the journalist and editor's general assessment 'in the round' could not be satisfactory given the gravity of the allegations and the devastating impact that the publication would have on those involved.[201] Eady J. focussed on the reasoning in *Terry v LNS*, whereby the court identified:

"…the fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the present case ought to be unlawful…but in a plural society there will

[196] *Above* n *191,* para 100.
[197] *Above* n *191,* para 122.
[198] *Above* n *191,* para 128.
[199] *Above* ,n 191, para128.
[200] *Above,*,n 191, para 147.
[201] *Above,* n 191, para 146.

be some who would suggest that it ought to be discouraged."[202]

In the recent decision of *Ferdinand v MGN Ltd* the decision concerned a well known football player who brought an action against the Sunday Mirror after the newspaper published an article and interview with a former acquaintance to which it was claimed Ferdinand had had an affair.[203] The alleged affair had taken place whilst Ferdinand was in a long term relationship with another women whom he fathered a child and later married. The action was significant as Ferdinand had been appointed England captain after John Terry had lost the position following his widely reported infidelity. Ferdinand had previously given a lengthy interview to the News of the World whereby he suggested that he was a reformed character and no longer a 'football bad boy' following settling down with his girlfriend. In conducting the parallel analysis between art.8 and art.10 Lord Justice Nichol identified that there was a public interest in publishing the article, even though the interviewee had been paid to provide the story, the claimant had, in a previous interview, wished to portray himself as a reformed character. Ultimately, the matter turned on the fact that he had portrayed an image of himself in the earlier article and 'whilst that image persisted' there was a 'public interest in demonstrating that the image was false.'[204]

The *Mosley* case should be contrasted with the later decision in *Ferdinand*. In *Mosley*, once it was identified that that 'Nazi' accusation was no longer justifiable, the claimant's sexual activities were not sufficient to constitute information in the public interest. The key distinction between the two cases is that it was held in Ferdinand that he had

[202] [2010] EWHC 119, 110.

[203] [2011] EWHC 2454.
[204] *Ibid*, para 86.

deliberately painted a false and misleading image to the public. In Mosley this consideration did not arise.

Post *Ferdinand*, it is submitted that information relating to a sexual relationship will be more likely considered as a matter for the public interest when balancing the competing rights. It is submitted that a politician who gives the impression of a family man or a man who claims family values when the reality is quite different is less likely to tip the balance in favour of the protection of privacy. Using the aforementioned privacy jurisprudence it is submitted that a whistleblower may be justified in revealing information relating to a personal matter if the disclosure of which is necessary to correct a false impression. It is submitted, that such information may be of a lower value to information which highlights serious wrongdoing or illegality in government. The public interest in the disclosure may be heightened if the personal matter in question has an impact on the conduct of the individual in public life. An example of this conduct may include circumstances whereby a minister engaged in an extra marital affair with a member of his staff and then promoted the person, thus giving the individual an unfair advantage over colleagues, thus bypassing procedures relating to fair recruitment and promotion.

In whistleblowing cases involving information considered to be of a private or personal nature, it is submitted that it may be necessary for the Court to engage in a parallel analysis of the competing rights of the right to private and family life afforded by article 8 and the right to freedom of expression afforded by article 10. The court must first consider whether the applicant enjoys a reasonable expectation of privacy in respect of the information which is intended to be published. If this is determined, the courts must

then, secondly, balance the competing Convention rights against each other in the parallel analysis. Guidance on the parallel analysis was provided by Lord Steyn in *Re S*:

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.[205]

This approach clearly identifies that domestic courts will not grant presumptive priority to either Convention right, and the value of both privacy and free speech will be equally scrutinised when they are structurally balanced against each other.

It is submitted that in cases applying the *Guja v Moldova* framework for assessing proportionality, domestic courts will need to adapt the test to take into account the competing privacy interest afforded by art.8. It is submitted that the correct approach in such a case would be for the Court to first apply the 'new methodology' test established in *Re S*. Second the court should apply the *Guja v Moldova* framework. However, in considering whether it should be in the public interest to disclose the information an 'intense focus' will be required to balance art.10 against art.8. It is submitted that it would not be sufficient to just consider the detriment to the employer in cases where privacy rights are engaged. A new category should therefore be included to consider the 'detriment caused to individuals' as a result of the disclosure.

In considering the detriment caused to the employer, it is submitted that domestic courts will need to provide focus as to the justifications for keeping official information secret. The next section will consider matters specific to the operation of government.

[205] *Re S (A Child)* [2004] UKHL 47; [2005] E.M.L.R. 2, para 17.

1.9.2 Matters specific to the operation of Government

Government departments may decide to withhold the release of information relating to the formulation of government policy or other aspects of the decision-making process. The justification for doing so stems from the need to maintain the longstanding doctrine of collective responsibility and to allow for 'candour' – the frank and open discussion of ideas without fear of inhibition. According to the convention of Cabinet collective responsibility, members of Cabinet must:

> "Publically support all Government decisions made in Cabinet, even if they do not privately agree with them and may have argued in Cabinet against their adoption. They must also preserve the confidentiality of the Cabinet debate that led to the decision."[206]

The purpose of the doctrine is to essentially allow 'Ministers to consider and test policy in robust debate' without fear that their decisions would be 'criticised by political opponents or a hostile media.'[207]

In *AG v Jonathan Cape Ltd*[208] an attempt was made to prevent the publication of Richard Crossman's diaries on the ground that they contained confidential information of Cabinet discussions. Lord Widgery considered the public interest in disclosing the information to the public domain against the public interest in maintaining the doctrine of collective responsibility, which entails the ability of Ministers to speak frankly and receive and make decisions on the advice Civil Servants without the possibility of the details of such

[206] See further, Information Tribunal decision at para 38, http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20L amb%20(EA-2008-0024,29)%20-%20Decision%2027-01-09.pdf 19 (accessed 02/12/11).

[207] *Ibid*, para 39.

[208] [1976] 1 QB 752.

discussions from reaching the public domain.[209]It was argued that, in allowing such information to reach the public domain, ministers would not feel free to discuss matters frankly, and that this would therefore be harmful to the public interest.[210]

Lord Widgery focused upon amount of time which had passed since the discussions were first documented; in this case eleven years had passed. He then stated that the Attorney-General must show '(a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon'[211] and that the Court must then 'closely examine to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.'[212]

There was a clear breach of confidence in this case; however the fact that the information was eleven years old meant that the 'confidential character' of the information had 'lapsed.'[213] Perhaps most importantly Lord Widgery was unconvinced that the Attorney General had made out a case that the public interest required such a Draconian remedy when due regard is had to other public interests, such as the freedom of speech.[214]Lord Widgery clearly distinguished between different types of information discussed in Cabinet meetings. He identified that:

> "Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it

[209] *Ibid* 765.
[210] *Above* n 207, 761.
[211] *Ibid*, 770.
[212] *Above*, n 207, *770.*
[213] *Ibid*, 771.
[214] *Above*, n 207, 767.

undermines the doctrine of joint responsibility."[215]

It is submitted that the aforementioned comment by Lord Widgery may run counter to many of the theoretical justifications for the right to freedom of expression. In particular, the right to communicate the identity of Ministers who voted in favour of an illegal policy may be justified to obtain truth and may be the information an electorate in a democratic society needs to determine why such a decision was reached and whether such individuals should be elected into positions of power in the future. A countervailing theoretical argument for secrecy such as that proposed by Fenster would identify that the disclosure of the identities of Ministers and how they voted on a particular position may lead to a 'panopticised state' where individuals are afraid to make decisions.

Judicial arguments for justifying candour in official decision making were considered at length in the case of *Burmah Oil Co Ltd v Bank of England*.[216] Lord Wilberforce considered the public interest in keeping the information private, in particular he focused upon the need for candour in communication between those concerned with the business of policy making. He identified that:

> "To remove protection from revelation in court in this case at least could well deter frank and full expression in similar cases in the future… another such ground is to protect from inspection by possible critics the inner workings of government while forming important government policy.[217]"

Later, in *Air Canada and others v Secretary of State for Trade and another (2)*[218] Lord Wilberforce again opined that familiar contentions were put forward as to the need to protect [cabinet decisions] against disclosure in the interest of the confidentiality of the

[215] *Ibid*, 770.
[216] [1979] 3 All ER 700
[217] *Ibid*,707.
[218] [1983] 1 All ER 910.

inner workings of government and of the free and candid expressions of views.[219]

The author will identify later in this thesis that despite advancements following passage of the Freedom of Information Act 2000, members of the public continue to encounter difficulty in accessing information and are denied access to the 'inner circle.' One must consider whether whistleblowers are the best persons to provide such access.

It is submitted that in order to balance the competing interests between the need to maintain candour and open government, concerns raised by whistleblowers regarding the identities of decision makers and Civil Servant advisers should only be justified where the information concerned is of a high value to the advancement of the public interest and debate and truth.

The disclosure of information which identifies that a Cabinet Minister who decided to vote in favour of a policy in private and then later so vehemently opposes it in public would be therefore be justifiable as evidence to correct a false impression. The disclosure of information regarding wrongdoing or illegality would also be justified. In contrast, the disclosure of information relating to routine policy decision making should not be justified. Such information, if disclosed, would make a limited contribution to public debate.

Whilst the disclosure of such information may be beneficial to a minority of individuals, whom may be affected by the decision, it may be outweighed by a countervailing argument that candour is required to allow the free and frank exchange of views and

[219] *Ibid*, 919.

uninhabited decision making. Routine disclosure would inevitably lead to the 'panopticised' extreme identified by Bentham resulting in an inevitable breakdown of the machinery of government. As Shauer identifies, public citizens are sovereign but confer power to elected representatives to carry out actions in their name.[220] It is therefore necessary, in a democratic society, to allow those representatives when making decisions beneficial to society, to do so without inhibition. The next section will consider national security as a justification for restricting the disclosure of information and whether the disclosure of national security information by a whistleblower may be justified.

1.9.3 National Security

In *The Zamora*, Lord Parker suggested that;

> "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."[221]

Later in *Council for Civil Service Unions v Minister for the Civil Service*, Lord Roskill identified that it was for the Government, not the courts to determine whether the requirements of national security outweigh the duty of fairness in any particular case. The 'government alone' had access to the necessary information, and he suggested that the judicial process was unsuitable for reaching decisions on national security.[222]

The question of whether information pertaining to national security may be disclosed by a whistleblower was considered in *A G v Guardian (2)* whereby the House of Lords

[220] *Above*, n 12.
[221] [1916] 2 AC 77, 107.
[222] [1984] 3 All ER 935, 28.

engaged in a lengthy balancing exercise in order to determine what constitutes the public interest. The case concerned the government's attempt to suppress publication of *'Spycatcher'* the memoirs of a former MI5 employee, Peter Wright. Lord Goff highlighted that in a free society there was 'a continuing public interest that the workings of government should be open to scrutiny and criticism.'[223] Lord Griffiths conceded that if an employee of the Security Service discovered malpractice 'detrimental to the national interest,' and he was unable to 'persuade any senior members of his service or any members of the establishment, or the police, to do anything about it,' then he should be 'relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger.' [224]

Despite the assertion by Lord Griffiths that such information may be disclosed in the public interest where internal avenues have failed, the law remains clear. If an employee or former employee of the intelligence community were to breach confidence they may receive protection. However, the employee may still be liable to prosecution for an offence of unauthorised disclosure. It will be indentified later in this thesis that the Official Secrets Act 1989 does not contain a public interest defence. Moreover, the Act does not provide sufficient scope for courts to test the public interest value of the speech communicated something which is vital to maintaining the spirit of Article 10. In *R v Shayler*, Lord Bingham identified that a system which 'favours official authorisation before disclosure' and which is subject to 'judicial review on grounds of proportionality' was 'within the margin of discretion which ought to be accorded to the legislature.'[225] Yet, the comments of Lord Roskill outlined above in the CCSU decision identify the

[223] *Attorney General v Guardian Newspapers Ltd (No 2)* [1998] 3 WLR 776, 807, Lord Griffiths found that no such considerations arose in the instant case."
[224] *Ibid*, 795.
[225] [2002] UKHL 22, 83.

reluctance of the courts to intervene in national security matters. Post Human Rights Act 1998, the courts are required, as a public authority (s.6) must act compatibly with convention rights. Whilst the proportionality test should be the appropriate standard of review for all decisions involving Convention rights, it should be noted that domestic institutions have traditionally been afforded a wide margin of appreciation where national security is concerned.

Lord Bingham, in the *Shayler* case, justified his position by suggesting that 'however well intentioned' the employee or former employee may be he may not be 'equipped with sufficient information to understand the potential impact of the disclosure' which may cause 'far more damage than the person making the disclosure was ever in a position to anticipate.'[226]It is submitted that the consequences of the disclosure of national security material may be harmful to the safety and public security of citizens. However, it will be identified later in this thesis that the widely drafted Official Secrets Act 1989 carries the potential to protect information not only harmful to the public interest but also information which may be more harmful to government or ministerial interests than national security.

Aftergood suggests that there are three distinct categories of government secrecy. The first, he calls "genuine national security secrecy," this aims to protect information which could pose an 'identifiable threat to the security of the nation' by compromising its defence or foreign relations and may include information about current military operational plans, identities of intelligence sources or confidential diplomatic initiatives.[227] The second category, according to Aftergood, often 'masks itself as

[226] *Ibid*, 84.
[227] S.Aftergood, *Secrecy and Government Bulletin*, http://www.fas.org/sgp/bulletin/secretro.html (accessed

government secrecy' so-called "bureaucratic secrecy" whereby the state 'hoards information' either 'out of convenience' or a 'dim suspicion that disclosure is intrinsically riskier than non disclosure.' The third category he identifies as "political secrecy" whereby classification authority is 'used for political advantage.' This, Aftergood argues, 'exploits the genuine national security interests' in order to 'advance a self-serving agenda' to 'evade controversy, or to thwart accountability' and in the extreme can 'conceal violations of the law' and threaten 'the integrity of the political process itself.'

It is submitted that disclosures relating to genuine national security information may be justified where the information ordinarily protected by the Official Secrets Act 1989 is of a high value to the public interest. Such high value information may include a situation whereby a confidential diplomatic initiative includes an agreement to conduct illegal extraordinary rendition between nation states. Any disclosure of this 'first category' information must be counterbalanced against a competing argument that such information would be harmful to individuals. Applying the theoretical perspective adopted by Dworkin, a limitation of speech must be justified by a 'clear and substantial risk' to individuals. Therefore, the disclosure of the existence of a policy authorising extraordinary rendition may be justified, but the disclosure of the policy document itself identifying the names of operatives may not.

The disclosure of bureaucratic secrecy may be less easy to justify. Routine leaks of routine bureaucratic secrecy may damage the ability of the security and intelligence services to remain 'secret.' The consequences of leaked material which is of a low value contribution to public debate may lead to a loss of confidence in the services. Lord

Nicholls argued in *Attorney General v Blake* and another that it was 'of paramount importance' that members of the services and those recruited as informers should 'have complete confidence' in their dealings with each other. Breaching that confidence, he suggested would, undermine 'the willingness of prospective informers to co-operate with the services,' and the 'trust between members of the services when engaged on secret and dangerous operations' which would 'jeopardise the effectiveness of the service.'[228]

1.10 Development of an Analytical Methodology

The purpose of this chapter has been to identify the theoretical and legal justifications for whistleblowing. The chapter has, where appropriate, identified circumstances where unauthorised disclosure or whistleblowing directly to the public may not be justified. In order to accurately assess the material in this thesis it is therefore necessary to develop two analytical frameworks. The first will be referred to as the 'Theoretical Framework' and will concern information discussed in the first part of this chapter. The second will be called the 'Legal Framework.' It will focus on information discussed in the second part of the chapter. The principle motivation will be to assess whether the current laws and material discussed is compliant with Article 10 values and, where appropriate, the test provided in *Guja v Moldova*.

As proportionality balancing requires a thorough determination of the public interest in any material disclosed, the author will then propose three categories of information, based upon existing case law principles, to ascertain the potential value of the disclosure of such information. As the test in *Guja v Moldova* requires an assessment of the

[228] [2000] UKHL 45.

detriment to the employer, a countervailing justification for non-disclosure of the information will be provided for each category.

1.10.1 Theoretical Framework

It is submitted that the argument from moral autonomy provides a strong justification for the right of individuals to raise concerns, in particular the right to make unauthorised disclosures of official information. In exercising his right to moral autonomy, the individual would not feel inhibited by social norms, legal restrictions or contractual obligations. The difficulty with the argument is that by bypassing the restrictions placed upon the individual as an employee or a citizen in democratic society, the argument fails to consider the practical realities of modern life. Upon entering employment, Crown servants agree to abide by rules of conduct in relation to political activities, legal obligations in relation to the law of confidence and the Official Secrets Acts, and the implied contractual term, existing in all contracts of employment that the employer and employee will treat each other with mutual concern and respect. Failure to abide by the aforementioned restrictions is likely to result in the Civil Servant losing his employment, or being prosecuted under the Official Secrets Acts.

The argument that whistleblowing communication enhances the individual may be more easily justified. The communication of a political policy which is legal and which does not identify wrongdoing may still be justified to allow the individual to become a participant in political debate. The arguments from moral autonomy and to enhance the individual share close similarities in that both may provide strong justifications to allow 'protest whistleblowing.' As neither argument requires a benefit conferred upon the recipients of the information, it is submitted that anonymous whistleblowing would be

justified.

Neither argument, however, allows for consideration as to the value of the communication to the recipient audience or to wider public debate. Such communication may be harmful to colleagues or to democratic society as a whole.[229] The argument that freedom of expression is justified to enhance the public good provides a stronger justification for whistleblowing speech, because it concentrates on the contribution the communication makes to society as a whole. The discovery of truth will provide an important justification for whistleblowing, particularly where members of the public have been misled. Where there has been a cover up of information or if false information has provided, the Crown servant may be best placed to provide such information.

The argument from participation in a democracy supports the argument from truth. In a democratic society it is vital that citizens are provided with sufficient information to engage in and enhance political debate, to decide who to elect based upon clear and informed decision making, and ultimately so that they can be aware on what actions are taken in their name. The arguments from truth and from democracy identify benefits to both the communicator of the information and the recipient audience. The argument that citizens should have a right of access to information is closely linked to the justifications from truth and democracy. Ultimately, where information has been suppressed from the public and such information could lead to truth or a better more informed electorate, a Crown servant may be justified in releasing such information. Conversely, information which discloses the private lives of individuals may not provide a contribution to the public debate and the disclosure of such material should be questioned.[230]

[229] Considered further below.
[230] According to Bok, *Above*, n. 44, 219.

In a theoretical justification for whistleblowing, the public interest in the speech communicated is as important as the act of whistleblowing itself. Thus, as Bok identifies, society must test the information to determine whether it is in the public interest. Determination of the value of the information is central to considering whether the suppression of whistleblowing speech may be justified. Both Barendt and Dworkin identify that governments must show strong grounds for interference, a clear and substantial risk that the speech will harm people or property. The unauthorised disclosure of national security information may cause grave harm to individuals and may provide a justifiable restriction on speech but must be tested and weighed against the benefit of the disclosure.

The disclosure of secrets which are not harmful to national security may still be harmful to the public interest if routine disclosure leads to a 'panopticised' regime whereby public officials feel unable to make decisions in the national interest for fear of recrimination, undermining the purpose of government in democratic society. Conversely, the disclosure of national security information as an act of necessity must be counterbalanced against the disclosure of bureaucratic secrecy. Where necessity is used as a justification, the act should not create more harm to individuals than the threat the whistleblower is trying to prevent.

The difficulty with information perceived to be confidential or pertaining to national security is that the act of interpreting the speech and balancing the public interest in the information often takes place post facto. It is therefore submitted that before deciding to make an unauthorised disclosure, a Crown servant should consider what official channels are available to him. Thus, external, unauthorised disclosure should be considered as a

last resort, where the official mechanisms available cannot deal with the concern, are not viable or may lead to suppression of the speech or where the matter is urgent and there is not time to use those official channels.

Where unauthorised disclosures are made to the public, the individual should identify himself to the audience and should be available to explain the contents of the information and his motivations for the disclosure. This should be preferred as an alternative (where possible) to anonymous leaking. Anonymous leaking may prevent the recipient audience from making an assessment as to the value of the information communicated. It may therefore be detrimental to the aims identified in the justifications from truth and from participation in a democracy. Anonymous leaking should be reserved to 'last resort' situations whereby the individual feels that he will receive grave reprisals for raising the concerns if identified.

1.10.2 Legal Framework

Article 10 of the European Convention on Human Rights affords a high level of protection to freedom of expression. Generally, the protection will extend to political expression which has been identified as the right to criticise the actions or omissions of government who must, in a democratic society, be open to close criticism, not only from the press but also public opinion. Freedom of political debate has been identified as the right to criticise political figures, who unlike private citizens, must expect fiercer criticism than other people. The right to criticise extends beyond the right to communicate facts and may include the expression of opinion or 'value judgements.'

Crown servants owe a contractual duty of loyalty to the government of the day. As a consequence of entering into employment as a public servant, the European Court of Human Rights has identified that voluntarily entering into such employment may constitute an agreed limitation of the employee's expression rights. By becoming a Crown Servant involved in national security matters, the employee owes a special duty of loyalty. Crown servants are placed in a position whereby they may disagree with policy decisions made their superiors who may be Ministers of the Crown or collective Cabinet decisions. It is submitted that it will be necessary for a court to distinguish between disclosures relating to policy decisions which may be legal but to which the Crown servant disagrees and disclosures of wrongdoing. Once determined the correct proportionality balancing may be applied.

1.10.3 Disclosures relating to Policy Dissent

It is submitted that where a Crown Servant chooses to raise concerns about a policy decision to which he does not agree but the information concerned does not identify wrongdoing, jurisprudence from ECtHR decisions regarding political expression should be considered. The value of any political expression made by a Crown Servant should be weighed against the duty of loyalty the individual has to the employer. The individual may express his opinion as to the quality of a certain policy decision to the public and may, as a Crown servant working in the area to which the information relates, be able to provide a contribution to public interest debate. The act of communication may amount to the disclosure of wrongdoing whereby the policy in question has been deliberately explained by a member of government in a way which is misleading to Parliament or the public. Or if a policy proposed is lawful but may result in a risk of serious harm. Where

any such matters arise, it is submitted that it would be appropriate for the *Guja v Moldova* test to be used.

1.10.4 Disclosures of Wrongdoing

Guja v Moldova is the leading decision on disclosures of wrongdoing and therefore the test applied in the proportionality analysis should be considered as the benchmark to determine whether the official whistleblowing mechanisms, the employment protections afforded by the Public Interest Disclosure Act, and the provisions used to control official information in the United Kingdom currently align with art.10 values.

Guja v Moldova identifies that it will not be sufficient for an employee to raise concerns directly to the public without there being a strong public interest in the information disclosed. The court will also identify whether or not there were alternative mechanisms available which be utilised

The first question in the analysis asks whether the employee had alternative channels for making the disclosure. *Guja* identifies that concerns should be raised internally unless it not practical to do so, therefore extensive consideration of the effectiveness of official whistleblowing mechanisms provided to Civil Servant employees will be considered in chapter three of this thesis, further consideration will be provided to employees of the Intelligence and Security Services in chapter six and members of the UK armed forces in chapter seven.

In determining the public interest in the disclosure, it is submitted that information

detailing wrongdoing would be of a high value to the public interest. Such circumstances may include where Parliament or members of the public have been misled. The disclosure of a dangerous or illegal policy decision such as the extraordinary rendition or torture of individuals may also be considered to be information of a high value. A defence of necessity may be justified where there is an immediate risk of harm posed upon the person making the disclosure or others to which he has a responsibility. Evidence of the personal conduct of officials (such as Ministers of the Crown, officials in the Civil Service, Chief Executives or Special Advisers) may be considered of a medium value to the public interest, whereby the conduct in question is evidence to correct a false impression, and the conduct is relevant to the person's work. The disclosure of an extra marital affair may not be considered to be of value. However the value is increased where that conduct has resulted in an employee receiving favourable promotion prospects or an abuse of office. The disclosure of a sexual relationship may not be considered relevant, unless where the public official has portrayed a very different image in the public domain and such disclosure is necessary to correct a false impression. Where personal matters are disclosed and article 8 is determined to be engaged, the court will be required to balance the competing rights of article 10 against article 8. As a consequence, it will be necessary for the court to consider the jurisprudence of cases concerning misuse of private information.

The Court will need to test the authenticity of the information, if the information it found to be untrue, or if the individual who raised the concern is unable to verify the communication, it is unlikely that he will receive art.10 protection. This is where it is identified that for communication of value judgements, such as informed opinions to which the applicant cannot prove, it will be more appropriate for the court to undertake

the proportionality assessment using the political expression cases such as *Lingens v Austria*. With regard to the unauthorised disclosure of false information, it is submitted that there will be a strong public interest in ensuring that the public will not be misled. This is because with regard to national security information in particular, the United Kingdom government, most often operates a 'neither confirm nor deny' policy. This means that society may not be able to correct the untruth, which as J.S. Mill identifies will lead to falsity.

The court will next need to consider the detriment caused to the employer as a result of the disclosure. Here, a court should consider the relevant domestic jurisprudence to consider whether, where appropriate, the disclosure will undermine the convention of collective Cabinet responsibility. It will need to identify whether or not the confidential character of the information has lapsed. If the information concerns a Cabinet decision taken several years before the disclosure it is more likely to be disclosed than a decision taken the day before. However, where there is a compelling reason that the disclosure is in the public interest, this should outweigh the detriment caused to the employer. If the disclosure was of national security information, the court will need to determine whether the disclosure could have a detrimental impact on 'the willingness of prospective informers to co-operate with the services,' and the 'trust between members of the services when engaged on secret and dangerous operations.'[231]

In determining whether the individual acted in good faith, it is submitted that the court will need to consider the circumstances in which the disclosure was made, i.e. whether the individual attempted to raise the concern internally before making an unauthorised disclosure. The Court will again need to refer to the public interest in the information

[231] *Attorney General v Blake* [2000] UKHL 45.

disclosed. It is submitted, that in determining whether the individual has acted in good faith, the court is likely to view any anonymous disclosures which have not attempted to utilise other official means with suspicion. This reinforces the proposition that unauthorised anonymous disclosures are likely to be protected by article 10 only as a last resort.

Finally, the court will need to consider the severity of the sanction imposed for the making of the disclosure. It is submitted, that the least severe sanction is likely to result in 'detrimental treatment,' such as sidelining an individual for promotion, or taking disciplinary action against an individual for a related or unrelated matter. A more severe sanction is likely to include the dismissal of the individual for the making of the disclosure. The most severe sanction available will be a civil action for breach of confidence, a criminal prosecution for a common law offence of misconduct in public office or prosecution under the provisions of the Official Secrets Acts. Any sanction must be weighed against the 'chilling effect' on other individuals raising public interest concerns in the future.

The next chapter will consider unauthorised disclosures, with particular emphasis of the whistleblower as a journalistic source and the impact of disclosures made to online outlets such as *Wikileaks*.

CHAPTER TWO

UNAUTHORISED DISCLOSURES: TRADITIONAL JOURNALISTIC SOURCE PROTECTION AND THE EMERGENCE OF ONLINE OUTLETS TO FACILITATE DISCLOSURE

The establishment of the online facility, *Wikileaks* has provided a new method of leaking documents. The website carries the promise of anonymity and the swift dissemination of official material. Established in 2006, the organisation has served as a forum to publish confidential and classified documents from anonymous sources. Whilst the unauthorised disclosure of thousands of official government documents, published by the website has brought the subject of whistleblowing to the forefront of the political agenda, the unauthorised disclosure of documents is not a new phenomenon. The news media have, for a number of years, utilised information obtained from Crown Servants in carrying out their vital democratic function as watchdog. The press require not only the use of 'off the record sources,' but the ability to protect them. This is an integral part of press freedom.[232] The ECtHR has identified that an order for source disclosure may undermine the watchdog function, potentially resulting in a 'chilling effect' which will deter future individuals from providing the media with information in the public interest.[233]

[232] T.Pinto, *How sacred is the rule against the disclosure of journalist's sources?* [2003] *Ent L.R.* 14(7), 170.
[233] See generally, *Goodwin v United Kingdom* (17488/90) (1996).

The purpose of this chapter is to provide an assessment of the avenues available to Crown Servants to leak information. It will consider how *Wikileaks* and other online facilities operate in comparison to the traditional journalist and source relationship. It will provide a critical evaluation of the protections afforded to the source by these avenues in the light of orders used to compel persons to reveal the origins of the information obtained. It will further consider potential offences for individuals who publish information. The chapter will conclude by providing an assessment of the avenues available alongside the theoretical and legal models developed in the previous chapter.

2.1 The relationship of journalist and source

The aim of this section is to consider the relationship of a journalist and the source of the information obtained. Before identifying the obligations a journalist may have to a source it is necessary to first consider the ways in which journalistic source material may be obtained. In providing an analysis of the theory behind the protection of journalistic sources, Carney identifies a number of different scenarios.[234] Firstly, a source may be 'un-named' in a story because of an 'express undertaking given by the journalist not to reveal his name.' Second, is a situation where a journalist may know the identity of the individual concerned but chooses not to reveal the name of the individual because 'he believes that the source desires anonymity.' Thirdly, is in circumstances where the journalist is 'the recipient of an unsolicited document that does not identify the sender.'[235] It is submitted that following the increase in the use of information obtained via an online outlet such as *Wikileaks* it is necessary to add a fourth category: circumstances in which information has been obtained by a third party.

[234]D. Carney, *The Theoretical Underpinnings of the Protection of Journalists' Confidential Sources* [2009] 1 JML 97.
[235] *Ibid.*

2.1.2 Establishing an obligation: a matter of professional ethics and personal standards

The requirement to protect a source is at the heart of journalistic ethics. The National Union of Journalists (NUJ) states in its code of conduct that a journalist shall:

> "Protect the identity of the sources who supply information in confidence and material gathered in the course of her/his work."[236]

Signing the code, which originates from 1936, is still an integral part of the process to join the union. In 2006 the NUJ produced a code of conduct specifically concerning 'witness contributors' in which it expressly stated that information obtained from a source should not be passed on to the Police or Security Services, without specific agreement of the contributor or by way of a court order.[237] However, the code reminds journalists that they must not give the source 'unrealistic guarantees' of the legal consequences of their disclosure. Breach of the NUJ codes may result in disciplinary action taken against the journalist. Rule 24 of the NUJ Codebook identifies that if a member has been found guilty of misconduct 'detrimental to the interests of the union' or 'of the profession of journalism' or is in breach of the code of conduct the union may:

> "(I) impose on that member a fine not exceeding £1,000; (ii) suspend that member for a period not exceeding 12 months; (iii) express its censure in such terms as it deems appropriate; (iv) impose more than one of these penalties, or (v) expel him/her from the union."[238]

Upon considering whether to release information obtained from a source to the public domain the journalist is faced with an obligation not only to protect the source in question, but also to uphold perhaps the most important aspect of reporting contained

[236] National Union of Journalists, Code of Conduct, para 7: http://www.nuj.org.uk/files/NUJ_Code_of_Conduct.pdf (accessed 05/08/11).
[237] National Union of Journalists, *Code of Conduct for Witness Contributors*, 2005, para 7.
[238] National Union of Journalists, *Rule Book 2010*: http://www.nuj.org.uk/innerPagenuj.html?docid=182 (accessed 05/08/11).

within the code: to ensure that the information that he disseminates is fair and accurate and to avoid falsification by distortion, selection or misrepresentation.[239]

The Press Complaints Commission acts as an independent self-regulatory body to the newspaper and magazine industry. The Commission comprises of ten lay members and seven members who are serving editors in.[240]If a complaint is made to the Commission and it is deemed to fall within the Commission's remit, the PCC may investigate. The PCC aims to resolve complaints by a process of mediation between the editor of the publication and the complainant. The PCC may suggest that the editor publish a public apology, a correction, or provide the complainant with a private letter of apology or an undertaking as to future conduct. If the complaint cannot be resolved the PCC may uphold the complaint and give a 'critical adjudication' the full content of which must be published with due prominence in the publication concerned. The PCC does not have the reach to investigate complaints regarding every newspaper and magazine in the United Kingdom because it is reliant upon print media organisations to subscribe to its funding body, the Press Standards Board of Finance (Pressbof). Several publications do not therefore come under the jurisdiction of the PCC.

The House of Commons, Culture, Media and Sport Committee, has noted that 'many, but not all, newspapers' include a requirement to respect the PCC Code of Practice in their journalists' contract of employment.[241] The Committee are supportive of the practice and in their 2007 report entitled Self-Regulation of the Press, they suggested that including a contractual obligation to adhere to the Code would 'safeguard journalists who believed

[239] *Ibid*, para 3.
[240] Press Complaints Commission Website, *About the PCC*: http://www.pcc.org.uk/about/index.html (accessed 05/08/11)
[241] Culture Media and Sport Committee, *Press Standards Privacy and Libel*, 2009, HC 532, para 554.

that they were being asked to use unethical newsgathering practices.[242]

Whilst paragraph 15 of the Press Complaints Commission Code of Practice identifies that 'journalists have a moral obligation to protect confidential sources of information,' the press 'must take care not to publish inaccurate, misleading or distorted information, including pictures.' If the information contains a 'significant inaccuracy, misleading statement or distortion,' it must be corrected once recognised and where appropriate an apology published. Moreover, the press have an obligation to 'distinguish between comment, conjecture and fact.'

With regard to the obtaining of information, according to paragraph 10 of the PCC Code, the press must not 'seek to obtain or publish material' which has been acquired by the 'unauthorised removal of documents or photographs' or by 'accessing digitally-held private information without consent.' In addition to this the code identifies:

> "…Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means."

The Press Complaints Commission Code of Practice[243] contains a detailed definition of the public interest which it expects the newspaper and periodical industry to adhere to. It essentially highlights information which would be deemed to be in the public interest as, including but not limited to:

> "(i) Detecting or exposing crime or serious impropriety, (ii) Protecting public health or safety, (iii) Preventing the public from being misled by an action or a statement of an individual or an organisation."[244]

[242] Culture Media and Sport Committee, *Self Regulation of the Press*, 2007, HC 375, para 58.
[243] The details of which can be found on the PCC website: http://www.pcc.org.uk/cop/practice.html.
[244] *Ibid* at para 16.

The value of the information obtained must be called into question. If the source remains confidential, as Fenwick and Phillipson correctly identify, the information concerned may consist of 'a mixture of substance and disinformation.'[245] There is no way of checking the accuracy of the information and the identity of the source in an open public forum. This may prove particularly problematical when dealing with sources in Government or Civil Service whose motives may be political or for personal gain.

By maintaining source confidentiality the journalist is inadvertently preventing the public from assessing the value of the information, and preventing further enquiries to the source in order to seek further information or clarity. It also prohibits those with a vested interest in the information, whether it is an employer or a person in receipt of criticism resulting from the disclosure to seek redress. Furthermore, it has also been suggested that members of the public will 'confuse self-protective instincts with cowardice and deceitfulness.'[246]

2.2 Wikileaks and the emergence of online resources to facilitate unauthorised disclosure

Wikileaks was established in 2006 as a not for profit organisation to provide "the most secure platform for whistleblowers the world had ever known."[247] Wikileaks is not a media organisation in the traditional sense – it is unconstrained by both commercial interests and professional and regulatory codes of practice. The founder of the service, Julian Assange, is a formerly convicted computer hacker and together with a team of staff has utilised those skills to establish a web-based system deemed impenetrable to law

[245] H.Fenwick and G.Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford, 2006) 311.
[246] Y.Cripps, *The Legal implications of Disclosure in the Public Interest* (Sweet & Maxwell, London 1994) 254.
[247] www.wikileaks.org, J.Assange, *The Unauthorised Autobiography* (Canongate, Edinburgh, 2011) 130.

enforcement and online monitoring.

Early publications on the website relate to allegations of corruption in Africa and the logs of equipment acquired by the U.S. Army for use in the Afghanistan war.[248] The website gained momentum in April 2010 when it published the 'collateral murder' video which had been recorded via an on-board camera on a U.S. Army Apache Helicopter. The video reportedly from July 2007 showed the killing of two Iraqi journalists, and the apparent indifference of the helicopter pilot who after being informed that he had injured children had replied that 'it was their fault for bringing them into battle.'

In July 2010, the website released 90,000 documents detailing military operations in Afghanistan. Known as the 'Afghanistan War Logs' the documents detailed the true extent of civilian casualties in the country and the use of US Special Forces to assassinate terrorist suspects. In October 2010 the website published 400,000 documents relating to the Iraq War, enabling a map to be drawn detailing the location of every fatality which occurred during the conflict. In November 2010 *Wikileaks* published 120,000 diplomatic cables – communications intended to be read by senior officials in Washington. The cables detailed a wide range of issues, from matters of high public concern, such as orders to obtain intelligence information on foreign diplomats the status of the perceived terror threat posed by the Middle East, to the innocuous yet deeply embarrassing revelations of US attitudes towards foreign leaders.

The alleged source of the leaks US military and diplomatic leaks is Bradley Manning, a U.S. Military Intelligence Analyst – it is not clear at this stage whether other sources

[248] J. Channing, *Wikileaks Releases Secret Report on Military Equipment* http://www.nysun.com/foreign/wikileaks-releases-secret-report-on-military/62236/ (accessed 01/09/11).

provided *Wikileaks* with information. Manning's apparent involvement was exposed when he reportedly discussed his conduct in an online discussion with Adrian Lamo, a computer hacker who later reported Manning to the Federal Bureau of Investigation. Manning is currently awaiting trial, following his arrest in May 2010. It is suggested that Manning had downloaded and removed the thousands of documents with relative ease.[249] The documents were readily accessible via the Secure Internet Protocol Router Network ('SIPRNET'). The Network had been established by the U.S. authorities to ensure that intelligence information could be shared between agencies, in response to key findings of the 9/11 Commission Panel Report.[250]

Julian Assange is currently awaiting extradition to Sweden after a European Arrest Warrant was issued on the basis that he committed sexual offences against two women. Currently he has not been charged with any offences arising from the publication of any unauthorised material. Assange disputes the allegations and his defence team have alleged that if he is extradited to Sweden this may result in attempts by the US authorities to extradite him to face trial in the United States or that he could face extraordinary rendition to the US facility at Guantanamo Bay.[251] At present *Wikileaks* has suspended its operations. The primary focus of this section will be to consider how *Wikileaks* can provide protection to sources and how it operates as a conduit to pass leaked documents to traditional media organisations and how it operates as a media organisation in its own right in comparison with those traditional organisations. It will also identify and critically

[249] D. Leigh, *How 250,000 Embassy Cables were Leaked*, Guardian, 28th November 2010, http://www.guardian.co.uk/world/2010/nov/28/how-us-embassy-cables-leaked
[250] *9/11 Commission Panel Report*, see in particular Ch.13: http://www.gpoaccess.gov/911/pdf/fullreport.pdf (accessed 09/08/2011).
[251] *Director of Public Prosecution Marianne NY, Swedish Prosecution Authority, Sweden (A Swedish Judicial Authority) v Julian Paul Assange* [2011] Skeleton Argument, accessible on Finers Stephens Innocent website: http://www.fsilaw.com/news-media/news/28-julian-assange-case-papers/ (accessed 19/10/11).

evaluate the number of 'copycat' organisations established following the prominence of the *Wikileaks* organisation.

2.2.1 Wikileaks as a Media Organisation

Once information has been sent to the organisation, a decision is made whether to publish the information on the website. In this sense, use of the term 'wiki' or a user controlled interface, allowing participants to upload and edit material is somewhat of a misnomer. The final decision to publish the material falls upon Assange, who may be identified as being the equivalent of an 'editor in chief.' Documents are reportedly vetted by Assange and four unidentified 'experts' with different areas of expertise.

Assange identifies that the first document published on the website, purportedly a letter from the Union of Islamic Courts in Somalia was obtained via a Chinese source and concedes that they 'couldn't be sure' that it was genuine.'[252] He continues:

> "Even if the document was a fake, perhaps prepared by Chinese sources, it still raised important questions and showed how the disclosure of secret documents could enhance our understanding of complex political situations."[253]

The aforementioned comment identifies that despite concerns that the document may have been a forgery Assange was prepared to publish the document anyway. Domscheit-Berg, a former member of the *Wikileaks* organisation had deceptively created the impression that all documents were subject to 'authenticity checks' and that 'until late 2009' nobody except Assange and himself had checked the 'vast majority of documents.'[254] With regard to the claim that the organisation had access to a pool of

[252] J.Assange, *the Unauthorised Biography (*Canongate, London) 132.
[253] J. Assange, *the Unauthorised Biography* (Canongate, London)133.
[254] D.Domscheit-Berg, Inside Wikileaks: *My Time with Julian Assange at the World's Most Dangerous*

approximately eight hundred experts at its disposal, he identifies that 'strictly speaking' they were 'not lying' but did not identify that the individuals in question did not have access to the material received by *Wikileaks*.[255] Checks were limited to Assange and Domscheit-Berg checking to see if documents had been 'manipulated electronically' and 'a few *Google* searches.'[256] Ultimately he suggests that:

> "…Apparently we developed a pretty good sense for what was authentic and what wasn't; at least as far as I know, we didn't make any major mistakes but we could have."[257]

It is submitted that whilst *Wikileaks* could provide an important resource for public information, it could as easily serve as a platform for the dissemination of disinformation with the aim of destabilising international relations or the political process. This assertion is supported by Aftergood, who suggested prior to the establishment of the website that it could 'become hijacked to serve vendettas.'[258] A further difficulty is caused by the fact 'it is a longstanding procedure that the government do not comment on leaked documents'[259] or national security matters. Moreover, there are no safeguards in place to prevent a scenario where authentic material has been disclosed as a result of self-authorisation or political leaking by government ministers seeking political advantage.[260] Such action would represent a significant departure from the utopian ideal the Wikileaks service aims to create.

The process of checking whether the information is harmful, to national security or to individuals either directly working for intelligence agencies or the armed forces or

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Website, (Jonathan Cape: London, 2011) 217.
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *Above*, n 254.
[259] Government Response to the tenth report of session 2008-2009 from the Public Administration Select Committee, *Leaks and Whistleblowing in Whitehall*, Cm 7863, Para 20.
[260] This factor was highlighted as a problem requiring a change in political culture, Public Administration Select Committee, Leaks and Whistleblowing in Whitehall, 2008, HC 83, paras 32-36.

indirectly as a source, requires consideration. In the United Kingdom media organisations observe a voluntary code of 'Defence Advisory' or DA Notices. The DA Notices cover a number of categories relating to military operations, plans and capabilities and matters concerning the UK Security and Intelligence Services.[261] If a journalist is due to publish information which may conflict with one of the standing DA Notices he is expected to contact the committee for advice before publication. Speaking on the editorial discretion to redact documents, Assange appears to hold a view contrary to current journalistic practices;

> "We simply felt it was for history to judge what was in the 'public interest' and what was not. We would use our best editorial judgment, but it was not for us to do as most media organisations do, and act as censors on behalf of governments and commercial interests."

With regard to the publication of the Afghan war logs Assange had reportedly claimed that all documents had been checked for named informants and as a consequence of the process, 15,000 documents had not been published.[262] However, the Times newspaper had sifted through the material, finding the identities and locations of many informants. The Campaign for Innocent Victims In Conflict, Open Society Institute, Afghanistan Independent Human Rights Commission, International Crisis Group and Amnesty International responded to the publications by requesting *Wikileaks* analyse all documents to ensure that those 'containing identifying information' were 'taken down or redacted.'[263]*Wikileaks* responded to the criticism by redacting the documents later published regarding the Iraq War. However, in September 2011 the organisation released an un-redacted version of all 250,000 diplomatic cables, a move criticised by the

[261]*Ibid.*
[262] C.Philp, A.Mostrous, J.Starkey, *Wikileaks Accused of Putting Hundreds More Afghans at Risk: Human Rights Groups Demand Removal of Names*, The Times, 11August 2010.
[263] *Ibid.*

organisations Reporters without Borders and Amnesty International.[264] Most interestingly, some of the cables had revealed the identity of military whistleblowers and individuals who were under 'permanent police protection' before they spoke to US diplomats.[265]

Assange has stated previously:

> "…the promise we make to our sources… is that not only will we defend through every means that we have available, but we will try to get the maximum possible political impact for the material they give us."[266]

The 'maximum possible impact' Assange refers to has in practice required the organisation to engage with traditional media outlets. Unless members of the public choose to visit the website in order to view the material for themselves, public awareness of the available information, has to the greatest extent, been achieved via traditional media reporting. Thus, Assange has brokered deals with the Guardian newspaper in the United Kingdom, Der Spiegal in Germany, Le Monde in France, El Pais in Spain, the New York Times in the United States and Channel Four News (UK) to publish material provided to them by *Wikileaks* acting as a conduit.

2.2.2 Wikileaks as a Conduit

The use of *Wikileaks* to provide information to journalists requires consideration. It is submitted that the position of Wikileaks acting as a conduit engages the Code of Practice for Witness Contributors to which members of the National Union of Journalists are

[264] A.Mostrous, *Anger as Wikileaks 'Recklessly' identifies Confidential Sources*, The Times, 3rd September, 2011.
[265] *Ibid.*
[266] Interview on Colbert report, 12th April 2010, http://www.colbertnation.com/the-colbert-report-videos/260785/april-12-2010/exclusives---julian-assange-unedited-interview, M.Sifry, *Wikileaks and the Age of Transparency* (2011, Yale University Press, New Haven).

required to follow. Paragraph one of the Code requires that organisations using material obtained from 'a citizen journalist' must agree to uphold s.1 of the Press Complaints Code of Practice, that they should not publish 'inaccurate, misleading or distorted information.' Paragraph two of the Code identifies that organisations 'should check and provide sufficient resources' for the 'adequate checking of witness contributions' in order that they 'establish their accuracy and authenticity before publication.' In relation to television and radio, all organisations except those regulated by the BBC Trust, must adhere to the Ofcom Broadcasting Code. The Code requires that the news, 'must be reported' with 'due accuracy' and 'presented with due impartiality.'[267] Thus, any 'significant mistakes' must be quickly 'acknowledged and corrected on air.'[268]

There is a danger that any information provided by a source may be false or misleading. The resignation of Piers Morgan as editor of the Daily Mirror newspaper in 2004 provides a pertinent example.[269] Morgan had published photographs purportedly showing the torture and abuse of Iraqi prisoners provided to the newspaper by an anonymous source. The Queen's Lancashire Regiment, who was at the centre of the abuse accusations, proved that the photographs had been faked, by identifying that the vehicle and equipment shown in the photographs had not been deployed in Iraq.[270]

It is submitted that the use of Wikileaks or any third party acting as a conduit creates detachment between the source and the publisher of the information. The potential for the news organisation to publish information which may be false or misleading is far greater than if the journalist knows the identity of the source and has either agreed to an

[267] Ofcom Broadcasting Code, s5: http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/impartiality/ (accessed 05/11/2011).
[268] *Ibid.*
[269] *Editor Sacked over Hoax Photos*, http://news.bbc.co.uk/1/hi/uk_politics/3716151.stm (01/11/2011).
[270] *Ibid.*

undertaking not to disclose the identity of the individual or believes that the identity of the source should not be disclosed. In both circumstances the journalist is provided with the opportunity to communicate with the source directly, to question the veracity of the material and to test the motivations of the source.

The publication of material from *Wikileaks* or other forms of online publications such as blogging or via social networking may also place members of the National Union of Journalists under an additional code relating to "witness contributors."[271] The code of conduct was published in 2006 in response to an increasing trend for traditional media outlets to publish information obtained from online sources. Paragraph one of the Code provides that organisations which use material obtained from 'witness contributors' agree to uphold s.1 of the PCC Code of Practice, the requirement that 'inaccurate, misleading, or distorted information' should not be published and that, if required, corrections must be published. Paragraph two of the Code requires that organisations should:

> "…check and provide sufficient resources for the adequate checking of witness contributions to establish their accuracy and authenticity before publication."

It is submitted that whilst the future of the Press Complaints Commission is currently in doubt following recent developments of phone hacking and the ongoing Leveson Inquiry into that issue and press standards in general, the aforementioned Code of Practice provides a recognition for existing ECtHR jurisprudence on the issue of accurate reporting. The enhanced level of protection afforded to journalists carries with it 'duties and responsibilities' and as a consequence journalists should act 'in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the

[271] Accessible via: http://www.mediawise.org.uk/www.mediawise.org.uk/display_page601e.html?id=903 (accessed 01/09/11).

ethics of journalism.'[272]

It should be identified that if *Wikileaks* sought the 'enhanced protection' afforded to journalists by article 10 in the future, a court (provided that the action was brought in a jurisdiction to which the ECHR applied), would need to identify what steps the organisation has taken to test the veracity of the source and information concerned. Regardless of whether it can be successfully argued that *Wikileaks* as an organisation have an ethical obligation to determine the veracity of a source and the material obtained, the position of *Wikileaks* acting as a conduit, must not detract from the obligation for the traditional media outlet to undertake the necessary checks before information is reported on and published. One must ask however, whether such checks could be possible, given the amount of information disclosed and the way in which *Wikileaks* has conducted its operations.

Bok argues that where anonymous whistleblowing occurs, journalists and intermediaries will be faced with the task of determining whether the information received from a source should be published in its entirety, and whether it should be used at all if the accuracy of the information is in doubt.[273] Bok suggests that unless the information disclosed is accompanied by 'indications of how the information can be checked' the value of the communicated message is diminished.[274] It does not appear that the relationship of *Wikileaks* acting as a conduit provided sufficient scope for the accurate checking of information. One must ask how such an operation could have been carried out without seeking assistance from other sources in the United States military that were privy to the information or by directly communicating with the source. It is submitted that the

[272] *Pederson and Baadsgaard v Denmark* ,para 78
[273] Above, n 44 223.
[274] *Ibid.*

position of *Wikileaks* and other similar organisations acting as a conduit presents a quandary for the traditional media outlet. If the identity of the source is revealed to a domestic media outlet so that the information and source may be verified, the potential for a domestic authority to apply for a *Norwich Pharmacal* order is increased. However, by not having access to the source of the information, the likelihood of publishing false information to the public is also increased. The potential for this is further enhanced by the volume of documents provided by *Wikileaks* to the journalistic partners. As Dean distinguishes three classes of the recipient audience, it may be suggested that 'those who believe through the judgements of others' are placed at the most risk. Neocleaous bolsters this position by identifying that society is placed at a 'serious technical and organisational disadvantage' when it comes to secret information. Society may lack the ability to determine whether the information disclosed is true.[275] The next section will consider the reported protections available to the sources that provide information to *Wikileaks*.

2.2.3 Wikileaks and Source Protection

At the heart of the protection available to sources is a system called 'The Onion Router,' more commonly known as 'Tor.' The system utilises a network of '2,000 global computer servers' and multi-layered encryption in order to route anonymous information via other computers using the Tor system, the result being that the origin of the information cannot be identified.[276]

Leigh and Harding identify that despite the sophisticated level of encryption, 'anyone who is monitoring the sender or receiver's internet connection will be see the receiver

[275] Above, n 24, 95.
[276] D.Leigh and L.Harding, *Inside Julian Assange's War on Secrecy* (Guardian Books, London, 2011) 52.

and source information,' therefore they will be able to identify that communication has taken place between source and recipient but not the content of the information.[277] Leigh and Harding suggest this is 'disastrous for whistleblowers.'[278] Prior to the official launch of *Wikileaks*, Ben Laurie, commenting on the levels of protection *Wikileaks* intended to provide to whistleblowers, suggested that he 'would not trust his life or even his liberty to Tor.'[279]

Indeed, it may not be difficult for an executive department to deduce that encrypted communication between a government employee and a recipient known to be linked to a 'whistleblowing service' is likely to be the source of documents later published on the site, if his colleagues have not been engaged in such communication. Other identifying behaviour such as an employee bringing in unauthorised recording, media or storage devices or being engaged in unauthorised copying or removal of intelligence material may also assist to provide evidence a certain individual is the source of the unauthorised disclosures.[280] The published documents may provide identifying marks as to the origin of the leaks. Publication of documents in their entirety may assist prosecuting authorities.

Following the arrest of Bradley Manning as the alleged source of the leaks, Domscheit-Berg, reportedly suggested that the Wikileaks organisation should not publish any more material for the time being as this may be harmful to Manning's legal position. The suggestion went un-noticed and Assange proceeded to publish the rest of the material provided by the source. It should be noted that neither Assange nor Domsheit-Berg have

[277] *Ibid.*
[278] *Above, n 276.*
[279] P.Marks. *How to Leak a Secret and Not Get Caught*, New Scientist, 13 January, 2011.
[280] The United States Army, *Military Intelligence: Threat Awareness and Reporting Program,* Army Regulation 381-12, 8 provides these behavioural examples. The Regulation was introduced following the Wikileaks disclosures. For commentary see further: A.Savage, *Wikileaks and Whistleblowers: The Need for a New Legal Focus*, JURIST—Forum, June 28, 2011.

confirmed or denied that Manning is the source, citing source confidentiality. The organisation has reportedly based its main operating location in Sweden because of the comprehensive nature of the legal protection available to journalistic sources.[281]

2.3 Court orders requiring journalists to reveal their sources.

An order to compel a third party to disclose identify the source of leaked information may be made by the High Court subject to the principle established by *Norwich Pharmacal Co v Customs and Excise Commissioners*.[282] The Norwich Pharmacal test for third party disclosure provides that:

> "…if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers…"[283]

The following sections will provide a contemporary analysis of the exercise of Norwich Pharmacal orders and with particular reference to the impact on the protection of whistleblowers. As a response to recent technological advancements it is submitted that such orders may arise in the following situations: firstly, the 'traditional journalist and source relationship' whereby the journalist works for a commercial media outlet such as a newspaper or television news organisation. Second, where the information is submitted to an outlet available on the internet, such as *Wikileaks*. Third, where an Internet Service Provider ('ISP') hosts the outlet and may hold information as to the whereabouts of individuals involved. Fourth, where an internet search engine may identify the individual(s) involved in the making of the disclosure. Fifth, where an online email service or social media service has been used in the course of the disclosure. The next

[281] Considered further below.
[282] [1974] AC 133.
[283] *Ibid* at 175.

section will consider the operation of Norwich Pharmacal orders alongside s.10 Contempt of Court Act 1981.

2.3.1 Section 10 Contempt of Court Act 1981

In the United Kingdom journalistic source protection is provided by Section 10 Contempt of Court Act 1981 which states that:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in any publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

Section 10 recognises the public interest in the protection of journalistic sources and imposes a presumption that courts are not to order the disclosure of a source unless satisfied that it is necessary to do so in one of four clearly defined circumstances. The four exceptions to section 10 rest upon the central term of 'necessity.' The element of necessity is deemed as a crucial justification for court's use of the contempt power.[284] Its meaning has been stated as "more than merely relevant or desirable, useful or expedient."[285] Although it is based upon a question of fact,[286] judgment will also be dependant upon the extent of enquires made by the person requiring the order of disclosure.[287] It is also expected that the person requesting the order give specific reasons for doing so.[288] Section 10 covers 'any speech, writing or other communication in

[284] See: R.Goldfarb, *The Contempt Power* (Columbia University Press, London, 1963) 22.
[285] See: *Maxwell v Pressdram Ltd* [1987] 1 All ER 656, CA and *X v Y* [1998] 2 All ER 648. See also: N.Lowe and B.Sufrin, *Borrie & Lowe: The Law of Contempt* (3rd Edition, Butterworths, 1996).
[286] [1988] AC 660, 704.
[287] *Broadmoor Hospital v Hyde* (1994) Independent 4 March.
[288] *AG v Guardian* [1985] AC 339 at 346 per Lord Diplock, 360 per Lord Fraser, 364 per Lord Scarman, 368 per Lord Roskilland 372 per Lord Bridge.

whatever form, which is addressed to the public at large or any section of the public.'[289] It is therefore submitted that a Norwich Pharmacal application should be subject to Section 10, regardless of whether the communication has been published by a traditional media outlet or by an online outlet such as Wikileaks.

2.3.2 Application of Section 10 post Human Rights Act 1998

Following the incorporation of the European Convention on Human Rights (ECHR) into domestic law by the Human Rights Act 1998 (HRA), s.10 CCA must be read and given effect to by the courts, so far as is possible to do so, in a way which is compatible with art.10 ECHR under s.3(1) HRA.

The term 'interests of justice' does not appear in art.10 (2) ECHR. It is therefore appropriate to consider whether the term may be applicable the existing provisions in art.10 (2). The term is open to particularly wide interpretation. Whilst, pre HRA domestic courts did not seek to provide a clear definition of the term, for the purposes of this study it may be identified that the 'interests of justice' would cover breach of confidence actions. Post HRA, the art.10 (2) exceptions, 'for the protection of the reputation or rights of others,' and 'for preventing the disclosure of information received in confidence,' would be most applicable. Whilst it is noted that 'interests of justice' could also be interpreted under the exception of 'prevention of disorder or crime' it should be identified that s.10 already carried such a provision. In order to be compliant with art.10 (2), the term 'necessary' must now be interpreted as 'necessary in a democratic society.'[290]

[289] Section 2 (1) and s.19 Contempt of Court Act 1981.
[290] *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, para 53.

It is clear that the restrictions identified require domestic courts to apply proportionality balancing. In doing so, domestic courts required by Section 2 (1) Human Rights Act, to take into account any 'judgment, decision, declaration or advisory opinion of the European Court of Human Rights':

> "…whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question is given."

Domestic courts are not bound to follow decisions of the Strasbourg Court but are required to take the jurisprudence into account in so far as it is relevant to the instant case before them.

In giving reference to s.2 (1) HRA Lord Bingham identified in the House of Lords decision of *R (Ullah) v Special Adjudicator*[291] that while the Convention jurisprudence was:

> "…not strictly binding, it has been held that the courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s.2 should not be without strong reason dilute or weaken the effects of the Strasbourg case law. It is indeed unlawful under s.6 of the 1998 for a public authority, including a court; to act in a way which is incompatible with a Convention right…The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."[292]

Lord Bingham's statement in Ullah must be considered and contrasted with the later decision in *Price v Leeds City Council*.[293]In Price, the House of Lords was required to consider the impact of the Strasbourg decision in *Connors v UK*[294] on the domestic

[291] [2004] UKHL 26.
[292] *Ibid* para 20.
[293] [2006] UKHL 10.
[294] [2004] 1 AC 983.

precedent set by the House in *Harrow London Borough Council v Quazi*.[295] The Court of Appeal in Price had found the Strasbourg decision to be incompatible with Quazi but had identified that it was bound to follow the decision of the superior court. Lord Bingham indentified concerns that different courts could take differing views of the same issue. He adopted a more restrictive approach, suggesting that 'certainty is best achieved by adhering, even in the Convention context, to our rules of precedent.'[296] If judges, in the course of reviewing Convention arguments before them consider a binding precedent to be inconsistent with Strasbourg authority then they may 'express their views and give leave to appeal.'[297]

It is submitted that in cases involving orders for the disclosure of journalistic sources, the domestic courts have grappled uneasily with the application of proportionality, the end result consistently favouring the applicant making the disclosure order. The resultant failure may be attributed to the domestic courts' lack of regard to a strong body of Strasbourg jurisprudence which is heavily weighted in favour of the role of the press as watchdog in a democratic society. This section will now consider proportionality analysis developed in the leading Strasbourg decision of *Goodwin v UK*.[298]

2.3.3 The Strasbourg Standard

In *Goodwin v UK*[299] the Strasbourg Court held that the House of Lords had not applied the required high standard of protection to press freedom when upholding an order for source disclosure. The applicant, a trainee journalist for The Engineer magazine, had

[295] (2004) 40 EHRR 189.
[296] *Above* n.291 para 43.
[297] *Ibid.*
[298] (1996) 22 E.H.R.R. 123.
[299] *Ibid.*

received a telephone call from an anonymous source detailing the financial status of a company. The information appeared to have been obtained from a confidential corporate plan, a copy of which was missing from the company in question. The company successfully applied to the High Court for an injunction to restrain publication and a Norwich Pharmacal order to obtain the applicant's notes from the telephone conversation in order to identify the source. The applicant resisted the order and appealed to the Court of Appeal and to the House of Lords but was unsuccessful.

At Strasbourg, the Court set a particularly high standard for the protection of journalistic sources:

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."[300]

The Court identified that with regards to the proportionality test, national authorities 'enjoy a certain margin of appreciation' in order to determine whether there is a 'pressing social need for the restriction.'[301] Yet, the Court held that with regard to the protection of journalistic sources, the 'national margin of appreciation' is 'circumscribed by the interest of democratic society in ensuring and maintaining a free press.'[302] Limitations imposed on the confidentiality of journalistic sources therefore 'call for the most careful

[300] *Ibid*, 39.
[301] .*Ibid*, para 40.
[302] *Ibid.*

scrutiny by the Court.'[303]

Most importantly, the ECtHR reiterated that it will not be sufficient for a party seeking an order for disclosure to show that without the order he would be 'unable to exercise the legal right or avert the threatened legal wrong' in order to establish the necessity of the disclosure.'[304] The Court identified that during the domestic proceedings the aggrieved party had successfully applied for an injunction. The Court suggested that the injunction had achieved its objective of preventing the further dissemination of material. In the Court's view the purpose of the *Norwich Pharmacal* order and the injunction was the same, to namely prevent further disclosure of the offending information. This proved a significant factor in finding the Norwich Pharmacal order disproportionate to the legitimate aim pursued.[305]The restriction in Goodwin caused by the Norwich Pharmacal order could not be deemed necessary in a democratic society, 'notwithstanding the margin of appreciation available to the national authorities.'[306]

2.3.4 Domestic Application

The failure of domestic courts to sufficiently apply the aforementioned reasoning can be indentified in the post Human Rights Act 1998 case of *Interbrew SA v Financial Times Limited*.[307] In *Interbrew*, a major brewing company based in Belgium, commissioned the assessment of a potential takeover bid for a large competitor in the brewing industry. A document disclosing that Interbrew was considering this takeover was leaked by an unknown person and sent anonymously to various newspapers and a news agency in the

[303] *Ibid.*
[304] *Ibid*, para 45.
[305] *Ibid*, para 42.
[306] *Ibid*, para 46.
[307] [2002] EWCA Civ 274.

post. The leaked document had been doctored by the unknown person to include an increased offer price as well as a fabricated timetable for the bid. The confidential information which the document contained was market sensitive and likely to affect the share price of both companies.

The leak resulted in a number of published articles referring to the possible takeover, published by several media organisations including the *Financial Times*, *The Times*, *The Guardian*, and *Reuters*. In addition, The Independent published an article on the takeover after obtaining a copy of the leaked document from another source. As a result of the extensive media coverage, the share price of both companies as well as the number of shares traded were significantly affected. *Interbrew* brought an action in the High Court seeking a *Norwich Pharmacal* order requiring that the five media organisations disclose the leaked documents so that the unknown person may be identified.

The High Court found that the unknown person had deliberately sought to manipulate the press by sending them incorrect information; moreover, there was a clear risk of repetition. Lightman LJ granted the order for disclosure after concluding that the public interest in allowing *Interbrew* to prevent further damage to its business and restore the integrity of the share market outweighed the public interest in the protection of journalistic sources. Whilst the court accepted that there was no certainty that the disclosure would ultimately lead to the identification of the unknown person, the order was granted on the basis that the document would assist in the investigatory process.

The media organisations challenged the decision before the Court of Appeal. Lord Justice Sedley, handing down the leading judgment of the court, dismissed their appeal on the

basis that *Interbrew* were entitled to the documents in order to enable them to ascertain the identity of the unknown person who had committed the actionable wrong of a breach of confidence against them. The court determined the compatibility of s.10 Contempt of Court Act with art.10 ECHR. Sedley L.J. held that the term 'necessary' in s.10 must be interpreted in accordance with art.10(2) ECHR which requires that any interference with the right to freedom of expression is 'necessary in a democratic society.' He then gave guidance on the proportionality test imported into the provision and held that for a disclosure order to be compatible with art.10 it 'must meet a pressing social need, must be the only practical way of doing so, must be accompanied by safeguards against abuse and must not be such as to destroy the essence of the primary right.'[308]

In undertaking the proportionality test Sedley L.J. recognised that it was well established in both the Convention's jurisprudence and the domestic common law that the protection of journalistic sources is one of the basic conditions for press freedom. In this regard, he said that there was a public interest in maintaining the confidentiality of sources. Sedley L.J. then indentified that there was a countervailing public interest in allowing Interbrew to restrain by court action any further breaches of confidence by the unknown person, and recover any possible damages for the losses sustained. In determining where the balance was to be struck between the two competing interests, Sedley L.J. held:

> "What in my judgment matters critically, at least in the present situation, is the source's evident purpose. It was on any view a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both. It is legitimate in reaching this view to have regard not only to what Interbrew assert is the genuine document but also to the interpolated pages; for whether they are forged or authentic, integral or added, they were calculated to maximise the mischief…. The public interest in protecting the source of such a leak is in my judgment not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source."[309]

[308] *Above*, n 307, 32.
[309] *Above*, n 307, 53.

The ‘malevolent motive’ of the unknown person was sufficient to satisfy that the Court of Appeal that the disclosure was necessary in the interests of justice.When the House of Lords refused leave to appeal from the decision of the Court of Appeal, the media organisations brought an action before the European Court of Human Rights against the United Kingdom alleging that the *Norwich Pharmacal* order granted by their domestic courts breached their art.10 right to freedom of expression.[310]

The ECtHR found in favour of the protection of journalistic sources in a decision highly critical of the Court of Appeal’s reasoning. With regard to Sedley L.J.s emphasis on the ‘malevolent nature of the unknown source, the Court reaffirmed that the conduct of the source can never be the decisive feature in determining whether a disclosure order ought to be made.[311] Instead, it may ‘merely operate as one, albeit important, factor’ to be taken into consideration when carrying out the balancing exercise in the proportionality test.[312] Ultimately, the domestic legal proceedings had determined the source’s motive without the opportunity of hearing full evidence of the matter. The Court proceedings in question did not allow for a determination of the source to be made with the ‘necessary degree of certainty.’[313] The Court identified, that domestic courts should be in ‘in the absence of compelling evidence slow to assume’ that the source was ‘acting in bad faith with a harmful purpose’ to disclose intentionally compelling evidence.[314]

With regard to the risk that the source could leak again (the so called ‘risk of repetition’) the Court observed that all cases where an unauthorised leak of information has occurred create such a risk. Most importantly it was held that the risk of repetition could only

[310] *Financial Times Ltd v UK* (2009) (Application No. 831/03).
[311] *Ibid*, para 63.
[312] *Ibid.*
[313] *Above*, 310, para 66.
[314] *Above*, 310, para 63.

justify a disclosure order in the exceptional circumstances where there were 'no alternative or less invasive means available of averting a sufficiently serious risk.'[315]

The ECtHR focused on the fact that Interbrew had received prior notification from a journalist that that a leaked document had been obtained and that the newspaper intended to publish. Despite this, Interbrew did not seek an injunction to prevent publication. The Court of Appeal failed to consider that the matter could be dealt with by use of an injunction rather than an order for disclosure.[316] Ultimately, the ECtHR found that the Court of Appeal had reached its conclusion that there was a no less invasive and alternative means of discovering the source by drawing inferences from the evidence before the court. The evidence available came from witness testimony from the Applicant and the Court of Appeal's reasoning based upon this evidence was highly speculative.[317]

The Court identified that the aim of 'preventing further leaks' would only justify an order for source disclosure in 'exceptional circumstances.' Those circumstances, the Court identified, were, firstly, where 'no reasonable and less invasive alternative means of averting the risk were available. Second, is where the risk threatened is 'sufficiently serious and defined' to render the disclosure order necessary within the meaning of art.10 (2).[318]

When balancing Interbrew's cumulative interests in identifying the unknown person against the competing public interest of the protection of journalistic sources, Strasbourg unanimously held that the *Norwich Pharmacal* order issued by the domestic courts was a

[315] *Above*, 310, para 69
[316] *Ibid.*
[317] *Above*, 310, para 69.
[318] *Ibid.*

disproportionate interference with the right to freedom of expression and could, therefore, not be said to be necessary in a democratic society. The national authorities had overstepped their margin of appreciation and had thereby violated art.10 ECHR.

2.3.5 Analysis of the protection of Journalistic Sources Post FT v UK

It is submitted that the *FT v UK* decision has reiterated that where the protection of journalistic sources is concerned, domestic courts must undertake the proportionality analysis with the upmost care. The domestic Courts in the Interbrew decision failed to afford sufficient weight to the protection of journalistic sources and the 'chilling effect' that could prevent individuals from imparting information to journalists in the future for fear of exposure.

The Strasbourg Court identified that the domestic proceedings did not allow the appropriate forum for the determination of the source's motivation for the disclosure. This factor is most important because it identifies the different approach needed to proportionality balancing of journalistic source cases in comparison with the Convention jurisprudence concerning Whistleblowing cases. In applications for *Norwich Phamacal* orders, the motivation of the source must not be a significant part of the balancing exercise. Whereas, in whistleblowing cases whereby the identity of the source is known, the motivation of the source becomes most important in determining whether the individual had made the disclosure in good faith.[319] Regardless of whether a court is considering a whistleblower as a journalistic source, or a whistleblower who approaches the public or other external avenue of disclosure directly, the 'chilling effect' is the same.

[319] Applying the reasoning in *Guja v Moldova*.

In both circumstances, the impact of a decision which will adversely affect the whistleblower is most likely to deter future employees from raising concerns. It may be argued that because the court in journalistic source cases should place emphasis upon the public interest of the information in question, rather than the purported motivation of the source, a whistleblower who acts out of revenge, but who raises information in the public interest is more likely to be protected. In *post facto* disclosure cases the source's motivation may be sufficient to outweigh the public interest in the information concerned. Whilst this may appear to the reader to be an unlikely occurrence, the individual circumstances of the case will necessitate full determination of the competing interests.

In a co-authored piece with Paul David Mora, the author has previously argued that in *FT v UK* the Strasbourg court had failed to determine whether the risk of repetition could have been dealt with using alternative and less intrusive means.[320] The authors identified that the grant of an injunction could have prevented further harm to *Interbrew.* This position is in line with the stance previously taken in *Goodwin v UK* whereby the previous grant of an injunction was considered as sufficient to prevent the risk of further disclosures.

In *FT v UK*, the Strasbourg Court did however identify that the risk of repetition could only be justified by a disclosure order in exceptional circumstances, firstly, where it was clear that there were no less alternative or invasive means available, and second, where the risk threatened is 'sufficiently serious and defined' to render the disclosure order necessary within the meaning of art.10 (2).[321] It is submitted that in cases involving new

[320] P.D.Mora and A.Savage, *The Protection of Journalistic Sources, Norwich Pharmacal Orders and Article 10 ECHR: Financial Times Ltd v. The United Kingdom* [2010] 21(4) Ent LR 137.

[321] *Above*, 310, para 69.

media, whereby the information was disclosed either via the internet per se or via an online outlet such as *Wikileaks*, the success of an injunction to counter the risk of repetition must be clearly called into question. It will be identified in Chapter 5 of this thesis that the traditional grant of injunctions may only be successful prior to any publication concerned.

Extensive publication of information on the internet is likely to result in individuals downloading or re-publishing the material in locations all over the world. The prevention of further publication is therefore extremely unlikely. Furthermore, one must consider whether the grant of an injunction prior to publication is likely to have the desired effect. The grant of an injunction against individuals based outside the jurisdiction will cause inevitable difficulties for any subsequent enforcement. The threat of any subsequent enforcement action may therefore not be enough for individuals based outside the jurisdiction to be convinced not to publish. This satisfies the first limb of the 'exceptionally serious' criterion identified in *FT v UK*. If the information disclosed by the whistleblower contains information pertaining to national security or its disclosure would be likely to result in the committal of an offence for misconduct in public office, it is submitted that this is likely to satisfy the second limb of the criterion, namely that the circumstances are sufficiently serious that a disclosure order is required to protect national security or to prevent disorder or crime. A *Norwich Pharmacal* order is therefore likely to be justified, applying both the reasoning in *Goodwin v UK* and *FT v UK*. The extraterritorial application and enforcement of Norwich Pharmacal orders against individuals based outside of the domestic jurisdiction is considered further below. The position relating to persons who disclose information to *Wikileaks* or similar organizations should be contrasted to whistleblowers that approach traditional media

outlets.

Domestically, if a newspaper pre-notifies the organisation to which it intends to publish leaked documents, then that organisation will presented with an opportunity to apply for an injunction against a newspaper or other traditional media outlet. In situations whereby the information disclosed is not pertaining to national security information or the disclosure of which is unlikely to result in the commission of a criminal offence it is likely that the grant of an injunction may provide the least obtrusive means to prevent the risk of repetition. This consideration would most likely render the grant of a *Norwich Pharmacal* order as disproportionate. If the same individual were to contact *Wikileaks* or a similar organization, it is submitted that the situation would more likely find the grant of a disclosure order to be justifiable and proportionate because the grant of an injunction in the circumstances may not be sufficient to prevent further disclosures. This discussion will now progress to consider where disclosures of information have engaged the competing right to privacy contained in article 8 ECHR.

2.3.6 Protection of Journalistic Sources and Countervailing Privacy Rights

Ashworth Hospital Authority v MGN Ltd[322] concerned the use of extracts of confidential medical records of 'Moors murderer,' Ian Brady, in an article by the Daily Mirror. Brady had chosen to go on hunger strike at the time and consequentially had received wide spread media coverage on the matter. Rougier J ordered the publisher of the Daily Mirror, MGN Ltd to make a witness statement identifying the source whom it had obtained the records from. MGN Ltd appealed stating, in its defence, that Rougier had no jurisdiction

[322] [2002] 4 All ER 193 HL.

to grant such an order. The *Mirror* journalist stated that he had assumed the source to be an employee of Ashworth hospital, but did not know the identity of the source. He did however, acknowledge that he knew the identity of the intermediary with whom he had obtained the information and that in revealing the identity; the original source would probably be exposed. The Court of Appeal and later the House of Lords took the step of upholding the order for disclosure. At the Court of Appeal Laws L.J. did however express the importance of 'off the record' sources and the protection of a free press:

> "The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source… the true position is that it is always prima facie contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way."[323]

The court considered hospital-patient confidentiality a more important relationship than journalist and source. The court believed that such leaks to the press are detrimental, not only on the relationship of practitioner-patient, but also that it creates an atmosphere of distrust amongst professionals and would fuel fears that further leaks may take place. Crucially, the case rested upon two key factors: trust and confidence. Lord Wolf C.J. drew guidance from *Z v Finland*[324]:

> "Respecting the confidentiality of health data is a vital principle in the legal systems of all contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general."[325]

Following the successful disclosure of Ackroyd as the intermediary, the Hospital then applied for a Norwich Pharmacal order to compel Ackroyd to reveal the identity of his source(s). The application failed in both the High Court and Court of Appeal. At trial, Mr

[323] [2001] 1 W.L.R. 515 at para 101.
[324] (1977) 25 E.H.R.R. 371.
[325] *Ibid*, 405.

Justice Tugendhat identified that the right to freedom of expression afforded by art.10 ECHR was in conflict with the right to respect for private and family life afforded by art.8. Tugendhat L.J. then engaged the 'new methodology' test formulated in *Re S (A Child) (Identification: Restrictions on Publication)*:

> "(1) neither article has precedence over the other
> (2) There must be a detailed examination of the 'comparative importance of the specific rights being claimed'
> (3) Judges should identify the reasons for interfering with or restricting each right.
> (4) The ultimate balancing test is determined by reference to proportionality."[326]

As Clayton and Tomlinson correctly identify, the new approach post HRA, requires that the court must consider the public interest value of the disclosure and balance it against the confidentiality rights of the individual whose information has been disclosed.[327] It is submitted that in importing the 'new methodology' test to Norwich Pharmacal orders, the court will need to consider the jurisprudence of a number of decided cases concerning actions brought for misuse of private information.[328]

For the purposes of this analysis, it is submitted that Article 8 is less likely to be engaged whereby the information disclosed refers to governmental activity. Thus, it would be highly unlikely and improbable that the UK government would be able to assert art.8 rights. As Baroness Hale identified in *Campbell*, in the domestic courts the 'problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons.'[329]

It should be noted that the information disseminated as a result of the *Wikileaks*

[326] [2004] UKHL 47
[327] R. Clayton and H. Tomlinson, *Privacy and Freedom of Expression* (2nd Edition edn, Oxford University Press 2010), 236.
[328] Discussed further in chapter one of this thesis.
[329] *Campbell v MGN*, para 140.

disclosures created a high likelihood of the publication of details regarding private individuals not working in an official governmental capacity or information detailing the private lives or private conduct of public officials. It is submitted that both of the aforementioned scenarios would most likely engage art. 8 and would require the most careful scrutiny of the court using the new methodology test. The grant and enforcement of a *Norwich Pharmacal* order against an organisation, such as *Wikileaks*, based in a different jurisdiction will now be considered below.

2.3.7 Extraterritorial application of Norwich Pharmacal Orders

The emphasis of this next section will be to consider the application of Norwich Pharmacal orders served outside of the domestic jurisdiction. In circumstances such as the *Wikileaks* disclosures, it is submitted that Norwich Pharmacal orders may be sought against the organisation that facilitated the disclosure (*Wikileaks*), an Internet Service Provider (more commonly referred to as an 'ISP') and any organisations relevant to the facilitation of the disclosure. Such organisations could include chat or discussion forums, social networking sites, providers of email facilities and internet search engines.

Before considering the extraterritorial application of *Norwich Pharmacal* orders it is necessary to briefly outline the process for making such an order. The common process requires the claimant to serve a claim form to the relevant party. In making the claim form the Claimant should also make an application to the court for a disclosure order. The Claimant may alternatively make an application 'without notice' to the High Court.

With regard to proposed action taken against a person based outside the jurisdiction, the

Claimant will first need to consider whether he can serve a claim form without the need for permission of the court. Civil Procedure Rules 6.33 and 6.34 identify the circumstances where permission of the court is not required. However, even if permission of the court is not required and a claim form is served, the Claimant will still require the assistance of the court to obtain a Norwich Pharmacal order.

According to Civil Procedure Rule 6.36, it is necessary for the claimant to argue that the relevant provisions of the Practice Direction apply and that the order should be granted on that basis. Firstly, he must identify that the claim is made against a person on whom the claim form has (or will be) served. Second, that there is 'between the claimant and the defendant' a real issue which is 'reasonable for the court to try' and thirdly that the claimant wishes to serve the claim form on another person who is 'a necessary or proper party to that claim.'

It should be reiterated that in addition to the aforementioned conditions detailed in the Practice Direction, the claimant must also satisfy the conditions established in the Norwich Pharmacal decision, reaffirmed and considered in detail following the establishment of the Civil Procedure Rules by Mr Justice Lightman in *Mitsui & Co Ltd and Nexen Petroleum UK Ltd*.[330] Most importantly, the person against whom the order is sought must be a) mixed up in so as to have facilitated the wrongdoing and b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.'[331] The first hurdle for the claimant to overcome is therefore the difficulty in being able to ascertain the identity of the person(s) involved in the facilitation of the unauthorised disclosure. The second hurdle is to establish the jurisdiction to which the

[330] [2005] EWHC 625, 21.
[331] *Ibid.*

individuals or the organisation is based, this is necessary for the court to establish whether the proposed method of service is legal in the jurisdiction in question and more importantly for the purposes of enforcement if the order is not complied with. Ultimately, a *Norwich Pharmacal* order cannot be used as a 'general licence to fish for information that will not do more than potentially assist them to identify a claim or a defendant.'[332] Technological advancements have enabled individuals to access the internet and post information globally, thus allowing organisations such as *Wikileaks* the opportunity to operate using laptop computers and remote servers, making the identity of the individual and the location to which he is based considerably more difficult to ascertain. This discussion will now progress to consider the case law developments where Norwich Pharmacal orders have been considered in the context of actions conducted on the internet.

2.4 Norwich Pharmacal Orders and the Internet

In *Grant v Google UK Ltd*[333] the applicant, a trustee of a trust owned the copyright to a book to which an early draft had been made available for free download via an advertisement on the search engine *Google*. Following investigations, the trust determined that the website in question had been registered through a company which specialises in 'cloaking' the identity of owners of web domains. After failed requests for information were made to the company, the trust contacted *Google* on the basis that the company would possess the identity of the advertiser. *Google* declined to provide the information without giving explicit reasons for doing so but suggested that the Trust apply for a *Norwich Pharmacal* order, prompting the Trust to do so. In the course of the

[332] *Arab Satellite Communications Organisation v Saad Faqih & Another* [2008] EWHC 2568 (QB).
[333] [2005] EWHC 3444.

proceedings, it emerged that *Google* had identified that it would not oppose the order provided that the trust abandon a proposed prohibitory injunction, the details of which were not made clear in the judgment.[334] On this basis Mr Justice Rimmer granted the order without considering the jurisdictional implications or how such an order could be enforced.

In *G and G v Wikimedia Foundation Inc (A Company Organised under the Laws of the State of Florida)* the applicants were a mother and young daughter. The first applicant contended that private and confidential information had been published on an entry to the *Wikipedia* website. The applicants sought a Norwich Pharmacal order against the proprietors of *Wikipedia* for the IP address of the registered user involved in the posting to prevent further breaches of privacy. The first applicant was in dispute with another individual who was making claims against the company she worked for. The first applicant identified to the court that she had been sent anonymous communications threatening to publish details of her personal expenses to which she denies any wrongdoing. The first applicant believed that she was subject to an attempt at blackmail by a person working for the company who was subject to a confidentiality clause. During the course of proceedings it was identified that the Applicants' solicitor had contacted the respondent requesting for the information contained on the website to be taken down and for the IP information to be disclosed. *Wikipedia* removed the information but resisted disclosure of the information. It identified that:

> "Without waiving our insistence that no court in the United Kingdom has proper jurisdiction over us as a foreign entity, we nevertheless are willing to comply with a properly issued court order narrowly limited to the material [requested]."[335]

[334] *Ibid*, para 5.
[335] *Above*, n 333, para 38.

Mr Justice Tugendhadt drew attention to the Form of Search order, paragraph 20, given in the practice direction to CPR Part 25, which prohibits the Respondent from directly or indirectly informing wrongdoer until 4.30pm on the return date specified or by further order of the court. The motivation for this provision is to prevent the wrongdoer from being 'tipped off' by the third party. Tugendhadt L.J. identified that the privacy policy adopted by *Wikipedia* indicated that the organisation would notify the user within three days of receiving the order. Tugendhadt L.J. noted that since the Respondent had not agreed to refrain from notifying the alleged wrongdoer and had stated that it did not accept the jurisdiction of the court there would have been 'difficulties in making or enforcing an order with which it had not agreed to comply.'[336] As Tugendhadt L.J. had not been asked to prohibit disclosure of the making of the order against the Respondent he did not feel it appropriate to 'make observations' as to prohibiting disclosure of the fact that a disclosure order had been made.[337]

It is suggested that Tugendhadt L.J.'s failure to consider the jurisdiction of the court to prevent the Respondent from disclosing to the alleged wrongdoer that an order had been made represents a missed opportunity to close a lacuna which runs contrary to the spirit of the practice direction and to the nature of *Norwich Pharmacal* orders, which may be applied for without notice. To allow the Respondent to notify the alleged wrongdoer may provide sufficient time for the individual to commit further acts of wrongdoing, before the opportunity for the aggrieved party to take action has arisen. If the wrongdoer commits further wrongdoing by releasing confidential information over the internet, the effects of a subsequent injunction will be severely limited, thus denying the aggrieved

[336] *Ibid*, para 43.
[337] *Above*, n 333, para 44.

party the chance of obtaining an adequate remedy.[338]

In *Lockton Companies International & Others v Persons Unknown & Google Inc*[339] the case concerned the sending of offensive emails purportedly by employees of an English company based in the jurisdiction. The recipients of the emails were also based in the jurisdiction. The applicant applied for a Norwich Pharmacal order against Google who operated the online email service used to send the emails. Mr Justice Eady identified that during the course of proceedings there had been communication with Google in which the company had indicated that it would comply with an order if served but that it does not accept the jurisdiction of the court. Eady L.J. therefore determined that it was necessary to consider whether it was appropriate to grant permission to serve an order on Google. Eady L.J. determined that as the circumstances related to an English company and to its employees based in the jurisdiction it was reasonable to infer that once the persons had been identified service would be affected on them in the domestic jurisdiction. Eady L.J. held that '*Norwich Pharmacal* relief is substantive relief,' therefore, 'the application did not offend against the principle that that one could not assert jurisdiction against a party resident abroad purely for the purposes of the disclosure of documents.'

Eady L.J. applied the test developed by Lord Justice Lightman in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd*[340] which requires three conditions for the court to satisfy before it can exercise Norwich Pharmacal relief:

"(I) a wrong must be carried out, or arguably carried out, by an ultimate wrongdoer;
(ii) there must be the need for an order to enable action to be brought against the ultimate

[338] See further chapter one, part two of this thesis.
[339] [2009] EWHC 3423.
[340] [2005] EWHC 625

wrongdoer; and
(iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the wrongdoer to be sued."[341]

Eady L.J. granted the order on the basis that the above conditions had been met. In particular, it was held that such an order could only be made against *Google*. The judgment is therefore consistent with the principle that an order made against a party outside the jurisdiction cannot be made for the disclosure of documents alone.[342] The Mitsui test provides a more stringent standard of review requiring the court to ask whether the order is necessary to obtain the information required. However, it is submitted that the test may still be easily satisfied. If an aggrieved Crown servant sent an email disclosing official information from a Google email account, or posted it on a blog operated by the company, discussed the matter on an online forum, used a certain internet provider to which the authorities are aware, or created a *Wikipedia* entry or posted information on *Facebook* or *Twitter*, there would be sufficient proximity between the wrongdoer and the company involved to satisfy the test. Moreover, if an online outlet (such as a *Wikileaks* type organisation) was used to publish and disseminate material and the applicant could not determine the location or identity or means of contacting the persons concerned, but was able to establish that one of the above methods were used to establish communication with the outlet or pass the information this would still satisfy all three limbs of the *Mitsui* test.

In determining whether a *Norwich Pharmacal* order should be granted outside of the jurisdiction it should be reiterated that before doing so the court is bound by s.6 HRA to Act compatibly with the Convention rights. Utilisation of different internet services and

[341] *Ibid*, para 21.
[342] This further bolsters the principle that *Norwich Pharmacal* orders cannot be granted to as a general licence to 'fish for information' see *above* [332].

the purpose of the use of those services are likely to engage different rights under the Convention. Therefore, an email sent using an online email system such as *Google* resulting in private correspondence between individuals is likely to engage art.8 of the Convention, particularly where disclosure of the contents of the emails is sought. Disclosures sought relating to the identity of persons conducting searches carried out using *Google*'s search facility would also likely engage art.8, whereas, posting information on a blog or on *Twitter* is likely to engage art.10 of the Convention. As has been outlined above, the court must rigorously test the competing interests to achieve the high level of scrutiny required by the proportionality test. This becomes most difficult when an order is applied for ex parte, without giving the party proposed to be subject to an order notice to present their competing argument as to why the information should not be disclosed. Where the party is notified that they may be subject to an order they are provided with an opportunity to identify their objections to disclosure of the information. It is most concerning that the organisations identified in the above cases have not attempted to resist the *Norwich Pharmacal* orders and instead have suggested that where information is sought, applicants may apply to obtain an order for disclosure from the court which if granted will lead to the unopposed disclosure of the information, without accepting the jurisdiction of the court. The following section will consider the Extraterritorial application of *Norwich Pharmacal* orders, with particular reference as to whether such orders can be enforced.

2.4.1 Extraterritorial application of Norwich Pharmacal Orders: Enforcement for non compliance.

This section is not intended to be a comprehensive treatment of the various international treaties and agreements for the service and enforcement of court orders. It will, however,

identify some of the considerations and difficulties in enforcing Norwich Pharmacal orders abroad. It will start by considering proceedings against online outlets such as *Wikileaks* who are located outside the domestic jurisdiction of the courts but inside the jurisdiction of EU member states.

Domestic courts are bound to adhere to EU Regulations, as per the obligations set out in s.2 European Communities Act 1972. Council Regulation 44/2001, Brussels Regulations I concerns the jurisdiction, recognition and enforcement of judgments in civil and commercial matters. According to Article 2, a judgment made by the court in one European jurisdiction may be enforced by the court in another. A judgment is defined to include an 'order' or a 'decision.'[343] Therefore a *Norwich Pharmacal* order against a person in another EU jurisdiction would apply. However, according to Article 34, a judgment may not be enforced where recognition of it is 'manifestly contrary to public policy in the Member State in which recognition is sought.'

It is submitted that the extraterritorial enforcement of a *Norwich Pharmacal* order against a journalistic organisation will be more difficult to achieve where the EU member state has comprehensive journalistic source protection.[344] Assange reportedly chose to base the *Wikileaks* organisation in Sweden because of the strength of journalist shield laws.[345] Chapter 3, Article 3 of the Freedom of the Press Act (1949) (Sweden) in particular protects the anonymity of journalistic sources. However, it should be noted that Chapter 3, Article 3 (3) contains an exception to the protection of anonymity whereby a person

[343] Defined in Article 32.
[344] For reasons of focus this section will concentrate upon Sweden as an example. A detailed summary of the various journalistic source protections in EU members states is contained in: Briefing Paper on the Protection of Journalistic Sources, Article 19, 1998: http://www.article19.org/data/files/pdfs/publications/right-to-protect-sources.pdf (accessed 04/01/12).
[345] *Sweden plays key role in Wikileaks Operations*, Swedishwire: http://www.swedishwire.com/politics/5586-sweden-plays-key-role-in-wikileaks-operations (accessed 09/01/2012).

who contributes to a publication as author or other originator renders himself guilty of:

> "1. high treason, espionage, gross espionage, gross unauthorised trafficking in secret information, insurrection, treason or betrayal of country, or any attempt, preparation or conspiracy to commit such an offence;
>
> 2. wrongful release of an official document to which the public does not have access, or release of such a document in contravention of a restriction imposed by a public authority at the time of its release, where the act is deliberate; or
>
> 3. deliberate disregard of a duty of confidentiality, in cases specified in a special act of law;"

It may be identified that in Sweden, the protections afforded to journalistic sources are not absolute. With regard to the unauthorised disclosure of official documents, Chapter 7, Article 4 (3) identifies espionage as whereby 'in order to assist a foreign power' a person 'conveys, consigns or discloses without due authority':

> "Information concerning defence installations, armaments, storage installations, import, export, mode of fabrication, negotiations, decisions or other circumstances the disclosure of which to a foreign power could cause detriment to the total defence system or otherwise to the security of the Realm, regardless of whether the information is correct."

Chapter 7, Article 4 (4) identifies the unauthorised trafficking of secret information as whereby a person 'without due authority but with no intent to assist a foreign power' makes an unauthorised disclosure of secret information 'regardless of whether the information is correct.' Such an act is taken to include circumstances whereby the offender disclosed information 'entrusted to him in conjunction with public or private employment.'

It is submitted that the aforementioned provisions provide a strong basis on which the United Kingdom could argue that a Norwich Pharmacal order could be enforced in Sweden and would not be 'manifestly contrary to public policy.' The Freedom of the

Press Act is part of the Swedish Constitution. Moreover, it may be argued that Chapter 7, Article 4 represent a more widely defined but similarly overarching counterpart to the exemptions of national security or the prevention of disorder or crime contained in s.10 Contempt of Court Act 1981.

The apparent transient nature of *Wikileaks*' operations suggests that it may be difficult to enforce Norwich Pharmacal proceedings in another jurisdiction. Unlike a traditional media organisation, individuals from online reporting outlets could move to another jurisdiction, frustrating any order sought. Individuals may be prompted to engage in 'rights tourism' by travelling to a state which has stronger journalistic source protections than another. In Iceland, for example, the *Icelandic Modern Media Initiative* has sought to make Iceland a 'safe haven for investigative journalism.'[346] In 2010, the Icelandic Parliament passed approval for a resolution, if the legislative changes proposed are implemented in their entirety, it would be highly unlikely that a *Norwich Pharmacal* order could be obtained in the jurisdiction. Moreover, as Iceland is not a member of the European Union, the Brussels Convention I will not apply.

Before this discussion progresses further, it is necessary to reiterate that a breach of a *Norwich Pharmacal* order may result in the committal of the criminal offence of Contempt of Court, as per the Contempt of Court Act 1981. A European Arrest Warrant may be issued by an EU member state to request another state to arrest and deport an individual for the purposes of conducting a criminal prosecution.[347] For a European Arrest Warrant to be issued, the alleged crime with which the warrant is concerned must

[346] IMMI Website, http://immi.is/Icelandic_Modern_Media_Initiative#Timeline (accessed 05/01/2012).
[347] For treaty documents see further: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT (accessed 03/01/12).

carry a custodial sentence of twelve months.[348] It should be noted that s.14 of the CCA 1981 identifies that a 'superior court' may hand down a custodial sentence not exceeding two years. Section 19 of the Act, defines 'superior court' to include the High Court, which is where *Norwich Pharmacal* orders are issued. The United Kingdom therefore has the jurisdiction to issue a European Arrest Warrant for non compliance with a *Norwich Pharmacal* order.

It is suggested that a person wishing to contact a *Wikileaks* type organisation would still at the outset need to identify how to access such a website. It may therefore be that whilst traditional *Norwich Pharmacal* orders against the press may not be as successful against online journalistic organisations, they may be successful against other actors who may either host the necessary information to which enquiries may be made or may provide a method of communication which may assist in identifying the source of an unauthorised disclosure.

The following cases provide information with regards to jurisdiction in the United States of America, in *Louis Bacon v (1) Automattic Inc (2) Wikimedia Foundation (3) Denver Post Inc*[349] the applicant sought a *Norwich Pharmacal* order requesting the names and addresses, IP addresses and other information to assist in identifying the person(s) responsible for publishing alleged defamatory material on the websites, *Wikipedia*, *Wordpress* and the *Denver Post*. The first two defendants were based in California whereas the third defendant was based in Colorado. As in the above cases, solicitors for the applicant first contacted the defendants requesting the information. The controllers of *Wordpress* requested a court order (the response did not stipulate the jurisdiction to which

[348] *Ibid.*
[349] [2011] EWHC 1072.

it would accept a court order). Counsel for *Wikimedia* responded that there is a procedure for having a foreign subpoena recognised by US courts and that they would only comply with a US court subpoena. The controllers of the *Denver Post* website did not respond.

The Claimant provided a witness statement, adduced in evidence to the proceedings. California council advised that a *Norwich Pharmacal* order may be enforced in California by virtue of the Interstate and International Depositions and Discovery Act, Cal Code of Civil Procedure Section 2029.100, and that he did not envisage difficulty in enforcing such an order in California.[350] Mr Justice Tugendhadt did not conduct a further analysis of the jurisdiction issue. Tugendhadt LJ granted *Norwich Pharmacal* orders against all three defendants in the case, allowing service by email.

It is submitted that *Norwich Pharmacal* orders are unlikely to be enforced in all states in the United States of America. The Uniform Interstate and International Depositions and Discovery Act was introduced to implement the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters in all States. However, the Uniform Interstate and International Depositions and Discovery Act has only been adopted by seven states and territories.[351] Morgan identifies that a foreign state may make a request for discovery directly to a United States Federal Court, via the Department of State, or directly to a United States District Court.[352] It is submitted that the difficulty will be for courts in other states (not including the seven identified) to accept jurisdiction of the Norwich Pharmacal order.

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[350] *Ibid*, para 14.

[351] California, Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands, see further: *Memorandum*, Oregon Law Commission, 2008, http://www.willamette.edu/wucl/olc/groups/2007-2009/pdf/uidda_prop_1_30.pdf (accessed 09/01/2012).

[352] E.Morgan, *Discovery* [1999] EJIL 10, 583, 585.

Whilst the UK could seek assistance from the U.S. Department of Justice to obtain discovery where a criminal case is pending, in *Re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago*[353] the United States Court of Appeals held that the district judge making the determination as to whether discovery could be granted should be satisfied that 'a proceeding is very likely to occur.'[354] Thus, if the judge has doubts that proceedings will be forthcoming or 'suspects that the request is a fishing expedition' he should deny the application.[355]

2.4.2 Proceedings brought in third party's home jurisdiction

Whilst it may be identified that enforcement of the *Norwich Pharmacal* orders may be difficult in other jurisdictions. It is suggested that as an alternative the authority could bring proceedings directly in the individual's home jurisdiction. In a recent case brought before the San Mateo court in California, USA, Tyneside Council sought disclosure of the identity of a local counsellor who had allegedly libelled the council via a number of anonymous accounts.[356] The Supreme Court of California upheld an order forcing Twitter to disclose the information. Twitter disclosed the name and email address of the

[353] [1988] 848 F.2d 1151.

[354] *Ibid*, para 15.
[355] *Ibid.*
[356] J. Halliday, *Twitter Anonymous User Battle,* Guardian, 29/05/2011: http://www.guardian.co.uk/technology/2011/may/29/twitter-anonymous-user-legal-battle (accessed 09/11/11). For related court docments see further San Mateo Court Website: http://www.sanmateocourt.org/midx/strip.php?kase=jp5w3 (accessed 09/11/11) and http://openaccess1.sanmateocourt.org/getpdf/pdftemp/20111201064808847 7/A-0000074796-1.pdf (accessed 09/11/11).

Counsellor. Whilst it is currently not known whether further action is intended to be taken against the Counsellor in the domestic jurisdiction, it should be observed that the Counsellor argued that a number of employees had contacted him as whistleblowers in order to disclose alleged malpractice at the authority. The success of the application is particularly significant for the purposes of this analysis as the United States Government have successfully been granted a 'secret' court order to obtain all information from *Google* and *Twitter* to hand over account information from users of messaging facilities provided by the respective organisations.[357]

2.4.3 Analysis of the Current Status of Norwich Pharmacal Orders and the Internet

The aforementioned analysis has identified that domestic courts have failed to rigorously engage proportionality balancing to the standard exercised at Strasbourg. The failure of domestic courts to correctly apply the Strasbourg jurisprudence has meant that journalistic sources in the UK have not been adequately protected. The decision in *FT v UK* reinforces the *Goodwin* decision as the right approach, and correctly applied, should the apparently unequal balance caused by applicants making often *ex parte* applications for disclosure orders. Disclosure orders must therefore only be granted in exceptional circumstances, whereby no other alternative and less obtrusive means are available. The difficulty with this reasoning for disclosure made via the internet is that the applicant will

[357]For commentary about the order see further Reauters, *US Order Targets Wikileaks Supporters Mail*, http://www.reuters.com/article/2011/10/10/us-google-wikileaks-idUSTRE79918F20111010 (accessed 10/10/11) and Reporters without Borders, *Twitter Forced to Hand Over Personal Data to Subscribers* http://en.rsf.org/united-states-justice-department-ordered-twitter-11-01-2011,39270.html (accessed 01/11/11).

have strong grounds to state that an injunction will not be sufficient to prevent the risk of repetition. If the information disclosed pertains to national security, it is most likely to fall within the exception indentified in art. 10 (2). It is submitted therefore, that with regard to the online leaking of official information there is still a strong possibility that a *Norwich Pharmacal* order will be granted.

The prior discussion has highlighted the apparent difficulties in the enforcement of such an order outside of the jurisdiction. However, the ease in obtaining the orders in cases like *Louis Bacon v (1) Automattic Inc (2) Wikimedia Foundation (3) Denver Post Inc* requires further consideration. Bacon and the cases identified prior, show a willingness of the organisations based outside of a jurisdiction to comply with a disclosure order without accepting the jurisdiction of the court. Neither the courts, nor the organisations themselves appear willing to question whether such an order could be enforced outside of the jurisdiction. This is significant because even if disclosures are made to a *Wikileaks* organisation or similar and the organisation refuses to comply with a *Norwich Pharmacal* order, it may be that the identity of the source could be determined from making a disclosure against organisations such as *Google* or *Twitter* with apparent ease.

Neither *Google* nor *Twitter* are journalistic organisations, meaning that they are less likely to oppose disclosure orders on the basis that they owe an undertaking to protect the identity of a journalistic source. Such organisations will lack sufficient proximity for protection under s.10 Contempt of Court Act. It should be reiterated that *Norwich Pharmacal* orders are often made ex parte, thus preventing the intended recipients of such an order with the chance of stating their opposition to it. Whilst s.10 may not be a consideration, the courts will still be placed under an obligation as per s.6 HRA to engage

the art.10 rights of source. It is submitted that in order to satisfy the high standards of protection afforded by article 10, domestic courts must not view the lack of proximity between the internet organisations such as *Google* and *Twitter* as justification to not apply Strasbourg jurisprudence relating to the protection of journalistic sources. Such applications will require the most careful scrutiny by the courts.

It is submitted that *Norwich Pharmacal* orders in the internet age will most likely to engage art.8, the right to private and family life, not as a competing right to art.10 but as an added layer of protection for the individual using those services. The providing of user account data is likely to identify private information which may not assist in the investigatory process. Any interference must therefore be proportionate within the exceptions identified in art.8 (2) which most likely for the purposes of an investigation into unauthorised disclosure are the exceptions: necessary for the prevention of disorder or crime, public safety, or the protection of national security.

It should be noted that police or other investigatory agencies could of course attempt to request the information directly from the provider. *Google*, which provides search facilities, webmail and blogging facilities, track the number of requests from governments for user data. In the period 2010-2011, *Google* reportedly received 1,444 government requests for user/accounts information and 1,279 requests for information regarding user data in the period 2010-2011. *Google* identified that they complied with 63% of those requests.[358] This discussion will now progress to consider the search and seizure of journalistic material, whereby recent Strasbourg case law has taken a consistent approach to the reasoning in *Goodwin*.

[358] *Google Transparency Report*: http://www.google.com/transparencyreport/governmentrequests/GB/?p=2011-06 (accessed 13/02/12).

2.5 Search and Seizure of Journalistic Material

The ECtHR decision in *Roemen and Schmit v Luxembourg*[359] contains an example whereby a journalist openly questioned the integrity of a government minister, it also gives an example whereby instead of obtaining an order for source disclosure the prosecuting authorities instead obtained warrants for the search and seizure of documents and other objects in order to ascertain the identity of the source. After receiving a leaked confidential memo, the first applicant, a journalist had published an article in a daily newspaper stating that a government minister had been convicted of value-added tax fraud and alleging that as a result he had broken the Seventh, Eighth and Ninth Commandments. He proclaimed that the minister's conduct was 'shameful' in that it involved 'a public figure who should have set an example.' It later emerged that the minister had appealed the conviction.[360] The minister first attempted to bring an action in damages against the journalist however the District Court dismissed the action on the grounds of press freedom. The minister then requested criminal proceedings be brought against the journalist for handling information disclosed in professional confidence and proceedings for breaching professional confidence against the unknown source.

The public prosecutor requested the investigating judge to carry out and arrange searches of the journalist's home.[361] The journalist unsuccessfully appealed for the search warrants to be set aside. Search warrants were then issued against the second applicant, the first applicant's lawyer, to seize all objects relating to the offence. The searches did not reveal the identity of the source however charges were brought against the journalist. The

[359](2003) (Application no. 51772/99).
[360]*Ibid* para 9.
[361]*Ibid* para 13.

charges were later dropped when the applicants produced an article from another newspaper which revealed that the Prime Minister considered the actions taken against both applicants to be disproportionate.

The ECtHR found that the searches carried out in the journalist's home 'indisputably constituted an interference with his Article 10 rights.[362] The Court identified that there was a 'fundamental difference' between the instant case and *Goodwin*.[363] It held that even if a search is unproductive it is a 'more drastic measure; than an order to divulge the identity of a source,' the searches undermined the protection of sources 'to an even greater extent' than the measures at issue in *Goodwin*.[364] The Government had not shown the balance of competing interests between the protection of journalistic sources and the punishments of the criminal offences. With regards to the second applicant, the first applicant's lawyer, the Court found a breach of Article 8 ECHR, finding that the warrant was drafted in particularly wide terms and that carrying out the search early on in the proceedings and had a bearing on the first applicant's Article 10 rights.[365]

It is recognised that the right to protect journalistic sources should be protected, unless the applicant can persuade the court of a compelling reason for disclosure. Lord Wolf highlighted in *Ashworth* that the source's 'reasonable confidence' of anonymity makes a 'significant contribution' to the press in performing their role in society, by making information available to the public. It is suggested by members of the press that a failure

[362]*Ibid* para 47.
[363]*Ibid* para 57.
[364]*Ibid.* See also the earlier case of *Nordisk Film & TV A/S v Denmark* (Application no. 38224/03) (2006) whereby the ECtHR rule that an order to produce unedited footage of a documentary on paedophilia to assist a criminal investigation did not constitute a breach or Article 10. The Court noted the investigation was into a serious crime and that order to specifically disclose footage of a man under criminal investigation was less intrusive than the more drastic measure of searching a journalist's home or workplace.
[365]*Ibid* para 71.

to provide such a duty of confidentiality would have a detrimental effect on media reporting and prevent the key role of the media as 'public watchdog,' as those who may wish to disclose information of the public interest may be dissuaded from doing so, over fears of legal repercussion and job security.

In the case of *Sanoma Uitgevers BV v Netherlands*, the applicant company was the publisher of the car magazine Autoweek.[366] The applicant had sent journalists to cover an illegal street race at the invitation of the organisers. The journalists were permitted to take photographs on the condition that they would guarantee that they would not reveal the identities of any participants by modifying the photographs. The photographs were to feature in an article on illegal street racing. Police officers were also in attendance at the event, however, no arrests were made. Following the event, police officers contacted the editors of the publication demanding that they provide all photographs taken at the event. The police officers claimed that the photographs would assist with an investigation into a series of robberies whereby they believed that a car used by the participants was also used at the street race. The criminals were clearly dangerous and on one occasion a firearm had been used to threaten a bystander. The editor of the publication refused the request, identifying that he had given an undertaking of anonymity to the participants.

Police officers made several attempts to obtain the information including issuing the editor with a summons obtained from the Amsterdam Public Prosecutor to surrender the photographs. Police officers later detained the editor on site and closed down the scene, preventing other publications from being able to function. The editor eventually

[366] (38224/03) (2010). For commentary see: A.Savage and P.D.Mora, *Independent Judicial Oversight to Guarantee Proportionate Revelations of Journalistic Sources: The Grand Chamber's Decision in Sanoma Uitgevers B.V. v. The Netherlands* [2011] 22(1) Ent LR 65.

surrendered the photographs contained on a CD Rom and brought proceedings to return the disc and to destroy any copies. The domestic court refused the request, holding that it was satisfied that the public interest in preventing and detecting crime outweighed the protection of journalistic sources. The data stored on the CD-ROM had been used by the police for the investigation of a serious offence where all other avenues had led to nothing. Following an unsuccessful appeal to the Supreme Court on the grounds of inadmissibility, the applicant company brought a case before the ECtHR against the Netherlands alleging that the summons to surrender the photographs issued by the police compelling them to hand over privileged journalistic material that would allow the identity of their sources to be revealed breached their right to free expression guaranteed by art.10 ECHR.

In applying the proportionality test to the facts of the case, the Third Chamber of the ECtHR noted that the crimes were serious in that they had resulted in the loss of physical property, and had the potential to cause danger to the public as the robbers had been seen with firearms. As the police had only become aware of the participation of the suspected vehicle in the street race after it had taken place, the Chamber was satisfied that there was no reasonable alternative possibility for identifying the vehicle at any time. Moreover, the Chamber found that because the authorities had not utilised the information for any purpose other than to identify and prosecute the perpetrators of the robberies, the applicant's sources had not been inconvenienced. Finally, the Chamber took into consideration the extent of judicial involvement in the case. The public prosecutor had also obtained the approval of the investigating judge, despite not being under an obligation to do so. The Court therefore held by a narrow majority of four votes to three that the reasons put forward for the impugned interference had been relevant, sufficient

and proportionate to the aims pursued. Accordingly, no violation of art.10 was found.

The applicants challenged the reasoning before the Grand Chamber of the ECtHR. The Grand Chamber found that despite the public authorities' argument that the CD Rom was necessary to pursue individuals unrelated to the journalistic sources, the distinction made by the Government was not crucial. Any requirement for journalistic material to be handed over to a public authority carries with it a chilling effect on freedom of expression. The Grand Chamber noted that there will be a chilling effect in all instances where journalists are seen to assist in the identification of anonymous sources. Secondly, the Grand Chamber identified that whilst the applicant's premises had not been searched or seized, there was a credible threat of such action, which culminated in the arrest of a journalist. The search and seizure of the premises would have resulted in the closure of the applicant's premises for a considerable time and would have affected not only the publication of the Autoweek magazine but also other magazines operating on the premises. News was a perishable commodity and any delay in publication, even for a short period of time, may deprive it of all its value and interest. It was therefore held that the summons issued by the police constituted a prima facie interference with art.10.

The Court emphasised that given the importance of protecting journalistic sources under art.10, any laws which interfered with this right must be attended with procedural safeguards which adequately protect the principle at stake. The Grand Chamber identified that central to these safeguards are that disclosure orders be reviewed by a judge. In doing so it underlined that in situations where the investigatory public authority seeks the disclosure of a journalistic source, it is necessary for the courts to engage in an assessment of whether the legitimate aim for the disclosure outweighs the protection of

the source.

The Court held that the proportionality test must be independently undertaken by a body separate to the investigatory authority which have a clear and vested interest in obtaining the material sought. Moreover, the independent body must be in a position to carry out the balancing act before any disclosures are actually made by the investigatory authority; the exercise of an independent review after the material capable of revealing a source has been handed over would undermine the very essence of the right to confidentiality. Finally, the independent body should be in a position to refuse to make a disclosure order, or make a qualified order, so as to protect sources from being unnecessarily as well as disproportionately revealed. The Grand Chamber unanimously held that the absence of any procedure in domestic law which required an independent body to engage in an effective and adequate assessment of the proportionality of the interference made to the possible revelation of a journalistic source failed to satisfy the quality of law test.

2.5.1 Domestic Impact of the Decision

The decision in *Sanoma* builds upon the leading decision in *Goodwin v United Kingdom* by adding a further level of protection to maintaining the confidentiality of journalistic sources. In civil civil proceedings, whereby *Norwich Pharmacal* applications are considered, the decision reiterates the importance of courts correctly applying the proportionality test. Domestic courts must therefore only grant orders for the disclosure of journalistic material in cases where there is a clear and overriding public interest in disclosure.

In criminal proceedings, the Police and Criminal Evidence Act 1984 contains safeguards for the protection of journalistic source material. Section 9 identifies such material to be excluded from the ordinary process of police officers obtaining search warrants. The police must instead apply for an order from the court for disclosure under the special procedures contained in s.1 of the Act. The officer must identify that there are reasonable grounds that an indictable offence has been committed, that the material is likely to be of substantial value to the investigation and relevant, and that it is in the public interest to order disclosure. Most importantly, the Act provides for the police to satisfy the court that other methods of obtaining the material have been tried without success or have not been tried because it appeared that they were bound to fail. If the application for the order is successful the journalist must produce the information to a police constable for him to take away or give him access to it. It is submitted that the result of these statutory requirements imposed by PACE for an order to be granted by the courtsare akin to a balancing exercise which satisfy the quality of law test imposed by art.10(2) as interpreted by *Sanoma*.

A breach of art.10 may occur when an order to produce the material results in the seizure of other material not intended in the original order. Section 50 of the Criminal Justice and Police Act 2001 provides that a police officer who is lawfully on the premises and has the power to seize material may seize items he is not entitled to seize if the material sought is contained within and it is not reasonably practicable to separate it. An example of such an item could be a CD-ROM, a computer or a USB memory stick. In applying this reasoning to the circumstances surrounding the Wikileaks disclosures, journalists and intermediaries were provided with USB memory sticks containing thousands of documents. Section 50 is therefore likely to be used where such searches take place. The

difficulty with modern technological devices is that the information required for the investigation may be contained on the same device whereby other information is stored. Thus, an investigation of the unauthorised disclosure of one document by one individual may expose the identities of other sources, with the likely consequence that prospective sources will be deterred from providing information, contrary to the spirit of the reasoning in *Goodwin*. Following *Sanoma,* it is submitted that s.50 should be amended to incorporate safeguards for the protection of journalistic sources as this provision appears to be in breach of art.10.

With regard to the unauthorised disclosure of information pertaining to national security, various longstanding provisions contained in the Official Secrets Acts provide scope for search and seizure without the need to seek judicial authority. Section 6 of the Official Secrets Act 1920 ("OSA"), as amended by ss.1 and 2 OSA 1939, gives a wide provision for a chief of police, where he is satisfied that there are reasonable grounds for suspecting that an offence under s.1 OSA 1911 has been committed (which essentially concerns espionage and the penalties for spying) and a person can furnish information then the officer can apply to the Home Secretary for permission to require a person to divulge the information, failure to do so will result in the committal of an offence. If there are reasonable grounds to believe that there is a "great emergency" and that in the "interest of the state" immediate action is necessary he may demand the information without needing the consent of the Home Secretary.[367]

Whilst the OSA 1989 made the provision of search warrants obtained under s.9(1) OSA 1911 subject to the "special procedures" in PACE, the Act also made it a criminal offence

[367] Section 6(2) Official Secrets Act 1920.

to impart information resulting from an unauthorised disclosure[368] and to fail to comply with an order to return the information.[369] The Act provides no safeguards to protect journalistic sources as it does not provide special protection for material likely to be of substantial value for the purposes of a terrorist investigation which may reveal a source. In urgent cases a police officer with the rank of superintendent or above may authorise the warrant.

Given the difficulties in controlling the unauthorised disclosure of national security material once it has been disclosed to an online outlet such as *Wikileaks*, it is submitted that the police and other investigatory agencies are likely to utilise the above provisions to ascertain the source of any leak. The risk of repetition may present catastrophic circumstances, if the information disclosed could cause harm to individuals or be useful to an enemy state. Urgent action is therefore likely to be considered to attempt to swiftly deal with the leak. However, it is reiterated that the police and investigatory authorities have an obligation as per s.6 Human Rights Act to ensure that any action taken is proportionate. It is therefore submitted that following *Sanoma,* in cases of urgency where the prosecuting authorities are unable to obtain authorisation from a court, procedures should be implemented to limit the possible damage caused by the chilling effect. The procedures should ensure that the respective authority has attempted other alternative means to obtain the information, and that any information is limited in so far as possible to the precise information sought. The judgment confers an obligation on investigatory authorities to also develop their own procedures to find viable alternatives to blanket search and seizure. The next section will consider the potential liability of journalists for

[368] Section 5 Official Secrets Act 1911.
[369] Note also, provisions contained in sch.5 of the Terrorism Act 2000 which allow for a police officer to apply for search warrants for the obtaining of material likely to be of substantial value for the purposes of a terrorist investigation, including "excluded" or "special procedure" material as defined in PACE.

Official Secrets Act offences.

2.6 Official Secrets Acts

A journalist based in the domestic jurisdiction may incur personal liability under the Official Secrets Acts. The offence of receipt of information that formerly applied under section 2 of the 1911 Act has now been repealed , but journalists may still be liable under section 5 of the 1989 Act which allows for prosecution of persons who publish information which is in contravention of other sections contained in the Act 'without lawful authority'. A recent notable example of this is the threat made by Attorney-General Lord Goldsmith to prosecute newspapers under section 5 if they published the contents of a document which allegedly related to a dispute between Tony Blair and George Bush over the conduct of military operations in Iraq.[370] The overall reach of section 5 is rather unclear particularly with regard to the publication of the memoirs of former servants.[371]

It should be noted that s.5 Official Secrets Act 1989 will not apply to online disclosures made by individuals located outside of the jurisdiction. Section 5(4) of the Act identifies that a person does not commit an s.5 offence unless the disclosure (made by the third party) was by a British citizen or took place in the United Kingdom, any of the Channel Islands, the Isle of Man or a colony. Neither condition is likely to be satisfied in relation to a foreign individual who receives the information outside of the jurisdiction. It is

[370] See: R.Norton-Taylor, *Legal Gag on Bush-Blair war row*, Guardian, 23rd November 2005.
[371] The concern was raised in *Lord Advocate v Scotsman Publications* [1989] 2 ALL ER 852. Lord Templeman believed that s.5 did extend to former 'crown servants' whereas Lord Jauncey thought that it did not. For further discussion see also: A.Nichol, G.Millar & A.Sharland, *Media Law & Human Rights* (Blackstone Press, London, 2001).

submitted that this creates a lacuna in the otherwise draconian official secrets protection. Section 1 Official Secrets Act 1911, would however provide an alternative to an s.5 prosecution. Section 1 is more readily used for the prosecution of espionage. However, s.1 (1) (c) criminalises the obtaining or communication to any other person of any 'sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.' The unauthorised disclosure of official documents pertaining to national security is likely to satisfy the aforementioned criterion. Section 10(2) of the Act extends the reach of the offence, allowing courts within the jurisdiction to determine offences committed outside of the jurisdiction. The difficulty will be for the domestic prosecuting authority to prosecute an individual based outside the jurisdiction. Domestic courts have an obligation to ensure that a defendant has a fair hearing; the natural law principle of audi alteram partem has been an established part of our legal system for many years prior to incorporation of Article 6 ECHR. It is unlikely that a trial will therefore take place with the defendant in absentia. Extradition which requires co-operation with a country based outside of the European Union will be dependent upon whether the country has signed a treaty agreement with the United Kingdom. The extradition request will be likely to be blocked if the country in question does not have an applicable official secrecy law. This is identified as the principle of 'dual criminality.' A further bar to extradition may exist if the extradition is considered to be politically motivated. Such an argument is likely to be put forward by an individual facing extradition proceedings whereby the offence alleged concerns the unauthorised disclosure of government documents. In EU member states, it may be identified that a European Arrest Warrant may be obtained; both the country who issues the EAW and the country receiving the EAW must be compliant with the European Convention on Human Rights. It is submitted that the following case of Stoll v

Switzerland which considers the prosecution of a journalist for the unauthorised disclosure of national security information must be considered by the prosecuting authority in the home jurisdiction, and the jurisdiction to which an EAW will be issued.

In *Stoll v Switzerland*[372] the Applicant had been prosecuted for publishing a document containing discussion of deliberations between the World Jewish Congress and Swiss banks concerning compensation due to holocaust victims for unclaimed assets deposited in Swiss bank accounts. The author of the document, Carlo Jagnetti was the Swiss ambassador to the United States and the document was classified as 'confidential.' Jagnetti described the deliberations as 'a war' and referred to the Jewish organisations as 'adversaries' proclaiming that 'most adversaries were not to be trusted.'

The document was disclosed by an unnamed civil servant to the newspaper Sonntag-Zeitung in an act that the ECtHR describes could not have been carried out without a breach of official secrecy. Stoll was convicted for the publication of official deliberations contrary to Article 320 of the Criminal Code (Switzerland) and received a fine of CHF 800. Stoll applied to the ECtHR. The chamber upheld the application; however the decision was reversed by the Grand Chamber. The applicant doubted whether the content of the paper had been 'liable to reveal a state secret who's disclosure might compromise national security.'[373] The Court reiterated that notwithstanding the vital roll the press plays in a democratic society, journalists cannot be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection.[374] The Court held that the safeguard afforded by Article 10 to journalists is subject to the proviso that in publishing the information they do so in good faith, that the information is accurate

[372](2006) (Application no. 69698/01).
[373]*Ibid* para 69.
[374]*Ibid* para 102.

and that they have provided 'reliable and precise' information 'in accordance with the ethics of journalism.'[375]

The Court noted that the conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest, thus impacting on the role of the press as public watchdog.[376]. In order to determine whether the interference of the Article 10 rights was proportionate, the Court held that it must have regard to the following factors: the nature of the interests at stake, the conduct of the applicant and whether or not the fine imposed was proportionate.[377]

With regard to the interests at stake, the Court held that it was vital to the running of government departments and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information. The court attached importance to the Government's argument that the publishing of a report classified as 'confidential' or 'secret' would have both an 'adverse and paralysing' effect on a country's foreign policy and make the official's position untenable – in this case the Court noted that the official was forced to resign.[378] It followed the reasoning in *Hadjianastassiou*[379] assessing that the disclosure of the report and the articles were at the time of publication capable of causing considerable damage. The court hearing the criminal case must determine in advance whether the 'secret' classification appears justified in the light of the purpose and content of the documents disclosed.[380]

[375] *Ibid* para 103.
[376] *Ibid* para 110.
[377] *Ibid* para 112.
[378] *Ibid* para 129.
[379] (1992) (application no. 12945/87) para 45.
[380] *Ibid* para 138.

With regards to the conduct of the applicant, the ECtHR drew a distinction between the manner in which the applicant obtained the report and the form of the articles in question.[381] The Court held that the manner in which a person obtains information considered to be confidential or secret may be of relevance to balancing interests in the context of Article 10 (2). The Court noted that the journalist could not claim in good faith to be unaware he was committing a criminal offence.[382] It found that the way in which the paper was edited, the sensationalist headlines and the inaccuracy of the articles were likely to mislead the reader.[383] Finally, the EC took into account the amount of the fine imposed upon the journalist for committing the offence and found the sum to be relatively modest.[384]

Judges Zagrebelsky, Lorenzen Fura-Sanderstrom, Jaeger and Popovic dissented. They argued that the Court had found the protection of national security, public safety, and the reputation or rights of others, to be without relevance and that the only remaining justification was the protection of secret information. The legitimacy of the classification of a document could not, they suggested, be weighed against the fundamental right to freedom of expression, without 'identifying the underlying interest for the protection of which the information must remain confidential.' They argued that any damaged sustained in the instant case must have been 'very minor' when judged against 'everything the court has said in numerous judgments about the importance of freedom of expression.'

[381] *Ibid* para 140.
[382] *Ibid* para 141.
[383] *Ibid* para 149
[384] *Ibid*, para 160.

It is submitted that the aforementioned dissenting opinions identify the difficulty with national security classifications. Chapter five of this thesis will provide a detailed analysis of whether the classifications given to documents in the United Kingdom can be successfully tested before the court using the Official Secrets Act 1989. In contrasting this reasoning against the domestic cases of *The Zamora* and *CCSU v Minister for the Civil Service* discussed in chapter one of this thesis, it may be identified that the domestic position, at least pre HRA has been to suggest that decision to determine what matters should be in the interests of national security is a decision for the minister and the government of the day, not the courts. However, post HRA, it must be identified that art.10 proportionality balancing requires the most intense scrutiny of the whether the public interest in disclosure outweighs the public interest in non disclosure. The author therefore agrees with the dissenting judge's comments concerning proportionality balancing.

The decision in *Stoll v Switzerland* is further significant because the good faith of the journalist rather than the good faith of the source is considered. It is argued that, the Court in identifying that the headlines were inaccurate and were likely to mislead the public, took an approach consistent with pre-existing case law that art.10 protection carries a journalistic responsibility not to mislead the public.

2.7 Conclusion

2.7.1 Theoretical Model

It is submitted that the making of unauthorised disclosure to online outlets such as *Wikileaks* will be most readily justified by the argument from moral autonomy, such

actions aim to bypass existing inhibitions caused by legal restrictions or contractual obligations. Disclosures to *Wikileaks* would also be justifiable on the basis that such expression enhances the individual. The disclosure and subsequent publication of official documents in their entirety may be justified to obtain truth, particularly in circumstances whereby the truth has been deliberately concealed and the disclosure of the documents is considered necessary to correct false information. If Dean is correct and techno culture provides the key to democracy by uncovering secrets, *Wikileaks* is representative of such a platform.

Disclosures to an online outlet which provides access to documents in a 'raw' form, satisfies both of the justifications from participation in a democracy. Firstly, to provide citizens with the information that they would otherwise be able to have access to so that they can make informed decisions on political matters and hold the government to account Second, as government serves at the will of the people, it is vital that citizens have the opportunity to communicate their wishes to the government of the day. Disclosures to websites such as *Wikileaks* may therefore allow citizens to review and monitor the actions of government and, to subsequently make representations to the government that they disagree, or indeed agree with current decision making. It is submitted that the public may encounter difficulties in interpreting the information disclosed. When faced with vast swathes of leaked documents, as occurred in the Iraq and Afghanistan war logs, one must ask whether members of the general public will be able to ascertain the messages the whistleblower is trying to convey by disclosing the material. Following the disclosures and subsequent publication of the material, the general public were essentially reliant upon traditional media outlets such as the Guardian newspaper to sift through and interpret the information. This position is supported by Bok, who

suggests that an individual's capacity to assess information is severely limited and subject to bias. Dean also identifies that the public lack the capacity to make judgement. Regardless as to whether the theories proposed are considered to be correct, it should be noted that many of the disclosures contained troop records written using military abbreviations that the layperson would clearly not be able to understand.

Further concerns regarding the justification from truth may be identified. The aforementioned discussion detailed the way in which Assange and his team sought to check the veracity of the information obtained. Domschiet-Berg suggests that many of the purported checks did not happen or were not sufficiently rigorous. One must consider that the sheer volume of information disclosed would make the verification of each document difficult. The lack of adequate checks may result in the disclosure of false information which would be contrary to the spirit of the justification from truth. Whereas *Wikileaks* do not have an obligation to abide by professional codes, traditional media outlets in the United Kingdom must still follow the Press Complaints Commission Code of Practice. One must ask whether the publication of material by traditional media outlets, with *Wikileaks* acting as a conduit, is still in keeping with the obligations set out in the Code.

The use of *Wikileaks* as a conduit, allows the whistleblower to obtain greater publicity for the disclosures. However, in doing so the proximity between the source and the recipient audience becomes much wider than even the traditional journalist and source relationship. As a consequence, the message communicated may be distorted or lost.[385] As Bok opines, unless the information published is accompanied by indications of how the information can be checked, the source's anonymity will diminish the value of the

[385] Above, n 44, 223.

message communicated. It can be identified that neither *Wikileaks* nor the traditional media outlets have attempted to fully engage in checking the material or providing assurances to the public that the source of the information and the information itself is genuine. Raynes and Scott support this reasoning further by suggesting that anonymous whistleblowing may be relatively ineffective because the inability for the receivers of the information to check and verify the information will result in a negative reaction.[386]

Bok considers that external disclosure directly to the public must be an act of last resort whereby other options have been considered and rejected. Bok suggests that disclosure direct to the public may be justified where there is no time to go through alternative channels. However, this must be questioned in relation to the *Wikileaks* disclosures. The disclosure of thousands of documents without providing an explanation as to why those documents uncover wrongdoing, may suggest that the time saved in bypassing the internal channels may be lost as the recipients of the information will need time to interpret and assess the information.

The unauthorised disclosure of thousands of documents, many containing historical material, may not be considered as an act of necessity. Howard Dennis identifies that necessity should be restricted to two situations: firstly, where there is an emergency situation, and second, where there is a conflict of duty giving rise to a danger of death or serious injury. The extensive disclosures to *Wikileaks* did not appear to be a response to an emergency situation. The whistleblower chose to remain anonymous and did not provide explanations as to the value of the material or the risk he was trying to prevent. The second scenario whereby there is a danger of death or serious injury must also be

[386] Above, n 24, 64.

questioned, whilst the disclosure of the 'collateral murder' video may have assisted holding the individuals concerned to account, it did not prevent the loss of life or injury shown in the footage. The disclosure of the Iraq war logs did not prevent further harm to the citizens of Iraq. The United States government had relinquished control of Iraq to the Iraqi forces by the time that the Iraq war logs were disclosed. It should be reiterated that the disclosure of many un-redacted documents detailed the identities and addresses of citizens who assisted the United States Government, causing grave harm to those individuals. As Brudner correctly identifies, necessity cannot be used as a justification for disclosure, where the individual imposes grave risks on the health of persons, regardless of the net saving of lives.[387]

The disclosure of thousands of documents and other information may achieve different objectives depending on the value of the information concerned. Therefore it should be identified that the 'collateral murder' video may have conveyed the message intended by the whistleblower relatively easily whereas the Iraq War logs and Afghanistan War Logs were of a different value to different people.

The disclosures, taken in their entirety, appear to be an act of protest whistleblowing, whereby the individual disagrees with the US government war policy. Yet, no explanation is provided by the whistleblower as to why, in his professional opinion, the policy is fundamentally wrong. As a form of Civil Disobedience, using Dworkin's reasoning, the Wikileaks disclosures identify a form of 'non persuasive' expression whereby the minority attempt to make the majority pay for their misconduct or inaction. This is because anonymous disclosures by their very nature do not allow for the

[387] Above, n74, 365.

whistleblower to openly explain and try to convince the majority as to why the documents communicated identify policy decisions which are fundamentally wrong.[388] This analysis will now progress to consider the legal model.

2.7.2 Legal Model

The emergence of *Wikileaks* and other online outlets to facilitate disclosure has most affected the United States Jurisdiction. Whilst it may be noted that there has been at least one disclosure by a purportedly British source,[389] the United Kingdom is yet to have an equivalent disclosure to the extent of the Iraq or Afghanistan War Logs or the diplomatic cables. The aforementioned analysis on s.10 Contempt of Court Act 1981 has identified that domestic courts have failed to sufficiently apply the high standard of protection Strasbourg affords to journalistic sources. As a consequence *Wikileaks* and other online outlets based outside of the jurisdiction provide an attractive 'safe haven' whereby documents may be sent and swiftly disseminated across the globe, the whistleblower's identity is shielded by sophisticated computer encryption and comprehensive journalistic protections in the host country where the organisation is based. Whilst the domestic courts continue to fail in providing the level of protection Strasbourg requires, online outlets will continue to be considered as a more viable alternative to the traditional media outlet.

This chapter has identified that despite the claims made by *Wikileaks* that a source's anonymity cannot be revealed, *Norwich Pharmacal* orders are available against the

[388] *Above*, n 31, 111.
[389] Disclosure of an MOD security manual to advise on leak investigations.

organisation. The likelihood of a *Norwich Pharmacal* order being granted against the organisation may be increased as the applicant could argue that the provision of the less intrusive option of granting an injunction would not be sufficient to prevent the dissemination of further leaks. The nature of the *Wikileaks* site and the availability of the information on different 'mirror sites' based in different jurisdictions across the world make the grant and enforcement of an injunction to prevent further leaks an impossibility. This chapter has identified that whilst the journalistic source protections in Sweden are strong; they are far from absolute and contain exemptions concerning the unauthorised disclosure of national security information. This chapter has identified that a Norwich Pharmacal order could be potentially enforced in Sweden.

Crown Servants will still need to obtain access to the website and will need to find a way of contacting the individuals concerned. It may therefore be more likely that investigating authorities could apply for a Norwich Pharmacal order against an online search engine or email service such as *Google*, or a social networking website such as *Twitter*. Such *Norwich Pharmacal* orders have been unopposed by the operators of websites, who whilst not agreeing to recognise the jurisdiction of the UK court have not sought to challenge the order. In order to be compliant with art.10 values, it is submitted that Norwich Pharmacal applications of this nature must be subject to the most careful scrutiny by the courts.

CHAPTER THREE

EXECUTIVE ACCOUNTABILITY AND THE OFFICIALLY PRESCRIBED MECHANISMS TO REPORT MALPRACTICE

"Accountability is a device as old as civilised government itself; it is indispensable to regimes of every kind. It provides the post-mortem of action, the test of obedience and judgement, the moment of truth; it can validate the power of command, or it can create favourable conditions for individual responsibility and initiative." [390]

Despite an express or implied duty of confidence not to reveal information obtained in employment in either the public or private sector, leaks of highly sensitive information are a day to day occurrence. From information concerning the salaries of television and radio presenters, political gossip and exposure of serious malpractice, leaks have become a mainstay of British media reporting.

The purpose of this chapter is to provide an insight into how Crown servants report concerns relating to wrongdoing or malpractice through official channels. It aims to identify the existing prescribed mechanisms available for Crown servants to report concerns, focusing upon authorised internal complaints procedures, and authorised external complaints to the Civil Service Commissioners and beyond. Close consideration will be given to these procedures in the light of the Public Interest Disclosure Act 1998, which offers protection in employment law to whistleblowers who report concerns and

[390] El Normanton, *Public Accountability and Audit: a Reconnaissance' in* B Smith and D Hague (Eds) *The Dilemma of Accountability in Modern Government* (MacMillan, London, 1971) 312.

who suffer reprisals as a result.

The Public Interest Disclosure Act 1998 (PIDA) is legislation to protect the person reporting the concern, not to deal with the reported concern itself.[391] The investigation of the concern once reported, whether it is through an internal investigation, or external investigation by an independent body is arguably just as important. Therefore, the chapter will broaden focus to include the current mechanisms used to hold the Executive to account, including the role of Parliament, Select Committees, the Parliamentary Ombudsman and the role of public inquiries to consider whether or not Crown servants have a role to play in providing information of wrongdoing or malpractice to those mechanisms.

This chapter identifies the difficulties posed by the existing internal framework for reporting concerns and illustrates that the current safeguards of Executive accountability lack the required teeth or impartiality to be fully effective. It is intended therefore, that this study will contribute towards gaining a greater understanding of why Crown servants choose to override the existing procedures in order to make unauthorised disclosures.

3.1 Internal Complaints and the Establishment of a New Civil Service Code

The formation of the Committee on Standards in Public Life in October 1994 by then Conservative Prime Minister John Major was introduced as a response to allegations of

[391] A distinction most recognised by the fact that the Department for Business Innovation and Skills introduced a 'tick box' on the Employment Tribunal Claim form (ET1) for claimants who want details of their claim and whistleblowing concern to be referred to a regulator, for more information see http://www.berr.gov.uk/files/file54221.pdf (Accessed 10/10/10).

unethical conduct in the public sector, in particular allegations of taking money for putting down Parliamentary questions. The Committee represents a significant step in setting ethical standards and monitoring issues of conduct, however investigations of malpractice on individuals are excluded from the Committee's remit. In its first report considerable consideration was given to the establishment of a new Civil Service Code and appeals system. It was recommended that the Code cover circumstances in which a Civil Servant is aware of wrongdoing or maladministration and that it be clear and brief.[392] The report also recommended that departments and agencies should nominate one or more officials entrusted with the duty of investigating complaints.[393]

The second report shifted focus to 'public spending bodies'; however it provided a framework for the internal reporting of concerns (based upon recommendations made by Public Concern at Work) which formed the basis for the Civil Service internal complaints procedure, it stated that the system should include:

> "- A clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters regarded as malpractice.
> - Respect for the confidentiality of staff raising concerns if they wish, and the opportunity to raise concerns outside the line management structure.
> - Penalties for making false and malicious allegations."
> - An indication of the proper way in which concerns may be raised outside the organisation if necessary."[394]

Ultimately the committee stated:

> "Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory for both the staff member and the organisation."[395]

The new Civil Service Code and accompanying procedures incorporate the recommendations of the second report. However, this chapter will argue that the

[392] *First Report of the Committee on Standards in Public Life*, 1995, Cm 2850-1, 59.
[393] *Ibid*, 60.
[394] *Second Report of the Committee on Standards in Public Life*, 1996, Cm 3270, 22.
[395] *Ibid.*

provisions do not go far enough to provide a reassuring, clear and structured alternative to leaking to the media. Most importantly it will highlight that there is an urgent need to strengthen the role of the Civil Service Commissioners in handling complaints under the Civil Service Code.

It should be noted that the Civil Service Code was further modified to be in line with provisions of the Public Interest Disclosure Act 1998 (PIDA). PIDA builds upon the recommendations of the second Nolan Committee report. The Act offers protection to persons who raise concerns and who suffer detriment as a result. By placing primary emphasis on protecting those who have utilised internal whistleblowing policies or procedures, rather than making external disclosures and leaking to the media, the Act has had a positive influence on the formulation of internal procedures.

A key recommendation of the second Nolan Report was to not only provide robust internal reporting mechanisms but also to have an independent mechanism set apart from the management structure. PIDA achieved this objective by allowing for disclosures to be made externally to a substantial list of prescribed regulators. This chapter will illustrate that Crown servants are at a considerable disadvantage to employees in the private sector. This is because the Civil Service Commissioners, who investigate breaches of the Civil Service Code, deal with Civil Service appeals and who are included in the Code as a means of direct contact for Civil Servants are not a prescribed regulator under the Act. It will be illustrated that the current mechanisms for Civil Servants to report concerns goes against the spirit of the Nolan recommendations when it should be leading by example. This chapter will first look at the general provisions under the Public Interest Disclosure Act before sharpening focus to provide an assessment of the

internal reporting procedures used in the Civil Service.

3.2 The Public Interest Disclosure Act 1998.

"British whistleblowers will become possibly the best protected in the world."[396]

The Public Interest Disclosure Act 1998 attempts to recognise that whistleblowing does occur; it offers protection to those who wish to speak out in certain circumstances and in doing so promotes good practice. In the first three years of the Act coming into force a total of around 1200 PIDA claims had been registered.[397]

In order to be a legitimate instance of whistleblowing under PIDA, the person must make a 'qualifying disclosure.' The authority for this is derived from s.43B (1) Employment Rights Act 1996 and is limited to cases whereby a worker reasonably believes the matter falls within the following specified categories:

> "(I) a criminal offence, (ii) a failure to comply with any legal obligation, (iii) a miscarriage of justice, (iv) danger to the health and safety of any individual, (v) damage to the environment, (vi) the deliberate concealment of information tending to show any of the matters listed above."

PIDA skilfully achieves a delicate balance between the public interest and the interests of employers.[398] The balance is provided by a tiered disclosure regime which is considered below.[399]

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[396] C.Camp, *Openness and Accountability in the Workplace* [1998] *NLJ* 149 46.
[397] Until 2nd July 2002, See Public Concern at Work (PCaw) report, *2Years Back, 3 Years Forward, 10 Years Old,* Review of 2001 and 2002, 18.
[398] The words of Lord Nolan, Hansard HL 5 June 1998, Col. 614, repeated in the British Standards Institute guide, *Whistleblowing Code of Practice*, 2008, 5.
[399] Also referred to as 'stepped disclosure' by the BSI Code of Practice *Ibid.* See also J. Bowers, Whistleblowing *Law and Practice* (Oxford University Press, Oxford, 2007) Chapter 5 which refers to 'three tiers of protection.'

3.2.1 Controlled Internal Disclosure[400]

At the lowest tier the employee is protected by s.43C PIDA for making an internal disclosure such as to person in the line management chain, nominated officer or his employer. s.43C (2) PIDA would cover disclosures to the Civil Service Commissioners, who whilst independent of the management structure are designated to receive concerns under the Civil Service Code. The employee is required to show that the disclosure was made in good faith and has reasonable belief that the failure relates solely or mainly to the conduct of a person other than his employer or any other matter to which a person other than his employer has a legal responsibility.[401]

3.2.2 Controlled External Disclosure

The next level of the tier allows protection of a disclosure if made to a prescribed regulator. There is a noticeable difference between the evidential requirements for internal disclosures made under s.43C and external disclosures under s.43F. Under s.43F the employee must have good faith in making the disclosure and additionally must have reasonable belief that the relevant failure falls within any description of matters in respect of which that person is so prescribed and that the allegations contained in it are substantially true.[402] This requirement is in contrast to s.43C where the employee does not have to show that the allegation is substantially true but rather that he held the reasonable belief that it was true.

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[400] These headings are provided by the author for ease of illustration and are not officially recognised titles.
[401] Section 43C PIDA 1998. The various internal reporting mechanisms of the Civil Service are considered below.
[402] Section 43F (b) PIDA 1998.

There is an extensive and diverse list of prescribed regulators, the most notable for the purposes of this study are: the Audit Commission for England and Wales, the Comptroller and Auditor General (C&AG) of the National Audit Office, the Chairman of the Criminal Cases Review Commission, the Health and Safety Executive, and the Information Commissioner.[403]

The National Audit Office (NAO) deals with the proper conduct of public business, its primary focus being on the correct expenditure of public finances and value for money. It is independent of government and provides scrutiny on behalf of Parliament. The NAO also investigates allegations of fraud and corruption in relation to the provision of centrally funded public services. In relation to complaints made by Crown servants in central government departments, the NAO provides a 'whistleblowers hotline' and information of protected disclosures under the Public Interest Disclosure Act. However a note of caution is also given to those considering making disclosures whereby it is stated that the Act 'does not require the C&AG to investigate every disclosure he receives' and that the decision to investigate 'is based upon various criteria designed to ensure the most effective use of the resources at his disposal in safeguarding the public interest.'[404]

The advice given also indicates that the NAO has no powers to 'determine that a disclosure is protected' and that this is up to an Employment Tribunal to decide. The advice given by the NAO highlights the inherent difficulty of making unauthorised disclosures to regulators, whilst such disclosures may be protected, they also may not be.

[403] See further: Statutory Instrument 2003 No. 1993 (for prescribed regulators in England, Wales and Scotland) and Statutory Rule 1999 No. 41 (for prescribed regulators in Northern Ireland).
[404] 'Contacts at the National Audit Office: Whistleblowers Hotline' http://www.nao.org.uk/whistle.htm (accessed 05/04/09).

Section 43E is a protection specifically for use by Crown servants. It provides for a protected disclosure to be made to a minister of the Crown if it is made by a Crown servant and if it is made in good faith. Whilst s.43E may be seen as a welcome addition to PIDA one must ask if it is best suited to situations where a Crown servant wishes to raise a concern about another Crown servant or issues in his department. Situations where the Crown servant wishes to raise a concern of a situation brought about by the minister or of ministerial conduct itself is inherently problematic. The minister is unlikely to address his own conduct and the Crown servant may not have the confidence to directly criticise the minister. Furthermore a Crown servant who questions the political decisions taken by a minister may find his good faith questioned if there is clear evidence that he shares a different political viewpoint.[405]

3.2.3 Uncontrolled External Disclosure

Section 43G PIDA 1998 provides the most stringent evidential requirements contained within the Act. Firstly in order for the disclosure to be qualifying it must be made in good faith. The employee must believe that the information disclosed and any allegations are substantially true and that the disclosure was not made for personal gain. Additionally the employee must meet one of the conditions contained in s.43G (2). For ease of reference this is quoted in full:

> "(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with s.43F,
> (b) that in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
> (c) that the worker has previously made a disclosure of substantially the same

[405] In any case this would potentially breach the requirement for Civil Servants to be impartial under the Civil Service Code.

information-

(i) to his employer, or
(ii) in accordance with s.43F (disclosure to a regulator)"

Most importantly even if the relevant conditions are met above there is a further requirement provided by s.43G (e). In all circumstances of the case it must be reasonable for the employee to make the disclosure. This is determined by a series of considerations prescribed in s.43G (3) to which the Employment Tribunal (ET) must have regard. The ET must consider, the identity of the person to whom the disclosure is made, the seriousness of the relevant failure, whether the relevant failure is continuing or is likely to occur in the future, and whether the disclosure is made in reach of a duty of confidentiality to any other person. Additionally if the employee has reported the concern to his employer the ET will have regard to any action which was taken by the employer or might have reasonably been expected to be taken as a result of reporting the concern.[406]

One should consider the differences in approaches taken by the Employment Tribunal in the cases of *Collins v National Trust*[407] and *Smith v MOD and Others*.[408] In *Collins*, the Claimant was an employee of the National Trust who had the responsibility for a stretch of coastline in Cornwall. Collins became concerned that a report detailing coastal erosion which identified the risk of a chemical leak from a nearby quarry had not been acted upon. Collins passed the report to a local newspaper and it ran a story quoting Collins as the source. Collins was dismissed and made a PIDA claim on the basis that his act amounted to raising a concern of an exceptionally serious failure under s.43H PIDA. As identified in the judgment, in order for the Claimant to obtain protection, section 43H

[406] Section 43G (4) provides a natural extension to the external disclosure of the information if the disclosure is about the employers failure to take action as a result of reporting the concern.
[407] (2006) (ET, Case no. 250725505).
[408] (2005) (ET, Case No. 1401537/04).

requires that he must overcome five hurdles: 1) the disclosure must be made in good faith, he must reasonably believe that the information disclosed is substantially true 3) that he does not make the disclosure for the purpose of personal gain, 4) the disclosure itself is of an exceptionally serious nature, 5) in all circumstances of the case the disclosure was reasonable.[409] The ET found that Collins had identified matters of n exceptionally serious nature in that the risk of chemical contamination proved a risk to health and safety and children playing at the beach could be put at serious risk.[410] The claim was accordingly successful.

The case of *Smith*[411] concerned a security guard who had received a caution for indecent assault on a child. After the guard was allowed to return to work, seven members of staff expressed concerns about the decision, claiming that as a nursery school was situated 50 yards away from their workplace this could pose a risk to the children. The seven staff members gave an interview to the media expressing their concerns and also contacted their local MP. The Claimants brought a PIDA claim. The ET held that their actions did not constitute a qualifying disclosure. The Claimants did not hold a reasonable belief, nor was the claim made in good faith. The ET identified that the Claimants had not attempted to use their departmental whistleblowing policy and that their act of disclosure to the media was therefore unreasonable.[412]

With regard to anonymous leaks to the media, it is clear that an employee's good faith will be questioned, particularly if the information is provided for a fee and a disclosure

[409] *Ibid* para 5.4.
[410] *Ibid* para 5.8.
[411] *Above*, n 33.
[412] For commentary see also J.Bowers, M.Fodder, J. Lewis and J.Mitchell, *Whistleblowing Law and Practice* (Oxford University Press, Oxford, 2007) at 4.32.

made to the press will only be allowed in exceptional circumstances.[413] Examples contained of chapter two of this thesis, of Crown Servants who have anonymously leaked to the media, indicate that it would be highly unlikely that any of those persons would qualify for PIDA protection.

Section 43G (3) (e) effectively allows for employees to make an uncontrolled external disclosure when a disclosure to an external regulator has not taken action as a result of the disclosure. It is submitted that this applies to extremely narrow circumstances. Most interestingly, if a Civil Servant were to make a controlled external disclosure to a prescribed regulator such as to the National Audit Office and they did not take action it is highly unlikely that he would be protected for then making an uncontrolled external disclosure because the disclosure would be a clear breach of confidentiality and would breach the Civil Service Code.

It can be observed that the provisions of s.43 G identify the main limitations of PIDA. PIDA is rooted in employment law and is therefore primarily aimed to protect employees. It does impose statutory obligations on the prescribed regulators to investigate the concerns raised. Furthermore, the Act places a strong emphasis on the use of internal reporting mechanisms. If there are internal reporting mechanisms in place it would be difficult for an employee to explain to the Employment Tribunal why he has chosen to bypass those mechanisms. This is particularly important for consideration of the position of Crown servants. It will be illustrated below that the current internal reporting procedures in the Civil Service are robust on paper but are ineffective in practice. It would be extremely difficult for a Crown servant to argue that he has

[413] See further: C.Camp, *Openness and Accountability in the Workplace* [1998] *NLJ* 149 46.

bypassed the mechanisms available to him because they are ineffective. It is unfortunate that a Crown servant who is faced with an ineffective internal reporting mechanism may find the tiered disclosure regime, coupled with a lengthy Employment Tribunal process too much to bear in comparison to a leak to the media. It should also be noted that Crown servants involved in national security matters are exempted entirely to the protections afforded by PIDA.[414]

Finally, Section 43J provides that any contractual duty of confidentiality will be void if it precludes the worker from making a disclosure however at the time of writing this provision is yet to be untested. This chapter will now progress to consider internal and externally controlled disclosure mechanisms.

3.2.4 The Public Interest Disclosure Act 1998 and the revised Civil Service Code: an Analysis of what types of information may be protected.

A new version of the Civil Service Code was published in June 2006. It has been revised to expressly recognise the Public Interest Disclosure Act 1998. It should be noted that paragraph 20 identifies that the Civil Service Code is part of a contractual obligation between the Civil Servant and the employer.[415] It is submitted that this significantly widens the scope of protection available to Civil Servants. Section 43B (1) (b) defines the breach of a legal obligation as having a reasonable belief tending to show that a person has 'failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.' It is submitted that this clearly extends to circumstances whereby the Crown servant's employer is requiring him to act in a way which is incompatible

[415] I would like to thank Bill Brooke of the Civil Service Commission for confirming this point.

with the Civil Service Code. Civil Servants are expected to uphold the values of 'integrity, honesty and impartiality.'[416] They must 'Set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and use resources only for the purposes for which they are provided' and must not 'deceive or knowingly mislead ministers, Parliament or others; or be influenced by improper pressures from others. This means, it is submitted, that a Civil Servant may receive protection for raising a concern that he has been asked to lie by a Minister or senior official, despite the fact that such information would not ordinarily fall under the other categories, such as the fact that a criminal offence has been committed. It is submitted that whilst this may not trigger an investigation into the Minister's conduct, the Civil Servant can at least receive employment protection for raising the concern. Section 43B (1) (b) would protect a disclosure whether or not the Minister's request had been carried out or not. The mere fact that the Servant has been asked to act in a way that would breach his own Code would be sufficient to satisfy the section.

It is submitted that with regard to disclosures of wrongdoing, the Public Interest Disclosure Act is consistent with article 10 ECHR values in that it offers protects and promotes speech of a value to the public interest. The leading decision in *Guja v Moldova*, primarily deals with external unauthorised disclosures, however, the framework in *Guja* requires the court to ascertain whether the whistleblower first attempted to raise concerns by using channels made available by the organisation or by contacting an appropriate authority. These options are clearly promoted by the PIDA stepped disclosure regime whereby protection is most readily available to disclosures made internally. From the lowest level upwards, all disclosures must be reasonable and

[416] Civil Service Code, para 3. http://www.civilservice.gov.uk/about/values/cscode/rights.aspx *(accessed 17/05/11).*

made in good faith, this is again consistent with the test identified in Guja. The next level in PIDA, disclosure to a prescribed person requires that the information must be 'substantially true,' Guja requires courts to test the authenticity of the information. It has been identified above that for first tier disclosures to an employer, an employee may receive protection for making a protected disclosure even if the information disclosed is later proved to be wrong. In comparison, applying the Strasbourg jurisprudence, an employee would not automatically be barred from the protection of article 10 if the disclosure he makes is false, although this is likely to weigh heavily against the employee in the proportionality analysis.

With regard to external unauthorised disclosures, PIDA does not expressly require the Tribunal to consider the detriment caused to the employer as a result of the disclosure. It does however require the Tribunal, when it is determining reasonableness to, identify as to whether the disclosure breached a duty of confidence owed to an employer or another person.

The fundamental difference between the Public Interest Disclosure Act and the *Guja v Moldova* test is that PIDA defines what types of disclosure may be protected whereas the resulting ECtHR decision requires the public interest to be determined on a case by case basis, using existing jurisprudence, as a consideration in the proportionality analysis. It is submitted that despite pre-determined categories of 'protected disclosures' the Public Interest Disclosure Act remains sufficiently flexible to allow Crown servants to disclose wrongdoing or malpractice in government departments. The fact that an actual breach or potential breach of the Civil Service Code may amount to a breach of a legal obligation considerably widens the scope of protection.

It is argued, however, that the Public Interest Disclosure Act is less likely to provide protection for protest whistleblowing, so-called disclosures relating to dissent about policy, where despite the fact that there is no express evidence of wrongdoing; the Civil Servant still believes that the policy is wrong. The Employment Appeal Tribunal has sought to consider whether PIDA is capable of protecting the expression of value judgements.

In *Cavendish Munro v Geduld*, [417] the Employment Appeal Tribunal made a distinction between conveying information in the form of a fact, which would be covered by PIDA and making a statement of a person's position or the making of an allegation which would not give rise to a protected disclosure. This reasoning was later considered in *Goode v Marks and Spencer*.[418] The applicant had been dismissed after writing a letter to the Times newspaper in which he revealed the Respondent's plans to change a redundancy package offered to staff. The applicant had previously expressed his concerns about the policy with line management and his union. The EAT held that expressing an opinion about a change in the redundancy policy was not sufficient to amount to a protected disclosure. The Tribunal held that the information was 'at its highest' a 'statement of his mind that he was disgusted with the proposals that had been put forward.'[419]

The inability of the Employment Tribunal to protect value judgments or protest whistleblowing should be considered. It has already been identified in this thesis that art.10 ECHR has the capacity to protect not only expressions of fact but expressions of

[417](2009) UKEAT/0195/09/DM.
[418](2009) UKEAT/0442/09/DM.
[419] *Ibid* para 36.

opinion.[420] Section 6 Human Rights Act holds that it is unlawful for a public authority to act in a way which is incompatible with a convention right. Section 6(3) defines 'public authority' to include 'a court or tribunal.' Therefore, in considering claims before the Tribunal where art.10 is engaged, s.2 Human Rights Act requires the tribunal to have regard to decisions made by the ECtHR so far as they are relevant to the proceedings at hand. Vickers suggests that Civil Servants may 'at times have a special duty contribute to public interest matters' this she identifies is 'clearly stressed in *Lingens v Austria*.'[421]

It is submitted that by placing such emphasis on the protected disclosures identified in PIDA, an Employment Tribunal may act in a way which is incompatible with the longstanding Strasbourg jurisprudence. Whilst it is clear that the aforementioned cases have dealt with value judgements in relation to company policy and the claimant's own redundancy, the Tribunal is yet to encounter a PIDA case involving political expression. The Tribunal has the jurisdiction to consider article 10 claims and whilst it is difficult to monitor decisions because the Employment Tribunal Service operates a closed register, the recent case of *Crisp v Apple Inc.* highlights that the Tribunal is actively determining employment law rights based upon the protections afforded by the Convention.[422] In Crisp, the claimant was an employee who was dismissed from his position for posting several comments on the social networking website Facebook, criticising both his job and Apple products. The Tribunal upheld the reasons for the dismissal identifying that the comments made by Crisp were 'not the type of comment that are particularly important to freedom of expression.' The Tribunal cited 'political opinions' as being the type of

[420] *Lingens v Austria* applied, discussed further in Chapter Two of this thesis.
[421] Above, n 122, 92.
[422](2009) *ET/1500258/11, note that the decision is not easily accessible but may be obtained from the Employment Tribunal Service for a fee.*

speech which may be of particular importance.[423]

It is submitted that a particularly novel way of obtaining art.10 protection where a policy issue is raised as a form of protest whistleblowing would be for the Civil Servant to raise any action taken against him for making the disclosure with the Civil Service as a breach of a legal obligation. Public authorities have an obligation as per s.6 HRA to act in a way that is not incompatible with Convention rights. Any form of detriment received for exercising the right to engage in political speech is likely to infringe article 10. Thus an alleged breach of s.6 would amount to a breach of a legal obligation which would give the Tribunal the jurisdiction to consider the issue. The tribunal would then need to balance the competing interests using the reasoning in *Lingens v Austria* against the detriment caused to the employer and the fact that the Civil Servant had agreed to a contractual limitation on expression rights.[424]

As an alternative, there is scope to incorporate amendments to the Civil Service Code, in order to allow Civil Servants to obtain protection for exercising dissent about policy matters. Currently, the New Zealand and Canadian whistleblowing legislation allows for the disclosure of 'gross mismanagement.' Thus, by incorporating 'gross mismanagement' as a new matter under the Civil Service Code, a Crown servant would obtain PIDA protection for raising concerns where he believed that a policy decision taken was so wrong that it was in the public interest to disclose such information. This alternative proposal will be explored in more detail in chapter five of this thesis.

This analysis will now progress to consider the authorised whistleblowing procedures

[423] *Ibid.*
[424] *Vogt v Germany* considered, see further chapter one of this thesis.

available to Civil Servants before providing a critical analysis as to whether these procedures are consistent with the reasoning of the Strasbourg Court in *Guja v Moldova*.

4.3 The Civil Service Code and Authorised Whistleblowing Procedures

The Civil Service Code speaks of the whistleblowing provision under the heading of 'Rights and Responsibilities.'[425] It directs servants who believe they are being required to act in a way contrary to the values set forth in the code to raise the concern with a line manager[426] in the first instance or with 'nominated officers' which essentially act as staff counsellors.[427] Alternatively it suggests that a servant may wish to seek advice from their nominated officer.[428] In cases of criminal or unlawful activity the Code directs servants to report their findings to the police or other appropriate authorities.[429] If the servant believes that the response given is unsatisfactory he may wish to contact the Civil Service Commissioners, or even to contact them directly, without using the internal channels available.[430]The following sections will provide an analysis of the above provisions, starting with the role of the nominated officer.

3.3.1 The Nominated Officer

The 'Nominated Officer' is a member of staff nominated by Permanent Secretaries in each department with the role of accepting complaints from aggrieved servants. Emphasis is on the premise that the officer must act impartially as a person outside the

[425]Civil Service Code 2006, para 15.
[426]*Ibid*, para 16.
[427]*Ibid*, para 17
[428]*Ibid.*
[429]*Ibid.*
[430]This will be discussed in more detail below.

servant's management chain.[431] However the officer is required to undertake the role in addition to their normal activities.[432] Their role is to advise individual servants on the interpretation and implications of the Civil Service Code, to advise them on steps which might be taken to resolve a concern relating to the code, to advise on how to take a concern through the departmental procedures should the servant wish to do so.[433] The final part of their role may entail passing on the concerns in question to the 'appropriate point within the department' if the Nominated Officer is satisfied that the matter may fall within the code.[434]

The concept of an impartial person for which a Crown servant can obtain advice and guidance appears from the outset to be a welcome addition to the code. If one were to compare it to the position of the servant who after observing malpractice feels increasingly isolated and who may even consider unauthorised disclosure, the Nominated Officer provides an informed individual to share the burden. However several important considerations arise. The strength of this internal framework rests upon the ability of the Nominated Officer to deal with the matter effectively and impartially, the Civil Service Code must be a clear and precise document and if the matter is reported, the matter must be investigated and dealt with appropriately.

One must ask whether the Nominated Officer can deal with the matter effectively bearing in mind that he would have other departmental responsibilities in addition to the role. This also has a direct consequence on the requirement to be impartial. There is a key distinction between being independent and being impartial. Because of the

[431]Civil Service Commissioners, Annual Report 2004-2005, 25.
[432]*Ibid.*
[433]*Ibid.*
[434]*Ibid.*

Nominated Officer's strong connection to the department of which the Crown Servant has a concern to report, this may have a significant psychological impact upon the servant who is undecided as to whether to leak to the media or use the internal framework.

The PASC report on Leaks and Whistleblowing and Whitehall found that nominated officers were often senior people and that this may intimidate staff at a lower grade. The report recommended that nominated officers should be 'evenly spread across grades and offices,' it also recommended that where possible nominated officers should be individuals with other pastoral roles such as welfare officers to 'improve visibility and ensure consistency of advice.'[435] An alternative way of tackling the question of independence could be to detach the role of the nominated officer entirely from the department itself. In the Security and Intelligence services the staff counsellor is independent of the services.[436] Another way would be to increase the involvement of the Civil Service Commissioners in the nominated officer's role. In giving evidence to the PASC report, the first Civil Service Commissioner has stated that they encourage Civil Servants to first discuss their concerns with the nominated officer and that the Commissioners were currently conducting an audit of the internal mechanisms across departments and that a dedicated website had been set up for nominated officers to share concerns.[437]

Whilst the actions of the Commissioners are a visible improvement to increase their

[435]PASC, *Leaks and Whistleblowing in Whitehall*, 2009 HC 83 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/8302.htm (accessed 13/06/10) at para 100.

[437] See further, PASC, *Leaks and Whistleblowing in Whitehall*, 2009, HC 83, EV 37, Q.241 http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf

participation in the nominated officer scheme, they should be contrasted to the work of the Canadian Public Sector Integrity Commissioner. Whilst the Canadian office has been around for a relatively short period of time, the Commission is actively involved in training members of staff who receive complaints. This has the positive effect that concerns are more likely to be dealt with consistently 'in house' but with the added safeguard of independent Parliamentary oversight. It is submitted that increased involvement in the training and oversight of nominated officers would be a positive step and would enhance the reputation of the nominated officer scheme. The next section details the current nominated officer scheme which identifies problems caused by the inconsistency of the role of nominated officers from which vary from department to department.

3.3.2 Differing internal procedures

Further to the appointment of 'nominated officers' different government departments also offer a number of different appointed persons in their internal policies who can be contacted, Public Concern at Work (PCaW) conducted a comparative analysis of the whistleblowing policy of each department. The list includes:

> "Officers with professional responsibility for standards, departmental advisers specialised in whistleblowing, internal audit, human resources, welfare officers, a Risk Assurance Division, a departmental whistleblowing hotline, special routes for particular issues-notably special contacts (sometimes a hotline) for suspicions of fraud."[438]

The use of a whistleblowing hotline appears an interesting prospect. It has the clear advantage of making the appointed person readily accessible and means that the concern can be reported quickly. However it is unclear as to whether or not it would be more

[438] *Whistleblowing and Whitehall*, accessible via: http://www.pcaw.co.uk/policy/civilservice.htm (accessed 06/12/08).

beneficial to report concern by way of the telephone rather than approaching a nominated officer or person direct. If the telephone line allowed for the sole purpose of anonymous reporting then it may be considered advantageous, however such anonymity is actively discouraged by PCaW[439] and the Department for Culture Media and Sport states in its policy:

> "…If you do not tell us who you are, it will be much more difficult for us to look into the matter or give you feedback. Accordingly, while we consider anonymous reports, this policy is not designed to deal with concerns expressed anonymously."

The PCaW report was particularly critical of the Cabinet Office which scored worse in the study with a total of 3.[440] The highest department was the Department of Culture, Media and Sport which scored a total of 25. The fact that the Cabinet Office scored so poorly presents a real cause for concern. The Cabinet Office itself indicates that it 'sits at the very centre of government'[441] and that it has an 'overarching purpose of making government work better.'[442] Furthermore the department cites the strengthening of the Civil Service as one of its 'core functions':

> "To ensure the Civil Service is organised effectively and has the capability in terms of skills, values and leadership to deliver the Government's objectives."[443]

It is perhaps most alarming that the Cabinet Office is failing in this aim.

3.4 Dissecting the Code: Conflicting Ethical Standards?

[439] Note that it would be more difficult for an individual to prove that he has suffered a detriment as a result of raising the concern if he does so anonymously. The Respondent could argue that he did not know it was the Claimant who raised the concerns.
[440] League Table of Whitehall Departments, *Ibid*,12.
[441] See Cabinet Office webpage: www.cabinetoffice.gov.uk/about_the_cabinet_office.
[442] *Ibid.*
[443] *Ibid.*

Despite the implementation of whistleblowing procedures contained within a revised Civil Service Code, Crown servants in positions within the Civil Service remain at an uneven keel with their private sector counterparts. The whistleblowing charity Public Concern at Work (PCaW) has welcomed the revised code, yet believes it to be inconsistent and confusing in parts, suggesting that the provisions contained within the code need to be 'expressed more clearly and simply and made more consistent with the Public Interest Disclosure Act.'[444]

The working group responsible for the revised drafting of the Civil Service Code received 2,150 mixed responses during a consultation process.[445] In particular the consultation report drew upon anonymous comments made by Civil Servants, a number of who believed that the old version of the Civil Service Code was more explicit about reporting concerns.[446] This position is rather unfortunate given that the Civil Service Commissioners identified the need for greater clarity as a particular motivation for drafting the new Code.[447] Furthermore, the Commissioners highlighted that it was unclear whether the code 'provided rules of conduct or a set of values' and that this had implications as:

> "…If it was a code of conduct, it could be seen as non-negotiable. If, on the other hand, it was a set of values that might imply it was for individuals to take a view on how to apply the values in particular circumstances."[448]

Upon reading the revised Code it is difficult to ascertain how it is any more affective in securing this aim, this is particularly notable when considering servants who intend to

[444]G. Dehn: Public Concern at Work. Letter on the Revised Civil Service Code to the Cabinet Secretary, the First Civil Service Commissioner, the Chair of the Committee on Standards in Public Life and the Chair of the Public Administration Committee, dated 19 April 2006.
[445]*Summary of Responses to Consultation on a New Civil Service Code, Cabinet Office*, June 2006.
[446]*Ibid* para 31.
[447]Civil Service Commissioners, Annual Report 2005-2006, OSCSC, 36.
[448]*Ibid.*

raise concerns.

The Code consistently refers to requirements detailing a high level of ethical standards. It defines 'honesty' as 'being truthful and open' and states that servants must: 'Set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and use resources only for the purposes for which they are provided.' And therefore must not 'deceive or knowingly mislead ministers, Parliament or others; or be influenced by improper pressures from others or the prospect of personal gain.' Furthermore, the Code requires servants to 'handle information as openly as possible within the legal framework and comply with the law and uphold the administration of justice.' [449]

However, the Code also specifies loyalty to the Government of the day. If one were to consider the position of Clive Ponting if he had served under the revised Civil Service Code, during the Belgrano affair he observed that ministers were attempting to mislead Parliament. Regardless of his obligations under the Official Secrets Act, under the revised Code he would be upholding the value of 'honesty' and yet would contravene other parts of the Code. For example he would clearly have 'disclosed information without authority' contrary to paragraph 6 and furthermore disclosing information to an opposition MP may be seen as contravening the requirement to be politically impartial (paragraph13).

In a guide available to Crown Servants on the giving of evidence or information of suspected crimes the introduction states plainly that servants have a 'general professional duty' to 'draw official information' which they believe may be relevant to the

[449] Civil Service Code, published 6 June 2006, Para 6.

investigation or prosecution of a criminal offence to the attention of their department. It is also stated that servants have a duty to support the 'administration of justice' by giving 'investigators, prosecutors and defendants 'full and proper assistance in their search for information about the alleged offence.' The servant is required to report concerns to their department via their line manager or Offence Enquiry Point.

3.5 Reporting Possible Criminality: The Offence Enquiry Point

The Offence Enquiry Point (OEP) or the Criminal Investigation Contact Point (CICP) as it is also known as is rather similar to the Nominated Officer in that an existing member of each department is nominated and given the responsibility to handle complaints relating to alleged criminality. The OEP also handles requests for information received from investigators, prosecutors or the defence.

The guide states that Crown servants must be as helpful and as open as they 'reasonably can' but 'must always' seek advice through the OEP before revealing official information as 'some information is protected by law and some will need to be protected in the public interest.' Furthermore the document specifies that all contact with investigators or prosecutors should be made through the OEP.[450] Advice is given clearly separating the difference between suspicion and belief. If a servant has a suspicion he is expected to confirm or deny that suspicion and then seek advice from the OEP. This directly contradicts the advice given by the Department for Culture media and Sport (DCMS) which states in relation to all concerns that:

> "If something is troubling you which you think we should know about please tell us straight away. We would rather you raise the matter when it is

[450]Para 2.7.

just a concern rather than wait for proof"[451]

In analysing the internal procedures in place in government departments and building upon the model provided by DCMS, PCaW recommended that in the advice given to Crown servants it would be helpful to indicate that staff are encouraged to raise concerns even if they have only a suspicion.[452] It has also been held that an 'overzealous investigation' can jeopardise any protection under PIDA. In *Bolton School v Evans*[453] the Court of Appeal upheld a judgement of the Employment Appeal Tribunal. The EAT had stated that a PIDA claim concerned two separate issues:

> "…conduct designed to demonstrate that the belief was reasonable and, second (that) the disclosure of the information itself which tended to show a breach of the relevant legal obligation…the law protects the disclosure of information which the employee reasonably believes tends to demonstrate the kind of wrongdoing, or anticipated wrongdoing that is covered by s.43. B. It does not protect the actions of the employee which are directed to establishing or confirming the reasonableness of that belief."[454]

In considering the difference between the reporting of an incident of malpractice to the reporting of an instance of possible criminality, there appears to be a grave inconsistency in the advice given and the reporting mechanisms available. With regards to a non-criminal instance of malpractice, there is no requirement to actively seek proof in order to confirm suspicions and in the Department of Trade and Industry and Foreign and Commonwealth Office guidance it is clearly stated that it is the responsibility of the department rather than the employee to provide proof. However, the reporting of possible instances of criminality requires the employee to seek proof in order to confirm suspicions. There appears to be no plausible explanation for why there is such a discrepancy. There is also the possibility that such amateur investigations might not only

[451]See further, *Above* n 438, 3.
[452]*Ibid.*
[453][2006] EWCA Civ 1653.
[454]*Ibid* para 13.

prove harmful to future official and possible police investigations, but also to the Crown servant, who may forfeit any available protection under PIDA and may also cause confrontation with other members of his department as a result.

There appears to be no reason as to why such suspicions need to be confirmed before approaching the OEP. It could not be for the reasoning that such allegations if unfounded could be seen as wasting police time as the OEP would undoubtedly make his own enquiries into the matter and consider the weight of evidence before deciding whether or not to pass on a formal complaint to the Police. If it is a logistical issue, this should not be to the detriment of the Crown Servant wishing to make the complaint.

The position of OEP carries a great deal of responsibility, the fact that one person is required to not only field complaints but also receive requests for information from investigators raises the question of whether or not that person is firstly equipped to deal with major instances of criminality and secondly, if the OEP has a heavy workload will he still be able to devote the same attention and provide a fair and just decision? There is however, the opportunity to consider the internal complaint procedures via the Nominated Officer, or as a last resort the matter may be taken to the Civil Service Commissioners. However, with a sense of irony, if the matter in question concerned sensitive information, the Civil Service Commissioners may be denied the information, on the basis of the fact that the information must be protected in the public interest or which would be unlawful to reveal, by the OEP.

The PASC found that there was a lack of clarity in the Civil Service Code as to when a Civil Servant is allowed or encouraged to approach a law enforcement or regulatory

body and that the Civil Service Code should be amended to 'give greater clarity on this issue and the circumstances where such disclosures would be protected under PIDA.'[455] It is submitted that in cases where there is clear evidence that criminal activity has taken place it should be a matter for the police to investigate it rather than a matter for the OEP to decide whether the information should be passed on to the police.

3.5.1 Subsequent Investigation

If the OEP decides to pass the information on, by way of making a formal complaint to the Police, they have a statutory obligation to investigate it. It is at this point that critics and conspiracy theorists alike would question the possible effectiveness and independence of a Police investigation, particularly if such an investigation involved persons at a high level within the political system. However, recent investigations into the 'cash for honours/peerages' scandal have appeared to be both thorough and unprecedented, with Tony Blair being the first serving Prime Minister to be questioned in relation to a criminal investigation. Whilst consideration of the Cash for Honours scandal is not directly relevant to the subject of Crown servants blowing the whistle, it is relevant to consider how the police would investigate a criminal complaint made by a Crown servant.

The alleged scandal involved political loans or donations given to the Labour party in exchange for peerages. In March 2006 several men nominated for peerages by the Prime Minister were rejected by the House of Lords Appointments Commission. It later emerged that the men had loaned money to the Labour party on the advice of the party

[455]HC 83 at para 75.

fundraiser Lord Levy. A complaint was then referred to the Metropolitan Police by the Scottish Nationalist MP Angus MacNeil that the party had breached the Honours (Prevention of Abuses) Act 1925.

It later emerged that several promises of either honours or peerages (depending upon the size of the loan) were made in exchange for loans, with the assurance that the loans would be kept secret, the justification for this was that donations made to a party had to be declared but those who made loans to the party were exempt.

Several arrests were made, not only of those persons who had made loans but also high profile officials such as Lord Levy and government aid Ruth Thomas. The questioning of the Prime Minister highlights not only the severity of the allegations but also the extent to which the Police are prepared to go to in order to conduct a thorough investigation. A Police investigation for serious allegations of misconduct provides a powerful accountability mechanism. There are also a number of advantages to such an investigation. There is the availability of experienced manpower, with skills to investigate and question if necessary. Furthermore, officers must follow the strict guidelines of the Police and Criminal Evidence Act. A high level and detailed Police investigation also provides a symbolic indication to the public that such matters will be taken seriously and dealt with appropriately. Also in terms of media reporting it would have a similar media impact to an unauthorised disclosure, but would be both authorised and legal.

3.5.2 Criminal Investigation, Prosecution and the Authorised Disclosure of intelligence and security information

If a Crown Servant has information regarding illegal conduct which relates to national security issues, reporting the matter to the police has particular relevance. This is because disclosure to the Commissioner of the Metropolitan Police is authorised by s. 7 (3) (b) Official Secrets Act 1989[456] and provides a powerful, and legal, alternative to making an unauthorised disclosure to the media. The question of whether the Police or prosecuting authorities will properly investigate and prosecute in cases involving alleged illegality when it involves individuals working in the security and intelligence field or within the executive remains to be seen.

In considering the outcome of a Police investigation one must not only view the role of the Crown Prosecution Service but also the role of the Attorney General. The question of impartiality becomes particularly pertinent in cases involving national security. It is submitted that the use of Criminal investigations to provide a strong accountability mechanism for instances of serious malpractice, can only succeed if the Attorney General remains impartial. As former Prime Minister Harold MacMillan stated it would be 'a most dangerous deviation…if a prosecution were to be instituted or abandoned as a result of political or popular clamour.'[457]

Recently, the Director of the Serious Fraud Office's (SFO) decision to discontinue the investigation into the alleged bribery of Saudi Officials by BAe Systems in order to secure defence contracts brought the operational independence of both the Director of the SFO into question. In December 2006 the SFO announced that its decision to discontinue the investigation into BAe Systems had been taken following

[456]For further information on the authorisation to disclose information see further Chapter 4, Section 4.2 and Chapter 6, Section 6.1 of this thesis.
[457]16th February, 1959, H.C. Debs, Vol. 600. Col. 31.

'representations' made to the Attorney General and the SFO Director and that the representations concerned the need to safeguard national and international security.

The SFO argued that it had been 'necessary to balance the need to maintain the rule of law against the wider public interest' and that 'no weight had been given to commercial interests or to the national economic interest.' The Attorney General released a statement the same day which argued that there was a strong public interest in upholding and enforcing the criminal law but that there was a distinction between this public interest and considerations of national security and 'our highest priority foreign policy objectives in the Middle East.'[458]

A judicial review action was taken by the non-profit organisation Corner House Research against the Director of the SFO into the legality of the decision to halt the inquiry after it emerged that both the Director and the Attorney General were placed under considerable ministerial pressure prior to the decision because Saudi-Arabia had threatened to pull out of a considerable deal to purchase Typhoon aircraft and would withdraw counter-intelligence co-operation arrangements with the UK. It emerged that during the investigation the Director had had meetings with the ambassador to Saudi-Arabia who argued that "British lives on British Streets" would be put at risk as a result.[459]

The Queen's Bench Division found that the Director's action was not lawful and

[458] See further: Z.Yihdego & A.Savage, *The UK Arms Export Regime: Progress and Challenges* [2008] *PL* 546 at 558 and *British Aerospace Systems, Al Yamamah and the UK Serious Fraud Office,* Briefing Note by Transparency International (UK), 15th January 2006.

[459] *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714.

impartial under domestic law on the basis that 'no-one whether within this country or outside is entitled to interfere with the course of justice' and that because the Director of the SFO failed to challenge the claim of a security threat or make sure that all other avenues had been exhausted to avert the threat made by Saudi Arabia. The Director of the SFO appealed to the House of Lords. The appeal was allowed on the basis that the Director had made the judgement that the public interest in saving the lives of British citizens outweighed any potential conviction and that the Attorney General had left the decision as to whether to continue the investigation up to the Director.[460]

The decision made by the Attorney General not to prosecute Katherine Gun despite clear evidence of a breach of the Official Secrets Act was arguably politicised.[461] Whilst criticism of the role of Attorney General has been levelled during any stage of political history whereby the dual role of government minister and 'guardian of the public interest,' a recent report by the Constitutional Affairs Select Committee entitled the 'Constitutional Role of the Attorney General'[462] has not only stated that the aforementioned events have 'compromised or appeared to compromise the position of the Attorney General'[463] but have called for major reform effectively splitting the current role into two: legal functions to be carried out by a non political official and ministerial functions to be carried out by a minister in the newly formed Ministry of Justice.[464]

In giving evidence to the committee, the then Attorney General Lord Goldsmith vehemently defended his role, arguing that in exercising his position of superintendence

[460] *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.
[461] For further critical discussion of the role of Attorney General as politician and legal officer see: J.Ll.J. Edwards *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964) 224.
[462] House of Commons, Constitutional Affairs Committee, Constitutional Role of the Attorney General, HC. 306, 2007.
[463] *Ibid.*
[464] *Ibid*, 3.

of the main prosecuting authorities,[465] he had made significant improvements which he stated would not have been possible from a position outside government.[466]

It is submitted that the main cause for critical analysis surrounds the 'Shawcross exercise' and the public interest. Here it is observed by the Attorney General that whilst considering whether or not to bring or discontinue prosecutions government colleagues should be consulted. From the outset Shawcross identified:

> "In order to inform himself, he (the Attorney General) may…consult with any of his colleagues in Government, and indeed… he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be."[467]

Whilst Shawcross clearly carries the instruction to be politically impartial and not to be influenced by the advice given by his government colleagues, it is this very exercise that has brought the role of Attorney General into question in the aforementioned events and particularly in relation to the advice given by the former Attorney General, Lord Goldsmith on the war in Iraq. Without political impartiality, such exercises are open to criticism and their subsequent decisions can be consistently argued to be politically motivated.

Andrews states that where matters of state interest are at risk the only way of achieving fairness for the defendant without giving the defence access to the information is to drop the case and that the extent to which criminal investigations and subsequent proceedings

[465]Namely, the Crown Prosecution Service, the Serious Fraud Office, the Revenues and Customs Prosecution Office and the Director of Public Prosecutions in Northern Ireland.
[466]*Ibid.*
[467]HC Debs, 29 January 1951, Cols 683-684. A brief explanation of the 'Shawcross Exercise' is also mentioned in the Code for Crown Prosecutors (Crown Prosecution Service, 2004) para 5.6.

are aborted because of national or political pressure is unknown.[468] However one must ask when does the state interest become a political interest? And consequentially by dropping such prosecutions whether or not this supports the public interest of the administration of justice.

The Code for Crown Prosecutors states:

> "Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, the victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source."[469]

The Code provides a widely framed instruction to disregard political considerations, however there is no guarantee that a Shawcross exercise will not result in a decision made to secure a political ideal. A consultation paper on the role of the Attorney General suggested that there is clear tension between the various functions of the Attorney General, being a member of Government, being an independent guardian of the public interest and performing superintendence functions. Furthermore, it stated that there is tension between being a party politician and a member of government and the giving of independent legal advice.

The then Prime Minister, Gordon Brown, stated on 3rd July 2007 that the role of the Attorney General needs to change and that the current Attorney General, Baroness Scotland had decided that 'except if the law or national security requires it' not to make 'key prosecution decisions in individual criminal cases.'[470] Whilst this decision represents important progress, its necessary impact is yet to be determined. However it is

[468] J. Andrews, *Public Interest and Criminal Proceedings* [1988] *LQR* 104, 413.
[469] See Code for Crown Prosecutors, para 2.2.
[470] *Ibid*

perhaps most notable that the difficulties posed in the Katherine Gun case would undoubtedly constitute a national security issue.

The decision to question Tony Blair, whilst holding office as Prime Minister, represents a voyage into unchartered territory, but in terms of access it is one which should be embraced. The proposed reform of the role of Attorney General would ensure that if high level investigations of this nature are conducted again, decisions whether or not to proceed with prosecutions will be dealt with impartially and would potentially make significant headway in reducing criticism to provide a strong and publicly overt accountability mechanism. The investigatory powers of other independent bodies will now be considered, starting with the Civil Service Commissioners.

3.6 The Civil Service Commissioners: Enforcement of the Civil Service Code.

If a Civil Servant believes that a serious breach of the Civil Service Code has taken place, he is advised to firstly contact his line manager, a person in the management chain or nominated officer (staff counsellor). If he fails to obtain an adequate remedy he may then appeal directly to the Civil Service Commissioners. Like the Parliamentary Commissioner, the Civil Service Commissioners are appointed under the royal prerogative and it is highlighted in the appeals procedure that the Commissioners are completely independent.[471] The procedure notes that in dealing with information marked "Secret or above" the servant should advise the Commissioners beforehand so that provision can be made for appropriate handling of the information.[472] The procedure

[472]See *Guide to the Civil Service Code*, accessible via https://www.civilservicecommissioners.org/web-

ends with a confidential report of the findings sent to both the individual and the department.

The Commission can make recommendations to the department subject to the complaint. The Commission identifies in its guidance that there is no 'specific obligation on a department to follow the Commission's recommendations' but suggests that if their recommendations are ignored there are 'levers of significant power' available to them.[473] It suggests that it may draw 'public and parliamentary attention' to the fact that their recommendations have not been auctioned and would raise the matter with the Permanent Secretary or Agency Chief Executive concerned and if judged necessary, with the Cabinet Secretary. It then indentifies that if the steps did not produce action then they would 'probably' draw the matter to the attention of other bodies such as the PASC or the Committee on Standards in Public Life.[474]

Section 17(1) of the Constitutional Reform and Governance Act 2010 allows for the Commission to produce an exceptional report on any matter relating to the carrying out of its functions, this identifies that there is certainly the legislative scope to produce a 'special report' on an unresolved issue however this provision has been drafted in implied rather than express terms. Here the Act presents a missed opportunity. A provision for dealing with situations where the department has failed to act on the recommendations of the Commission would formalise an important aspect of the Commission's functions and would reduce uncertainty. Such a provision could have contained a protocol allowing for the Commission to submit a notice with

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app/plugins/spaw2/uploads/files/Guide%20to%20the%20Civil%20Service%20Code.pdf (accessed 07/09/10).

[473] *Ibid*

[474] *Above*, n 472.

recommendations for corrective action which specifies a reasonable time frame for completion. If the recommended action is ignored the legislation could identify a 3 part escalation process, allowing the Commission to serve notice on the Permanent Secretary or Agency Chief Executive to deal with the issue within a specified time frame before reporting to the Cabinet Secretary. If these avenues fail, the Commission could then submit a report to Parliament.

The Commissioners received the power to investigate appeals under the Civil Service Code in 1996. A freedom of information request by the author of this thesis has identified that the total number of new approaches made by Civil Servants to the Commissioners making a complaint under the Code has remained low. In the period of 1996-1997, a total of 6 new approaches were made, this should be contrasted to the period, of 2009-2010 whereby 24 new approaches were made. Very few appeals are accepted for full investigation. Between the years 1996 and 2009, the Commissioners investigated a total of 13 appeals, 10 were upheld or partially upheld and 3 were not upheld.[475]

In 2009 the Public Administration Select Committee (PASC), highlighted in their report Whistleblowing in Whitehall that although awareness of the Civil Service Commissioners appeared to have improved, they still received a very low number of appeals considering the size of the Civil Service.[476] In 2011, the Civil Service reportedly has 479,000 employees and it is clear that despite increased awareness of how to raise a concern under the Code, more work needs to be done to recognise the role of the Civil Service Commission in receiving and investigating complaints under the Code.

[475] All information obtained by FOIA request to Civil Service Commission 19/05/11.
[476] *Above* n 435, para 91.

There is no further opportunity to appeal if the Crown Servant is dissatisfied with the findings and he is advised to 'leave the service.'[477] It is submitted that the requirement to 'leave the service' if the Civil Servant is unable to seek a remedy through the Civil Service Commissioners is unhelpful. As the Civil Servant will most likely view the appeal procedures and Civil Service Code before choosing whether or not to make an unauthorised disclosure and the statement, without any further explanation, does not provide reassurance and may have the adverse affect that Civil Servants will be inclined to bypass procedures and make unauthorised disclosures as they would probably have to leave their job anyway as a result of the Commissioner's decision.

3.6.1 Direct Access to the Civil Service Commissioners

Paragraph 8 of the Civil Service Code states that the Civil Service Commissioners 'will also consider taking a complaint direct.' The Committee on Standards in Public Life highlighted in its 3rd Report that:

> " The essence of a whistleblowing system is that staff should be able to by-pass the direct management line because that may well be the area about which their concerns arise and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course."[478]

In the context of the Civil Service 'going outside the organisation' means approaching the Civil Service Commissioners. In a response to an article which encouraged Civil Servants to leak, the First Civil Service Commissioner, Janet Paraskeva stated that 'clear routes are provided for Civil Servants to raise concerns.'[479]

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[477] *Ibid.*
[478] Committee on Standards in Public Life, 3rd Report, 1996, 48.
[479] *'How Can a Government Function if it Cannot Trust its Civil Servants?'* http://www.guardian.co.uk/commentisfree/2008/dec/16/whitehall-civil-liberties-response (accessed

A Crown servant may feel unable to discuss the issue with their line manager or nominated officer because of fears of reprisal, particularly if the person is involved in the matter he is reporting on. One must also envisage the Crown servant/ department relationship after the report has been published. Regardless of the outcome of the appeal the Crown servant may again fear reprisal, particularly if the report does not fall in his favour. The servant's position has the potential to become swiftly untenable once he is identified as the source of the compliant and consequently the desire to make an anonymous unauthorised disclosure may become an attractive proposition.

The British Standards Institute Code Practice for Whistleblowing Arrangements states that express provision for external disclosures 'which is not surrounded by caveats and conditions' should be included and that this would have a positive effect in ensuring that a concern is 'less likely to degenerate into a protracted personal battle.' However, there is no further opportunity to appeal if the Crown servant is dissatisfied with the findings and he is advised to 'leave the service.'[480]

It is submitted that the requirement to 'leave the service' if the Civil Servant is unable to seek a remedy through the Civil Service Commissioners is unhelpful. As the Civil Servant will most likely consider the appeal procedures and Civil Service Code before choosing whether or not to make an unauthorised disclosure the statement, without any further explanation, does not provide reassurance and may have the adverse affect that Civil Servants will be inclined to bypass procedures and make unauthorised disclosures as they would probably have to leave their job anyway as a result of the Commissioner's

18/12/08).

[480] Civil Service Code Para 19: http://www.civilservice.gov.uk/about/values/cscode/rights.aspx (accessed 12/02/10).

decision. If the Civil Service Commissioners are going to support and enforce the values of the Civil Service Code they must recognise that the need for consistent complaint handling and strong investigation and oversight of concerns is paramount to provide a realistic alternative to the unauthorised leaking of official documents.

The Commissioners most recently published guidance for Civil Servants on raising concerns.[481] Most interestingly, the new guidance identifies that it was published following the principles of the British Standards Code of Practice. The Commissioners cannot be consistent with the principles of the BSI code because the Civil Service Code carries the ultimate condition that if a Servant is not satisfied with the response he should leave.

The new guidance is a positive step towards promoting the involvement of the Commissioners in concern reporting. Prior to the guidance, very little information existed on how the Commissioners operate and handle concerns. The publication of three documents, one aimed at the Civil Servant, one aimed at the department and another setting out a general statement of remit and values will undoubtedly enhance the work of the Commissioners however the timing of the publication is too early to gauge the impact of the work.

The Civil Service Commissioners are not a prescribed regulator under s.43F PIDA and the former First Civil Service Commissioner Lady Usha Prashar had indicated that it would not be appropriate for the Commissioners to be prescribed.[482] Lady Prashar indentified that this was because of concerns that the general public would approach the

[481] http://www.civilservicecommissioners.org/Civil_Service_Code/Appeals_under_the_Code/ (accessed 12/02/10).
[482] Letter of from Baroness Usha Prashar CBE to Guy Dehn, Public Concern at Work, 25 July 2003.

Commissioners with complaints. Nevertheless it could be argued that if the Commissioners were prescribed under s.43F PIDA it would instil a greater degree of independence in the process.

It should be noted that regardless of any reporting mechanism in place, there will always be a person who disagrees with a decision or form of working practice. This may be for a moralistic reason or because of personal disillusionment with their position. There will always be unauthorised disclosures. But providing a clear and structured approach to the reporting and handling of concerns should discourage Crown employees from leaking documents to the media.

3.6.2 Publication of the Outcome of Investigations

Publication of the outcome of appeals in the public domain, in the form of reports such as those made available by the Parliamentary Commissioner would be a substantial improvement to Civil Service accountability. The introduction of the Civil Service Code provides a uniform code of standards, but it should not merely constitute a number of ideals. Enforcement of the Code would be best served if the information was readily available and consequently lead to a reduction in unauthorised disclosure. Special provision would be needed to ensure the protection of documents relating to national security, yet as the appeal procedures illustrate, the Commissioners are readily equipped to deal with such information.

It may not be appropriate for the details of investigations to be published with the identities of individual Civil Servants and their department revealed. Government

departments need to be able to make decisions quickly. Departments would undoubtedly stall if they had to seek public approval, and individual Crown servants would be reluctant to make politically sensitive decisions for fear of repercussions. However, there is nothing to prevent the Commissioners from publishing redacted information to protect the identities of the Civil Servants concerned.

The UK Civil Service Commissioners are also constitutionally an agent of Parliament and yet have no obligation to report findings to Parliament. The UK Parliamentary Ombudsman who is an agent of Parliament does report its findings of investigations to Parliament.[483] The publication of investigations by the Commissioners would therefore be a positive step towards improving Parliamentary oversight and a step away from unnecessary secrecy in the Civil Service.

3.6.3 The Case for Improved External Oversight

In giving evidence to the PASC the First Civil Service Commissioner, Janet Paraskeva said that she would refer the most serious cases to the Permanent Secretary or to the Head of the Home Civil Service Sir Gus O'Donnell. The Commissioner then stated that if Sir Gus O'Donnell failed to take action that the Commissioners had a duty to report and that she would report the matter to the PASC. When asked what would happen if a Civil Servant raised a concern that a minister was being untruthful on a matter of public

[483] It should be born in mind that the Canadian Public Sector Integrity Commissioner, as an agent of the Canadian Parliament, has a duty to report findings of investigations to the Canadian Parliament. Therefore there is scope for the publication of findings to Parliament without harming the interest of the individual or the department concerned.

interest, the Commissioner explained that she 'would go to the Cabinet Secretary' because:

> "If it is a matter of ministerial pressure being put on civil servants that is not a matter for us, as Commissioners, but it is a matter that the Cabinet Secretary would no doubt raise perhaps even with the Prime Minister."[484]

With regard to reporting to the PASC, there is a lack of information which states that in cases where the Civil Service Commissioners are unable to deal with whistleblower concerns they will refer the matter. Again, the approach lacks a clearly identifiable framework for civil servants who are unsure whether or not to blow the whistle, particularly in relation to breaches of the Ministerial Code. There is no assurance that the Commissioners will report to the PASC if such a situation occurred and furthermore there is no assurance that the PASC will be able to deal to appropriately deal with such a matter.[485]

3.6.4 Reporting and Investigating Ministerial Misconduct

With regard to reporting matters of ministerial pressure on Civil Servants the comments of the First Commissioner are worrying. If such a matter were to occur it would be referred to the Cabinet Secretary or the Prime Minister. The Cabinet Secretary is also the Head of the Home Civil Service, Sir Gus O'Donnell. Whilst the Cabinet Secretary has the authority to deal with complaints arising under the Ministerial Code the position places Sir Gus O'Donnell as ultimate arbiter of the complaint or if he refers the matter to the Prime Minister there is a clear conflict between the need to maintain accountable government and the potential political embarrassment caused by dealing with the

[484] Accessible via: http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmpubadm/c83-iv/c8302.htm (accessed 18/12/09).
[485] These concerns are fully addressed in the next section of this chapter.

complaint.

The current position places too much power in the hands of government and the Cabinet Secretary at the expense of clear Parliamentary oversight. There is a clear risk that if the Civil Service Commissioners refer a complaint to the Cabinet Secretary, emphasis will be primarily placed on the need for Civil Servants to serve the government of the day, rather than dealing with the alleged ministerial misconduct.

When Clive Ponting disclosed information to Tam Dalyell the then Cabinet Secretary Sir Robert Armstrong dealt purely with the unauthorised disclosure and did not deal with the ministerial misconduct. Similarly during the Christopher Galley leak investigation Sir Gus O'Donnell stated that the unauthorised disclosures were of a real risk to national security, a position repeated by then Home Secretary Jacqui Smith, claims later criticised by the Public Affairs Select Committee as an exaggerated impression of damage done by the leaks. Whilst it is understandable that a the Cabinet Secretary would not condone leaks by Civil Servants there is a risk, as a consequence of having a dual role of Cabinet Secretary and Head of the Civil Service, that by placing emphasis on the conduct of Civil Servants, the conduct of ministers may be overlooked.

The Civil Service Commissioners are under no obligation to refer the matter to the Cabinet Secretary. Currently investigations of alleged breaches of the Ministerial Code may be carried out the Independent Advisor on Ministerial Interests, Sir Philip Mawer, at the behest of the Prime Minister. Sir Philip must then report to the Prime Minister who then decides, what action, if any should be taken against the minister concerned. Whilst Sir Philip has unquestionable experience and integrity as former Commissioner for

Standards in Public Life, the current investigatory process lacks the necessary Parliamentary oversight.

In 2001 the PASC recommended that the Parliamentary Ombudsman should carry out investigations into ministerial misconduct.[486]Utilising the already existing mechanism would have provided the necessary oversight capability and co-operation with Parliament. However, following the appointment of Sir Philip's predecessor, the PASC were satisfied with the system despite the fact that the appointment inevitably meant an apparent lack of oversight from the PASC.[487] The next section will provide an analysis of the current role of the Parliamentary Ombudsman to consider whether the role could be enhanced to receive complaints from civil servants on matters falling under her current remit or under an extended remit to include investigation of breaches of the Ministerial Code.

3.7 The Parliamentary Ombudsman: A valuable deterrent against malpractice or a missed opportunity?

In the United Kingdom the Ombudsman allows members of the public, not Crown employees to raise issues against the state. The Parliamentary Commissioner for Administration or 'ombudsman' was established in the United Kingdom by the Parliamentary Commissioner for Administration Act 1967. Once described as providing MPs with 'a new powerful weapon with a sharp cutting-edge to be added to the antiquated armoury of Parliamentary questions and adjournment debates' and 'an extremely sharp and piercing instrument of investigation.'[488]

[486] *The Ministerial Code: Improving the Rule Book*, HC 235, Session 2000-2001, para 31.
[487] *The Ministerial Code: the Case for Independent Investigation,* HC 1457, at para 23.
[488]*The Parliamentary Commissioner for Administration*, Cmnd 2767, 1965; Hansard, H.C. Debs, 1966-67,

In the United Kingdom the Ombudsman sits uneasily between the requirements to adhere to an unwritten constitution, which places the concept of ministerial responsibility at the forefront, and the need to accurately highlight cases of maladministration and malpractice with the aim of promoting good, accountable governance. Most importantly, the Ombudsman can only receive complaints from Members of Parliament on behalf of the public[489] (the so-called 'MP filter') and must report the result of her findings to the Member of Parliament concerned.

3.7.1 Crown Servants and the Parliamentary Ombudsman

In 1969 the Select Committee discussed whether the Civil Service, the armed forces and other Crown appointments should be given access for the purpose of reporting concerns relating to personnel matters.[490] The government presented a memorandum to the committee strongly opposing any such additions to the office's remit. It stated that the Ombudsman scheme concerned the relationship between the government and the governed, rather than the government as employer. Furthermore it stated that allowing such access would make the service a 'privileged class' affording them access to the Ombudsman when other employees would receive no such privilege (and one must also consider that members of the general public do not have the right of direct access to the Ombudsman, instead being reliant upon the MP 'filter'). Also it was considered that Crown servants already had access to their staff associations and that this would be harmed as a result of allowing Crown servants access to the machinery.

Cols 44, 49 and 60. See also R.Gregory and J.Pearson, *The Ombudsman: Twenty Five Years On (*Cavendish, London, 1993) Ed. N.Hawke, 10.

[489]Section 5.1 (a) Parliamentary Commissioner for Administration Act 1967.

[490]The Committee debates are detailed at length in R. Gregory & P. Huchinson, *The Parliamentary Ombudsman: A study in the Control of Administrative* Action (George Allen & Unwin, London, 1975) 559.

There is a notable distinction between the reporting of personnel issues and the reporting of instances of maladministration. Personnel issues may be largely regarded as an internal matter, concerning the relationship between the state as employer and employee. However one must ask if instances of maladministration should also be regarded as an internal matter, bearing in mind that the consequences of such action may indeed affect the relationship between the government and the governed.

Whilst the Civil Service Commissioners present an independent body to report concerns, their office can be largely regarded as a last resort, whereby an approach is made after the Civil Servant has failed to seek redress from approaching their line manager or staff councillor. It is also notable that the reports of such appeals are confidential. When the facts in issue concern information of high public importance one might again argue that such information should be available in the public domain.

In justifying the original Parliamentary Commissioner for Administration Bill the Labour government had placed considerable emphasis on the fact that the Ombudsman should be a servant of MPs rather than of the general public. This was considered as necessary to allay MPs concerns that their own duty of fielding complaints from constituents would diminish as a result of the Ombudsman entering office.[491] However, the Parliamentary Ombudsman is now an established part of the constitutional framework. Indeed, the Select Committee has identified the Ombudsman scheme as 'part of the fabric of the UK's unwritten constitution.'[492] By allowing members of the public to directly approach the Ombudsman, the position is redefined as a servant of the people. The most logical

[491] See further R.Crossman, Leader of the House of Commons, Parlaimentary Debates (Commons) 5th Ser. 734. (1966) 42-43, 47-48, 51. W.B. Gwyn. *Ombudsman or Ombudsmouse?* [1973] *J POLIT* 35 1, 50.
[492] First Report from Select Committee, 1990-1991, HC 129, 19 December, 1990.

solution to this would be to allow members of the public to make complaints directly to the Parliamentary Commissioner. The unsuccessful Parliamentary Commissioner (Amendment) Bill 2004 made provision for complaints to be made not only to MPs, but also directly to the Commissioner.[493]

3.8 Parliamentary Select Committees: External Oversight?

In written evidence to the PASC, Public Concern at Work suggested that the chairman of an appropriate select committee, such as the PASC should be made a prescribed regulator under s.43F PIDA.[494] This was on the basis that the Civil Service Commissioners had expressed that it would not be appropriate for them to be a prescribed regulator under s.43F. It would mean that Civil Servants would have PIDA protection if they reported a concern directly to the chairman of a select committee, provided that they made the disclosure in good faith and that the information disclosed and any allegation contained in it was substantially true.

The PASC recommended in their report that a Civil Servant should be allowed to go directly to the PASC as a last resort.[495] Protection for Civil Servants to go directly to a chairman of a select committee is similar to the US approach for members of the CIA who may report their concerns to a senate committee, albeit with management approval.[496] Making an approach directly to a select committee would not be without its own problems and this chapter will now progress, in the light of these recommendations, to consider the work of Select Committees and Civil Servants appearing before them.

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[493] Cl.2 Parliamentary Commissioner (Amendment) Bill 2004.
[494] http://www.pcaw.co.uk/policy/policy_pdfs/PASCWBinWhitehallPCAWJan09.pdf (accessed 12/01/10).
[495] http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf at para 36 (accessed 12/02/10).
[496] See further: Chapter 6, Section 6.6.4 of this thesis.

Parliamentary select committees provide a mechanism of Parliamentary oversight which extends beyond the rowdy confines of the Commons chamber. Committees are staffed by senior backbenchers and are headed by a chairperson whose own selection process is somewhat dominated by the influence of party whips. There are advantages to Select Committees in that they choose to investigate any matter which comes under the terms of their remit whereas the Civil Service Commissioners or Parliamentary Ombudsman would have to accept a complaint before investigating. The clear disadvantage is that their investigatory work is limited to persons giving evidence before the Committees, unlike the Parliamentary Ombudsman and the Civil Service Commissioners who have access to investigate within departments. It may be argued therefore that this limits the questions that the committee can ask to the information it knows about which will most likely already be in the public domain. The next section will consider the role of ministers and Civil Servants giving evidence before Select Committees.

3.9 Civil Servants and the Osmotherly Rules

Parliamentary Select Committees maintain the right to summon named civil servants to give evidence[497] however, in practice civil servants give evidence on behalf of ministers and may be instructed not to disclose certain information as the minister sees fit. A memorandum of Guidance issued to senior civil servants, identifying what should and should not be discussed before Select Committees reaffirms the notion of executive control:

> "Officials appearing before Select Committees do so on behalf of their ministers. It is accordingly government policy that it is for ministers to

[497] *Departmental Evidence and Response to Select Committees*, para 42.

decide which officials shall give evidence to Select Committees on their behalf…If, however a Select Committee summoned by name any other official to appear before them, and insisted on their right to do so, it would be for the ministers to decide what course to follow. The formal constitutional position is that although a committee's power under their terms of reference to summon persons and papers is normally unqualified, such a summons is effectively binding only if backed by an Order of the House."[498]

In the Westland Affair the Defence Committee sought evidence from five named Crown Servants. The Government resisted the requests. The Secretary of State for Trade, Paul Channon did not "regard it as appropriate" that the officials attend.[499] Similarly, the Secretary of the Cabinet stated that he had conducted his own inquiry and held the belief that it would 'neither be fair nor reasonable' to 'expect these officials to submit to a second round of detailed questioning, of the sort that would be involved in giving evidence to your Committee.'[500]

The attendance of five named officials was substituted for evidence given by Sir Robert Armstrong, author of the infamous Armstrong memorandum.[501] Not only did Armstrong request the utmost loyalty to Government from servants but he also assisted in preventing those officials from giving evidence. In reality the appearance of Crown servants at Select Committees, is meaningless if they are instructed by their ministers to answer questions in a certain way or not at all.

If a minister is personally involved in an act of malpractice, the opportunity to frustrate the Committee and prevent an accurate representation of the facts is a very real possibility. This factor was made particularly apparent when the Trade and Industry Committee attempted to make inquiries into the tin crisis of 1985-86. Upon questioning

[498] *Ibid.*
[499] B. Hayes, Permanent Secretary to the DTI, Letter to the Clerk of the Defence Committee, 29 January 1986.
[500] Letter to the Clerk of the Defence Committee, 4 February 1986.
[501] HC 519 (1985-86).

Civil Servants the Committee was faced with a series of refusals to answer questions resulting in an inaccurate representation of the facts meaning that the Committee had to base their conclusions 'in some cases' on 'second hand evidence and on supposition' and that the fault for this 'lies with ministers.'[502]

Former Crown servants were also being prevented from the opportunity to testify before the Treasury and Industry Committee, in the Supergun Inquiry.[503] The inquiry was called after Customs and Excise officials alleged that the Matrix Churchill Company had breached export regulations after exporting machine tools to Iraq for use in the construction of a 'supergun'. It later emerged that the government had authorised the exports and MI6 were fully aware of the fact. Tristan Garel-Jones, Malcolm Rifkind, Michael Heseltine and Kenneth Clark refused to disclose information relating to communication between the Department of Trade and Industry and the Foreign and Commonwealth Office at the trial of the directors of the company. The case collapsed after former Defence Minister Alan Clark, in defence of Matrix Churchill revealed that the government were fully aware of the exports. In his report Sir Richard Scott was highly critical of the decision and did not accept the contention that retired Crown servants lack up to date information and therefore could not 'contribute directly to his accountability to the House'.[504] Scott Believed that the former servants were:

> "Primary witnesses to the facts…Far from being unproductive; their evidence would have been highly pertinent and helpful. A minister's duty to account to Parliament for what his department has done ought…to be recognised as extending…to an obligation to assist an investigating Select Committee to obtain the best first hand evidence available on the matters being investigated. The refusal to

[502] Second Report, Trade and Industry Committee, HC 305-1 of 1985-6, para 12.

[503] The prevention of Crown Servants testifying before Select Committees has been noted to extend to the intelligence services, see *Shifting the Balance: Select Committees and the Executive* HC 300 (1999/2000), para 92

[504] Rt. Hon. Sir Richard Scott, VC, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HC 1995-95, 115, Gen Notice 80/38, Para 44. Also see P. Birkinshaw, *Government & Information: The Law Relating to Access, Disclosure & Their Regulation* (3rd Ed, Tottel, Haywards Heath, 2005).

facilitate the giving of evidence…may be regarded as a failure to comply fully with the obligations of accountability owed to Parliament."[505]

The inability of Select Committees and inquiries to successfully hold the Executive to account, largely due to efforts by ministers to offer as little assistance as is required is counterproductive, not only because it fails to give an accurate representation of the facts, but because it is more likely to prompt Crown servants to leak. The impact of this is most important in considering whether a Crown servant could in practice approach a Select Committee directly.

In going externally to the PASC the whistleblower would need reassurance that the Select Committee would be able to conduct an effective investigation. It is therefore difficult to envisage how an investigation would be conducted thoroughly if a minister chose to frustrate such an investigation. Furthermore, one must then ask what role the potential whistleblower would take in the process. By their very nature, Select Committees are reliant upon people giving evidence before them. This creates a significant difficulty for the whistleblower that is traditionally seen as a witness to wrongdoing or malpractice. However, whilst a select committee could convene a private session or give immunity from prosecution, unlike a witness in a court of law, a whistleblower appearing before a select committee would not be subject to the correct standards imposed on courts with regards to advocacy, witness and evidence handling. Despite the best intentions of the members of Select Committees it must not be forgotten that those members are elected members of Parliament. Perhaps unfairly an example of a whistleblower being handed particularly harsh questioning by members of a Select Committee is Dr David Kelly.[506]

[505] *Ibid*, para F4 66.
[506] Oral Evidence of Dr David Kelly to Foreign Affairs Committee, 15th July 2003,

It is submitted that whilst there is considerable value in the work carried out by Select Committees the involvement of Crown servants in the Select Committee process is deeply problematical, partly because of the traditional doctrine of ministerial responsibility and the Osmotherly Rules and partly because since the introduction of the Civil Service Code, Civil Servants have a clear duty of political impartiality.

A Civil Servant who blew the whistle to a Select Committee would clearly breach the Code. Firstly, Civil Servants have a duty of confidentiality and must remain politically impartial. Both requirements mean that an approach to a Member of Parliament would break the Code. Secondly, Civil Servants do not have access to report concerns to the Parliamentary Ombudsman. Select Committees would be best placed to investigate the work of the Civil Service Commissioners.

A welcome reform would be to build upon the recommendation of the PASC report to allow the Commissioners to report to Parliament, and perhaps the best forum would be the PASC.[507] This would have the dual benefit of allowing the Civil Service Commissioners to conduct a thorough investigation whilst still allowing the necessary involvement of the Select Committee by providing Parliamentary Scrutiny. It is therefore submitted that in cases where an extensive investigation is required the Civil Service Commissioners should produce a 'special report,' similar to those provided by the Parliamentary Ombudsman and the Intelligence and Security Committee, which can then be made available to the PASC. This proposal is both consistent with constitutional

http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/uc1025-i/uc102502.htm (accessed 12/09/10).

[507] HC 83 accessible via: http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf at para 34 (accessed 12/02/10).

convention and the Civil Service Code. In the next section, this study will consider whether the Parliamentary Ombudsman be made available to receive whistleblowing concerns from Crown Servants. The next section provides analysis of public inquiries and Crown Servants appearing before them.

3.10 When Things go wrong: Public Inquiries

The role of public inquiries as a mechanism of public accountability is of great importance to the aim of this thesis. It is submitted that some of the most important investigations into Executive malpractice, if not all over the last 25 years have involved either a leak of information or the involvement of a 'whistleblower.' The Westland affair –for instance- involved the leak of a letter by MP Michael Heseltine to the press, which later resulted in the Cabinet Secretary conducting his own inquiry. Later notable scandals resulted in full scale public inquires. This section provides an overview of whistleblowers that have appeared before inquiries.

The Scott Inquiry concerned an inquiry into the export of parts by the Matrix Churchill Company to Iraq.[508] It was found that the parts could be used in the manufacture of weapons. Matrix Churchill had the permission to export the parts following a relaxation in export rules; however the then Secretary of State, Alan Clark had failed to inform Parliament of the change in the rules when asked if the rules had been relaxed in a Parliamentary question had denied that a change in the rules had taken place. The company was prosecuted by HM Customs on the basis that they did not have permission to export the parts. At trial, Public Interest Immunity certificates were obtained by the

[508] Sir Richard Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, 321.

government on national security grounds. The judge later overturned the certificates and the trial collapsed after Alan Clark MP admitted that he had been 'economical with the actualite.'

It later emerged that a Matrix Churchill company employee had sent a letter to the Foreign Secretary, Sir Geoffrey Howe and the Security Service identifying that the company was exporting parts which could be used in the manufacture of shell casings. Michael Heseltine refused to sign a PII certificate for fear that if he did so and the employee went to the press during the trial he would be accused of a cover up.[509]

In 2003, retired judge Lord Hutton chaired an inquiry into the death of Dr David Kelly, a biological weapons specialist and former United Nations weapons inspector in Iraq who was employed by the Ministry of Defence. Dr Kelly had spoken 'off the record' to BBC journalist Andrew Gilligan claiming that a dossier detailing Iraq's capabilities to launch weapons of mass destruction had been exaggerated or "sexed up" in order to provide justification to invade Iraq. Following BBC news reports, Dr Kelly was exposed as the source of the information and was subjected to questioning by the Foreign Affairs Select Committee. Dr Kelly was later found dead in woodland near his home and had apparently committed suicide. During the course of the Inquiry, Lord Hutton heard testimony from another apparent whistleblower, Dr Brian Jones. Dr Jones, an employee of the Defence Intelligence Staff, had expressed reservations about the worth of the intelligence contained in the dossier and had waited until he left employment before writing a letter to Sir John Scarlett, chairman of the JIC.

[509] *Ibid* at para D2.318.

The Review of Intelligence on Weapons of Mass Destruction[510] was a Privy Council inquiry, chaired by Lord Butler. The inquiry, more commonly known as the 'Butler Review' specifically focussed upon the intelligence relating to Iraq's WMD capability. Carne Ross, a UK diplomat testified before the inquiry that during his time in Iraq the UK government did not assess WMD to pose a threat.[511] Ross opined that there were viable alternatives to the invasion of Iraq and believed that the actions of Saddam Hussain could be curtailed by putting a stop to illegal oil exports by the regime. Carne Ross later resigned from the diplomatic service and testified before the Iraq Inquiry.[512] The Iraq Inquiry, chaired by Lord Chilcott, also heard evidence from Elizabeth Wilmshurst, a former Deputy Legal Adviser to the Foreign Office. [513] Wilmshurst resigned in 2003 after the government reversed her legal opinion that the invasion of Iraq would be illegal without a second UN Resolution. Whilst the reasons for her resignation were not made public at the time, the letter was made available after a Freedom of Information Act request two years later.[514]

Most interestingly, the Saville Inquiry into the events of 'Bloody Sunday' took the extraordinary step of receiving testimony from both David Shayler and his partner, also an ex-Security Service employee Annie Machon. This has relevance because surprisingly David Shayler was due to stand trial for offences of unauthorised disclosure under the Official Secrets Act 1989. The Security Service has since denied all of David

[510] HC 98, The Review is accessible here: http://www.archive2.official-documents.co.uk/document/deps/hc/hc898/898.pdf (accessed 09/10/10).
[511] Note that the Mr Ross' statement before the Butler Review is not accessible on the review website nor is Ross identified in the Review. Carne Ross did however attach his statement to the Butler Review in his evidence to the Iraq Inquiry, accessible below.
[512] The inquiry was launched on 30th July 2009 and at the time of writing is yet to conclude. Statement of Carne Ross http://www.iraqinquiry.org.uk/media/47534/carne-ross-statement.pdf (accessed 09/10/10).
[513]Transcript of testimony of Elizabeth Wilmshurst http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf (accessed 09/10/10).

[514] *'Wilmshurst Resignation Letter,'* BBC News Website, http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm (accessed 10/09/09)

Shayler's allegations. Intelligence officers were then questioned on Shayler's testimony.[515] Before considering the position of a Crown servant appearing as a witness before a public inquiry it is first necessary to consider how a public inquiry is set up.

3.10.1 Formation of an inquiry

From the outset a government minister will decide whether or not to hold a public inquiry. The decision will be made whether to hold an inquiry under the terms of the Inquiries Act 2005 or on an 'ad hoc' basis, meaning that the Inquiry will not be subject to the legislative framework provided by the 2005 Act. Under s.1 Inquiries Act 2005 any minister can set up an inquiry if 'particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred.'

If a minister decided to hold an inquiry he may then choose a single chairman or a panel to conduct the proceedings. If the minister decides to appoint a judge, he is required under s.10 of the Act to 'consult with' the Lord Chief Justice as to the proposed appointment of judges. A Commons Library research paper highlights that an inquiry with a judicial figure as its chair might be referred to as a 'judicial inquiry' but that the term is 'simply descriptive.'[516] The advantage of placing a judicial figure in the role of chairman gives the inquiry legitimacy, in that the qualities of independence and thorough analysis are observed by way of association. A government consultation paper stated that the government believes that it can be appropriate for judges to chair inquiries because

[515] At the time of writing the findings into the inquiry are yet to be published, however see inquiry website: http://www.bloody-sunday-inquiry.org/transcripts/Archive/Ts328.htm (accessed 10/09/09). See also article by Shayler in the New Statesman whereby he discussed the inquiry's interested in what he has to say: http://www.newstatesman.com/200101220005 (accessed 10/09/09).

[516] K. Parry, *Investigatory Inquiries and the Inquiries Act 2005*, House of Commons Library 2007, SN/PC/2599.

'their experience and position make them well rounded individuals.'[517] The clear disadvantage is that a public inquiry is not a court of law and this places significant limitations on the powers and witness handling of inquiries.

Section 5 of the Inquires Act affords ministers the power to decide the terms of reference of the inquiry. He also has the power to amend the terms of reference at any time if he considers that 'the public interest so requires.'[518] The minister is required to consult with the person he has appointed as chairman,[519] when setting or amending the terms of reference but is not obliged to consult with any other person, or indeed with Parliament. After making such a change he must then inform Parliament by way of a ministerial statement, although at this stage Parliamentary involvement in the process may be regarded as minimal. In practice the chairman and any other members of the inquiry panel are empowered to investigate or make conclusions on information within the limitations of their prescribed remit. If the chairman finds information which is highly relevant to the facts in issue but which goes beyond the scope set by the terms of reference, the minister may inform the chairman of this, and may refuse to provide funding for such actions.[520]

The minister may also make use of further provisions to restrict public access to the inquiry proceedings. He may prevent public attendance to the proceedings or any part of the proceedings[521] and may restrict 'disclosure or publication of any evidence or documents given, produced or provided to an inquiry' as per section 19 (1) (b).

[517] Government Consultation Paper, DCA, *Effective Inquiries*, CP 12/04 (6 May 2004) Para 46. The comment is in marked contrast to attitudes in the United States whereby the US Supreme Court in *Mistretta v United States* 488 U.S. 361 (1989) ruled that the use of judges in inquiries was unconstitutional.
[518] Section 5 (3) Inquiries Act 2005.
[519] Section 5 (4) *Ibid.*
[520] Section 39 *Ibid.*
[521] Section 19(1)(a) *Ibid.*

Subsection (4) details the particular matters and effectively proscribes a harm test which balances the potential damage caused by restriction of information which might inhibit the allaying of public concern[522] against any risk of 'harm or damage' which could be 'avoided or reduced by such a restriction.'[523]

The minister has the power to wind up the inquiry before completion under Section 14 if he delivers a notice to the chairman that this is so. Under Section 24 the chairman is required to report his conclusions first to the minister in question who will then deliver the report before Parliament.

It is important to note that regardless of the powers afforded by the Inquiries Act 2005 the Executive may still if it so chooses, create an ad hoc inquiry. The Deepcut Review was conducted on such a basis. The Review, an investigation into the deaths of four soldiers at Deepcut Barracks in Surrey, whose families believed the deaths were not suicides, was conducted by a human rights lawyer, Nicholas Blake QC.[524] Crucially, Blake chose not to conduct the inquiry in public as he acknowledged that 'the Army was not required to have one.'[525]

The Butler Review into the intelligence behind Iraqi weapons of mass destruction was also conducted in private. Again, the inquiry was set up on an 'ad hoc' basis and a number of Privy Councillors formed the inquiry panel and were given full access to the

[522] The 'harm or damage' criterion contains a number of definitions: risk of death or personal injury, damage to national security and international relations, damage to United Kingdom economic interests and damage caused by disclosure of economically sensitive information s 19(4)(b) *Ibid.*
[523] *Ibid.*
[524] The Deepcut Review: A Review of the Circumstances Surrounding the Deaths of Four Soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002, accessible via: http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf
(accessed 10/10/10).
[525] *Ibid.*

material in private. The panel was intended to be made up of representatives from all three major political parties. However the then foreign affairs spokesman, Menzies Campbell explained that the Liberal Democrats opted out of the review because it 'excluded politicians from scrutiny.'[526] This analysis will now progress to consider Crown servants appearing before public inquiries.

3.10.2 The Crown Servant as Witness

The aforementioned analysis has illustrated that public inquiries are most often formed on an ad hoc basis, meaning that the nature and function of the inquiry will often differ depending on decisions made by the minister who decides the terms of reference and who selects the inquiry chairperson/ committee. Whether the minister appoints a chairperson with a judicial background or a person of standing, for example a privy counsellor, will often shape how the inquiry is set up. The Iraq inquiry provides the most recent example of a team of Privy Counsellors who are tasked with asking probing questions to witnesses.[527] In the Hutton Inquiry such examination was carried out by the respective representative's legal teams. Most importantly both inquiries were not a court of law. A question therefore arises as to how the Crown Servant as witness can give evidence in a setting which exists outside the courtroom.

In order to facilitate and encourage the giving of evidence at a public inquiry several measures may be put in place. Section 37 (1) (c) Inquiries Act 2005 affords immunity from suit to 'a person engaged to provide assistance to the inquiry' provided that such evidence is given in good faith. Furthermore, the witness is protected from subsequent

[526] Hansard, HC Debs, 3rd Febuary 2004, col 631.
[527] See 'about the inquiry' accessible via: http://www.iraqinquiry.org.uk/about.aspx (accessed 13/10/10).

actions in defamation for ‘any statement made in or for the purposes of proceedings before an inquiry and reports of proceedings before an inquiry’ as would be ‘the case if those proceedings were proceedings before a court in the relevant part of the United Kingdom.’ Other measures available are not part of the Inquiries Act 2005, and in keeping with the nature of the inquiry process have been implemented on an ad hoc basis.

During the Scott Inquiry the government gave its ‘lawful authority’ to witnesses to disclose ‘official information’ to the Inquiry meaning that the ‘normal constraints’ imposed by the Official Secrets Acts were ‘effectively suspended.’ Such disclosure was dealt with by allowing hearings to go into closed session if the disclosure of information posed a risk to national security. Furthermore, in the ‘interest of securing full and honest testimony’ evidence given by witnesses would not be used in evidence in any subsequent prosecutions, this provision was afforded by the use of an ‘undertaking’ given by the Attorney General. Such arrangements are not superseded by the Inquiries Act 2005.

The Cabinet Secretary also gave an assurance that any ‘admissions made during testimony’ before the Scott Inquiry would not be used in subsequent disciplinary proceedings against them. This assurance was facilitated by the sending of a letter to the heads of the Civil Service departments. The assurance contained two limitations. Firstly, that the Civil Service reserved the right to take disciplinary action against a Servant if the evidence given before the inquiry ‘turned out to be false’ or ‘incomplete.’ Secondly, the exemption did not extent to information already available to the Government from sources other that witness testimony at the inquiry.

The question of whether a public inquiry should be provided with an undertaking to encourage witnesses to give full and frank testimony raises several considerations. It may be argued that an undertaking from the Attorney General to give an assurance that evidence given before an inquiry will not be used in a subsequent prosecution is necessary in situations whereby the Crown Servant as witness may disclose information protected by the Official Secrets Acts. The government during the time of the Scott Inquiry dealt with the Official Secrets Act issue well by giving 'lawful authority' thereby authorising any disclosures of material normally protected by the OSA to the Inquiry.

The Hutton Inquiry provided a degree of protection for witnesses to speak freely. According to the Inquiry website, the inquiry was 'protected from any legal proceedings coming from information disclosed during the Inquiry, e.g. slander and libel, so long as publication of that material is consistent with the needs of the Inquiry.'[528] However, there is no information from either the inquiry report or the available evidence on the Inquiry website that the Attorney General gave an undertaking that evidence given before the inquiry would not be used in any subsequent prosecutions. The Inquiry did state that witnesses should seek their own legal advice on legal protections required.

In a similar way to the undertaking given to the Scott Inquiry, the Cabinet Secretary did provide Lord Hutton with an undertaking that Civil Servants would not be disciplined for information given in evidence before the inquiry. The undertaking contained two exceptions. Firstly, that it did not apply to Civil Servants who were charged with

[528] http://www.the-hutton-inquiry.org.uk/content/faq.htm (accessed 03/01/2010).

deliberately misleading, lying, or deliberately omitting information before the inquiry. Second, whilst preventing departments from investigating information amounting to 'possible misconduct' the undertaking did not apply to allegations of misconduct so serious 'that it would justify summary dismissal for gross misconduct' and that such information could be used in subsequent disciplinary proceedings.'[529]

The use of such evidence in disciplinary proceedings may be deemed as overly restrictive in comparison to the undertaking provided to the Scott Inquiry. The Cabinet Secretary's letter stated that the government required Civil Servants to give 'full and frank testimony.'[530] However, by including the threat that evidence may be used against them at a disciplinary hearing, the exception to the undertaking is more likely to create the opposite effect. The function of a Public Inquiry is not to operate as a court of law, nor to apportion blame but to act as a mechanism to determine the truth of a situation in order to learn lessons from it.

An undertaking which relates to assurances that disciplinary action will not be taken against Crown servants who give evidence before an Inquiry was considered at length at the Baha Mousa Inquiry whereby the Inquiry Chairman drew a clear distinction between an undertaking to protect someone from disciplinary action if he gives evidence of his own misconduct and a person who gives evidence of someone else's misconduct.[531] This raises the question of what protection is available for Crown Servant who gives evidence

[529] *Ibid.*
[530] Note also that the Cabinet Secretary provided a letter for disciplinary immunity in the Butler Review, interestingly because the hearings were conducted in private this limited the potential risks of actions taken against witnesses, for a link to the letter see further: http://www.cabinetoffice.gov.uk/404pagenotfound.aspx?originalUrl=http://www.cabinetoffice.gov.uk/publications/reports/secletter/indem_let.pdf (accessed 06/09/09).
[531] See Rt. Hon Sir William Gage, *Rulings (First Direction Hearing)* at para 4. http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf

of the misconduct of others. The Saville Inquiry and the Deepcut Review allowed for some witnesses to give anonymous testimony, thus limiting the opportunity for recrimination against those witnesses.

3.11 Conclusion

3.11.1 Theoretical Model

The Civil Service Code requires Civil Servants to be politically impartial; this read in conjunction with the constraints imposed by the Civil Service Management Code creates a barrier to the expression of value judgements. Because of the nature of the work that Civil Servants do, any expression of opinion on such work is likely to be considered as a statement of political expression. Such communication could lead to disciplinary action for breaching the respective codes. This is contrary to the spirit of the arguments that communication can enhance the individual and that it can aid participation in a democracy. Whilst the restrictions may be considered an acceptable consequence of employment in the Civil Service, one must question what should happen if a Civil Servant believes that a policy decision taken is so fundamentally wrong or that an issue has been so grossly mismanaged that the public have a right to know. This argument gathers strength when applying the theoretical justification that communication can enhance the participant audience. Currently, the Public Interest Disclosure Act does not protect the expression of value judgements; as a consequence it will be most difficult for the Civil Servants who act as protest whistleblowers to obtain protection.

3.11.2 The Legal Model

4.11.2.i The Public Interest Disclosure Act: application to art.10 values

This chapter has argued that the Public Interest Disclosure Act is consistent with article 10 ECHR values in that it offers protection for disclosures raised in the public interest. The framework in *Guja v Moldova* requires the court to ascertain whether the whistleblower first attempted to raise concerns by using channels made available by the organisation or by contacting an appropriate authority. The first step in the disclosure regime provided by PIDA, to an employer or to an individual designated to receive concerns, actively promotes internal disclosures because protection is most easily available. The next level in PIDA, disclosure to a 'prescribed person,' requires that the information must be 'substantially true.' With regard to wider disclosures, the claimant must satisfy a more stringent evidential test. Section 43G (2) closely mirrors the test formulated in *Guja v Moldova* by requiring the claimant to have a reasonable belief that if he raises a concern with his employer he will be subjected to detrimental treatment or that information will be concealed or destroyed. The claimant may also obtain protection if he has raised concerns to his employer or a prescribed person of substantially the same information, this provides a 'safety valve' to allow for protection where the available mechanisms have failed and is consistent with the reasoning in *Guja* that public disclosure should be a 'last resort.'[532]

4.11.2.ii The effectiveness of current available mechanisms

In determining whether an act of whistleblowing will be protected by art.10 ECHR a

[532] For further discussion see chapter one of this thesis.

court will need to first determine whether the applicant had alternative channels for making the disclosure and, second, whether those channels are effective. It is submitted that the reasoning in *Guja v Moldova* creates a positive obligation on public bodies to implement effective whistleblowing mechanisms.

The work and respective remit of each accountability mechanism discussed in this analysis has the goal of either providing oversight of government departments, Executive action, ministers and Civil Servants and yet the accountability mechanisms are not often discussed together. The relationship and means of direct contact between Civil Servants and the Civil Service Commissioners is unclear, the work of the Ombudsman provides detailed investigation of government departments without being able to look into the conduct of the minister in charge of the department. The Independent Advisor on Ministerial Interests is responsible for carrying out investigations of breaches of the Ministerial Code but he must have prior authorisation from the Prime Minister to carry out the investigation and to report to Parliament.

Crown Servants owe a duty of loyalty to their minister and also to the government of the day. However, paragraph 8 of the Civil Service Code makes it clear that Civil Servants 'must not deceive or knowingly mislead ministers, Parliament or others.' The Code states at paragraph 13 that Civil Servants must be politically impartial. The provisions of the code are undoubtedly in conflict, particularly in situations whereby the Crown Servant observes Executive malpractice. Paragraph 18 of the Code states that if the matters cannot be resolved and that a Civil Servant feels that he cannot carry out the instructions he has been given he will have to resign from the Civil Service.[533]

[533] http://www.civilservice.gov.uk/about/values/cscode/rights.aspx (accessed 06/01/10).

Paragraph 18 places considerable importance on the Civil Service Commissioners to carry out their role effectively. There is a clear risk that a Crown servant who reads this passage may believe that he is better off making an unauthorised disclosure because he does not have trust in the Civil Service Commissioners to appropriately deal the concern and believes that he would have to leave the Service anyway.[534] Paragraph 18 creates an unnecessary 'chilling effect' and ought to be removed in order to build greater confidence in the Civil Service Code and internal provisions. Paragraph 18 is currently inconsistent with the spirit of Public Interest Disclosure Act which allows employees to take a detriment claim. A detriment claim may be made whilst the employee is still working at the organisation. Regardless of whether or not his claim is successful before an Employment Tribunal, the employee may continue to work in his position unhindered.

With regards to reporting concerns internally, if a Crown servant observes malpractice he may approach his line manager or alternatively his nominated officer. The PCaW Whistleblowing in Whitehall report found that the level of support offered through the nominated officer system differed from each department.[535] Whilst it may be observed that different government departments will have different internal structures and administrative practices it is noted that all Civil Servants must observe the same Civil Service Code. It therefore seems appropriate that a consistent level of support via the nominated officer system should be provided throughout the Civil Service. The author

[534] A proposition is supported by journalist David Henke that leaks mostly came about because the civil servant was 'concerned about a specific issue and became exasperated with internal processes' and that 'between 70% and 80% of civil servants who had leaked material to him had made some attempt to pursue the matter through official channels.' HC 83 at 70: http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf (accessed 02/02/10).

[535] Accessible via: http://www.pcaw.co.uk/policy/civilservice.htm see in particular p.10 (accessed 02/02/10).

proposes that in order to build consistency in the process the Civil Service Commissioners should provide training to nominated officers and should maintain a level of enhanced oversight over the respective nominated officers.

The Civil Service Commissioners are not consistent with the stepped disclosure regime created by the Public Interest Disclosures Act 1998. The Committee on Standards in Public Life stated clearly in their Third report that in order for a whistleblowing mechanism to work effectively employees should be able to go outside of the organisation in order to report the concern. The Civil Service Commissioners are not currently prescribed under PIDA. It is submitted that making the Civil Service Commissioners a prescribed regulator under PIDA would highlight their independence and bolster confidence in their office.

With regards to complaints of ministerial conduct, the Civil Service Commissioners cannot investigate. In evidence to the PASC inquiry, Leaks and Whistleblowing in Whitehall, the first Civil Service Commisioner Janet Paraskeva, said that she would refer such complaints to the Cabinet Secretary. Currently, no specific individual or organisation exists to assess complaints against ministers. Investigations may be carried out by Sir Philip Mawer the Independent Advisor on Ministerial Interests but Sir Philip must be instructed by the Prime Minister to investigate. The decision to make public the outcome of the investigation is made by the Prime Minister alone.

The doctrine of ministerial responsibility means that the Prime Minister is 'ultimately responsible to Parliament for the conduct of his administration.'[536] This provides an

[536] http://www.cabinetoffice.gov.uk/media/135230/mawer_annualreport.pdf (accessed 05/01/10).

obstacle to independent scrutiny of ministerial conduct. A compromise is therefore required between the aforementioned doctrine and the need for an independent investigatory mechanism. It is submitted that a new commissioner is needed with the power to investigate concerns without needing the permission of the Prime Minister. The Commissioner should be able to submit his report to the Prime Minister and allow the Prime Minister a reasonable time frame, perhaps 21 days, in order to make corrective action. It would be for the Commissioner to report his findings to Parliament. This new role would effectively provide more 'teeth' than the current Independent Advisor on Ministerial Interests whilst recognising the Prime Minister is ultimately responsible for the conduct of his ministers.

With regards to the role of the Parliamentary Ombudsman, It is submitted that if a member of the public is having difficulty with a government department and is alleging malpractice, the Crown servants who work in the department may be most likely aware. It therefore makes sense that if the Crown servant is aware that a member of the public has been mistreated he should be able to provide the Ombudsman with such information.

It is submitted that to allow Crown servants to go directly to a Parliamentary committee may impair their obligations to remain politically impartial. Moreover, the Osmotherly Rules make it particularly difficult for a Crown servant to appear before a committee and make an independent contribution. The European Court of Human Rights has identified that Civil Servants may consent to certain restrictions of their article 10 rights upon entering employment with the Civil Service. Certain restrictions designed to limit political expression rights may therefore be proportionate to maintain political neutrality.

PIDA does not provide mechanisms to investigate concern or provision for the concern to be investigated. The employment protection is a secondary motivation and the use of PIDA will only be necessary if the Servant suffers a detriment as a result of raising the concern. It is of paramount importance therefore, that robust mechanisms are in place to effectively deal with whistleblower concerns.

It is submitted that the difficulty created by apparently inconsistent and uncertain authorised mechanisms should be contrasted with the apparent ease in which an individual may leak documents via an online outlet such as *Wikileaks*. It may be identified from the aforementioned analysis that anonymous whistleblowing via the official channels may result in suspicion caused by the recipient of the message who may not be able to assess the information or identify the wrongdoing involved without seeking an explanation from the communicator. Conversely, by leaking information to the public, those working for the official accountability mechanisms lose the opportunity to deal with the wrongdoing internally. It was identified in chapter two of this thesis that anonymous whistleblowing may be seen as preferable to self identified whistleblowing because the employee is concerned about the risk of reprisals. The author proposes a system that the nominated officers and Civil Service Commission could utilise the advancements in technology which have lead to the promotion of online leaking. The computerised system could offer the opportunity for individuals to raise concerns anonymously but also offers the opportunity for those investigating to seek further information from the whistleblower. The system could take the form of an online secure inbox which encrypts communication between the sender and recipient. The whistleblower could be assigned a reference number so that the investigator could contact the whistleblower if further information is required and both parties could provide updates.

Similar enhancements should also be considered to the current online system which has been made available to nominate officers. It is suggested that whistleblowing concerns which have been raised to nominated officers should be recorded centrally by using an online reporting form; this could be a simple form which could assist in making sure all of the required information is recorded. The recording of such concerns should be made a mandatory requirement for all Civil Service departments and this should also extend to line managers who may also receive concerns. The form could be made secure so that the information is shared only between those receiving and investigating the concern and the Civil Service Commission. The next chapter will consider the protection and control of official information.

CHAPTER FOUR

THE PROTECTION AND CONTROL OF OFFICIAL INFORMATION

The protection and control of official information is of particular relevance to this thesis. The Freedom of Information Act 2000 confers members of the public with a general right of access to official information held by public authorities. This so-called 'right to know' was intended to result in a 'fundamental and vital change in the relationship between the government and the governed.'[537] During passage of the bill, it was suggested that the Act would reduce the need for public servant whistleblowers. The first part of this chapter will provide a critical introduction to the Freedom of Information Act 2000. Focus will be provided on the effect of the legislation on central government departments, the operation of the various exemptions contained on the Act, operation of the ministerial veto and public interest immunity.

The second part of this chapter will consider how official information is 'protected.' The draconian use of section 2 Official Secrets Act 1911 failed to prevent high level unauthorised disclosures, particularly in the 1970s and 1980s, many of which exposed malpractice by the Executive. Despite reforms to narrow the provisions, the Official Secrets Act 1989 has failed to prevent leaks and most recently the arrest of Christopher Galley for the common law offence of Misconduct in Public Office has renewed the debate as to how official information should be protected from unauthorised disclosures by Crown servants. The section traces the history of the protection of official

[537] Preface, *Your Right to Know*, White Paper, CM 3018: http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm (accessed 05/01/11).

information, giving primary focus to the now repealed s.2 Official Secrets Act 1911. It then provides a critical analysis of the Official Secrets Act 1989 and the impact of the emergence of the common law offence of Misconduct in Public Office.

Finally, the fourth section considers the civil remedy of breach of confidence. The motivation for combining criminal sanction and civil remedy in one chapter stems from the fact that actions for breach of confidence have, on occasion, been used as an alternative to a criminal prosecution for instances whereby Crown Servants have made unauthorised disclosures of information. Furthermore, the contents of the Official Secrets Acts have proved key considerations for judges in certain breach of confidence cases. This section will consider the grant of an injunction to restrain publication of official information, in the context of the recent developments in online unauthorised leaking via outlets such as *Wikileaks.*

4.1 Part I: Freedom of Information[538]

The introduction of freedom of information legislation was a key election pledge by New Labour. Shortly after entering office in 1997, the new administration produced a White Paper entitled 'Your Right to Know.'[539] It aimed to break down the 'traditional culture of secrecy' and change the relationship between the government and the governed.[540] Following publication of the White Paper, the proposals were generally well received. Birkinshaw proclaimed the proposals as an "all singin' all dancin' affair," however, as he

[538] Note that for reasons of focus, this section does not consider the following matters subject to exemptions under the Act: Relations within the United Kingdom (relations between the UK administration and the devolved governments) s.28 FOIA, The Economy s.29 FOIA, Audit functions s.33 FOIA, Health and safety s.38 FOIA, Environmental information s.39 FOIA, Commercial interests, s.43 FOIA, and Communications with Her Majesty, etc. and honours s.37 FOIA.
[539] *Above*, n 537.
[540] *Ibid*, Chapter One.

later reflected some observers felt that they were "too bold to become a reality."[541] The Freedom of Information Bill received criticism for not going far enough to meet the stated aims of the White Paper. Palmer suggested that the Bill was a 'deeply disappointing document' which contained 'devises' to ensure that if a public authority wanted to maintain secrecy it could do so.[542]

The Freedom of Information Act 2000 ("FOIA") provides the general public with a right of access to information held by public authorities. Section 1 of the Act provides that 'any person' making a request to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and if that is the case to have that information communicated to him. If the public authority does not hold the information requested, the person is entitled to a notice of denial. Where the information is determined to be exempt from disclosure, the person is entitled to be informed of this. The definition of 'any person' is not restricted to natural persons, as a consequence companies and persons located both domestically and abroad are entitled to request for information. The request must be made in writing, including by electronic means provided that it is received in a legible form and is capable for being used for subsequent reference.[543]

According to s.84 of the Act, information is defined as 'information recorded in any form.' The applicant is required to describe the information he requests.[544] This requirement, according to Wadham, Harris and Griffiths places the applicant at a 'significant disadvantage' as he will be likely unfamiliar with the way in which the

[541] P.Birkinshaw, *The Law Relating to Access, Disclosure & their Regulation* (Tottel, Haywards Heath, 2005) 1.
[542] S. Palmer, *Freedom of Expression and Freedom of Information* (OUP, Oxford, 2000) 266.
[543] Section 8(1)(a) – 8(2) FOIA.
[544] Section 8(1)(c) FOIA.

information has been stored by the public authority in question.[545] However, they note that the public authority is under a duty to provide assistance under s.16 of the Act which could include providing an outline of the different types of information which might meet the terms of the request.[546] Public authorities are entitled to charge a fee of £25 per hour in order to cover the cost of the time spent by staff in searching for and providing the information requested, they must however provide a fees notice to the applicant to notify him of the intended charge.[547] Moreover, there is an exemption from providing information where to do so would exceed the cost of £650 for government departments or £450 for all other public authorities.[548] Where this is likely to be the case, the authority should provide an indication of what information could be provided within the cost limit.[549] A public authority must respond to a request for information by providing an acknowledgment as per the terms of s.1(1) promptly, and in any event not later than the 20th working day following the date of receipt.[550] A public authority is not obliged to provide information where the request is deemed 'vexatious.'[551]

4.2 Exemptions

There are a number of exemptions to the types of information that may be disclosed. The exemptions take the form of either 'harm-based' or 'class-based' exemptions. A 'harm-based' exemption requires a public authority to identify that the release of the information requested by the applicant would, or would be likely to cause 'prejudice' to

[545] J.Wadham, J.Griffiths, K.Harris, Blackstone's Guide to the Freedom of Information Act 2000 (3rd Edition, Oxford University Press, Oxford, 2007) 57.
[546] Ibid.
[547] Section 9(1) FOIA.
[548] Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
[549] Secretary of State for Constitutional Affairs' Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act, Para 14.
[550] Section 10(1) FOIA.
[551] Section 14(1) FOIA.

the interest specified in the exemption. The Information Commissioner's guidance on the meaning of the prejudice test suggests that the prejudice shown 'need not be substantial' but should be 'more than trivial.'[552] Whilst the appropriate level of prejudice is not specified the Commissioner advised public authorities that 'the less significant the prejudice is shown to be the higher the chance of the public interest falling in favour of disclosure.' [553]

Some provisions apply an additional hurdle, the public authority must first consider the prejudice test before considering a public interest test contained in s.2 of the Act (considered further below). Some provisions require the public authority to engage the prejudice test but do not require the public authority to consider s.2 public interest test.

In contrast, class-based exemptions require the public authority to identify that the information requested falls within the class of information contained in the substance of the exemption. There are provisions subject to a class-based exemption where a public interest test does not apply, these 'absolute' exemptions do not require a public authority to prove that harm or prejudice would result if the information is disclosed, this is easily achieved. There are provisions contained in the Act which are subject to a class-based exemption and where a public interest test will apply. It should be noted that a class-based exemption subject to a public interest test will be more easily satisfied than a harm-based exemption which is subject to a public interest test, as the public authority does not have to show prejudicial effect, merely that the information fell within the prescribed category of information. This discussion will now progress to consider the operation of the public interest test.

[552] Freedom of Information Act: Awareness Guidance No 20.
[553] *Ibid.*

4.2.1 The Public Interest Test

Section 2(1)(b) FOIA provides that the duty to confirm or deny in section 1 does not apply where:

> "In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority"

With regards to the disclosure of the information s.2(2)(b) provides:

> "in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

The Information Commissioner has issued guidance on the public interest test. He identifies broad categories which place a presumption in favour of disclosure. Firstly release of the information may 'further the understanding of and participation in the public debate of issues of the day.' Secondly, it may 'promote accountability and transparency by public authorities for decisions taken by them.' Thirdly, it may 'promote accountability and transparency in the spending of public money.' Fourthly, it may 'allow individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.' Fifthly, disclosure of the information may 'bring to light information affecting public health and safety' the prompt disclosure of which may prevent accidents or 'increase public confidence' in official scientific advice.[554]

[554] Guidance on the Public Interest Test, Information Commissioner's Office, Version 3, 2009, 6: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf (accessed 14/07/11).

4.2.2 Information Intended for Future Publication

Before considering the specific categories of information subject to an exemption it is important to note that a public authority does not have to release information intended for future publicationthis extends to whether the future date is determined or not. ,[555] At the time of the request the information should have been already held with a view to publication, and it is reasonable in all of the circumstances that the information should be withheld from disclosure until the date referred to. The purpose of this provision is to prevent individuals from gaining access to official documents early, for example a media organisation seeking disclosure of a public inquiry report in advance of its intended release. It is submitted that this provision may allow potential for considerable abuse by a public authority. In order to qualify for an exemption under this section the authority will effectively need to only prove that it intended to publish a document at a future date. The authority does not need to specify an intended date of the publication. It must consider withholding of the document 'reasonable in all of the circumstances' however, as it does not have to specify an intended date, this would theoretically allow a public authority to decide not to publish the document for 100 years and to consider it reasonable in the circumstances to do so. It would not have to disclose the intended date to the applicant; merely that it had considered it reasonable in the circumstances not to disclose the documents by an undetermined date in the future.

4.3 Categories of Information subject to Exemptions

4.3.1 National Security

[555] Section 22 FOIA.

Whilst the provision concerning information pertaining to national security provides an ordinary exemption subject to a public interest test[556] it is important to note that an absolute exemption covers information which derives from or refers a number to bodies responsible for security detailed in s.23 FOIA, including: the Security Service, the Secret Intelligence Service, GCHQ, the Special Forces the Security Vetting Appeals Panel, The Security Commission, The National Criminal Intelligence Services, the Serious Organised Crime Agency, the various tribunals dealing with intelligence issues and others. Moreover, a public authority is exempt from communicating information where the exemption is required to safeguard national security.[557]

A Ministerial certificate may be issued under s.23 concerning 'information supplied by, or relating to bodies dealing with national security matters' and s.24, concerning 'national security.'[558]The certificate may provide a general description of the information. According to s.60 an applicant may appeal to the Information Tribunal to challenge the veracity of the statement. With regards to s.23 information, the Tribunal has the power to quash the certificate if it determines that the information concerned did not constitute exempting information under s.23. With regards to s.24 The tribunal may quash the certificate if it determines that the Minister in question did not have reasonable grounds for exempting the information for the purposes of national security.

4.3.2 Defence

A specific provision relates to defence. Information is exempt if its disclosure would or 'would likely' prejudice the defence of the British Islands or of any colony or the

[556] Section 24 FOIA.
[557] Section 24 FOIA.
[558] Section 25 FOIA.

capability, effectiveness, or security of any relevant forces.[559] Public authorities are exempt from their duty to confirm or deny where compliance with the duty would prejudice one of the aforementioned criterion. 'Relevant forces' is defined to include the UK armed forces but extends wider to include any forces co-operating with them. The provision is subject to a qualified exemption requiring the data controller to conduct a public interest test. Guidance issued by the Information Commissioner suggests that there is a presumption that the matters the exemption is designed to protect, namely, the national defence, safety and effectiveness of the armed forces are in the public interest.[560] He suggested a number of factors that would weigh in favour of disclosure.

Firstly, the Commissioner suggested that disclosure may assist in 'furthering the understanding of and participation in the public debate of issues of the day.'[561] He identified that there is a strong public interest in decisions as to whether to deploy troops to go to war, the disclosure of such information resulting in improved decision making and an increase of public confidence in decision making. In contrast he suggested that it is likely that there will be strong arguments against the disclosure of operational information.[562] Secondly, the Commissioner identified that the release of information would assist in promoting accountability and transparency for the decisions taken by them; this must however, be balanced with the prejudicial effect to current or future operations. Thirdly, the Commissioner identified that the disclosure may lead to 'promoting accountability and transparency in the spending of public money.' The Commissioner argued that there would be a strong argument in favour of disclosing such information as the public have a 'clear interest' in knowing 'that the very large sums of

[559] Section 26 FOIA.
[560] Information Commissioner, *Freedom of Information Awareness Guidance: 10, The Defence Exemption*, version 1, 2006.
[561] *Ibid*, para D.
[562] *Ibid.*

money' have been 'wisely spent' unless the disclosure would prejudice the security of the armed forces or national defence.[563] Fourthly, he stated that disclosure may be in the public interest where it brings to light information affecting public health and safety,' particularly where the information relates to the safety of equipment or the direction of a military operation which has resulted in a loss of life.

4.3.3 International Relations

A public authority is exempt from the duty to communicate information where disclosure of the information, would or would be likely to prejudice:

> "(a) relations between the United Kingdom or another state, (b) relations between the United Kingdom and any international organization or international court; (c) the interests of the United Kingdom abroad; or (d) the promotion or protection by the United Kingdom of its interests abroad."[564]

Section s.27(2) contains an exemption from the duty to communicate information where that information has been obtained from another state other than the United Kingdom, or an international organisation or international court. Again, the public authority is exempt from its duty to confirm or deny, if to do so would involve the disclosure of confidential information obtained from another state, international organisation or international court.[565]

4.3.4 Criminal Investigations and Law Enforcement

A public authority is exempt from the duty to communicate information relating to criminal investigations and proceedings where the information has, at any time, being

[563] *Ibid.*
[564] Section 27 FOIA.
[565] Section 27 (4)(b) FOIA.

held for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with the offence is guilty of it. The provision extends further to any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority o institute criminal proceedings and any proceedings which the authority has power to conduct.[566] Section 31 FOIA exempts a public authority from the duty to communicate where to do so would, or would be likely to prejudice the prevention and detection of crime, the apprehension or prosecution of offenders, the administration of justice, the operation of immigration controls, the maintenance of security and good order in prisons, the assessment or collection of any tax or duty and any civil proceedings brought by or on behalf of a public authority. The aforementioned provisions have a clear aim to restrict individuals from obtaining information which may be prejudicial to a criminal investigation.

4.4.5 Confidential Sources

Section 30 (2) provides that a public authority is exempt from the duty to communicate information where it relates to investigations, criminal proceedings or civil proceedings to which the authority has the power to conduct and the information in question relates to the obtaining of information from a confidential source. It is a qualified exemption subject to a public interest test. The provision would, it is submitted, provide a safeguard to an employee who raises concerns about wrongdoing or malpractice resulting in a criminal or civil prosecution. The public authority is exempt from their duty to confirm or deny such information. Wadham, Griffiths and Harris correctly identify that the

[566] Section 30 FOIA.

provision applies to information relating to the obtaining of the information as opposed to the information offered by the confidential source itself.[567] As a consequence however, one must ask whether the safeguard offers sufficient protection to the confidential source. It may be that the information provided by the confidential source includes significant indicators as to the identity of the person who supplied the information. It is submitted therefore, that a public authority must proceed with considerable caution before releasing the information to an applicant, particularly after civil or criminal proceedings have taken place, whereby the public interest in withholding the information will have diminished – release of the information itself may inevitably lead to release of the identity of the informant.

4.4.6 Duty of Confidence

Section 41 (1) FOIA provides an absolute exemption of the release of information if, it was obtained by the public authority from any other person, including another public authority, and the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person. It is noted that the provision has the potential to prevent to release of government documents which may, if ordinarily subject to a qualified exemption, be in the public interest. Public authorities may be provided with an opportunity to frustrate the purpose of the freedom of information legislation by entering into relationships resulting in a duty of confidence between two public authorities the result being that applicants will be unable to obtain information on a particular topic from either authority. The provision is particularly overarching; as it confers an absolute rather than a qualified exemption,

[567] J. Wadham, J. Griffiths and K.Harris *Blackstone's Guide to the Freedom of Information Act* (3rd edn 2007).

preventing an assessment of the public interest test from taking place. A subsequent legal claim for breach of confidence would require a court to engage in a detailed consideration of a public interest test, balancing the public interest in disclosure against the public interest in non-disclosure. It is submitted that this section should be replaced with a qualified exemption to ensure that public authorities utilise the public interest test contained in s.2 FOIA. This reform is necessary to ensure that the provision is consistent with the common law doctrine of confidence and necessary to ensure that the section cannot be used to prevent the release of information which would ordinarily be released under a section which provides a qualified exemption.

4.4.7 Formulation of Government Policy

Section 35 FOIA (1) provides that information held by a government department (or by the Welsh Assembly Government) is exempt from the duty to communicate information where it relates to: the formulation of government policy, ministerial communications, the provision of advice by law officers or any request for the provision of such advice; or the operation of any ministerial private office. The duty to confirm or deny is excluded in relation to information which is exempt under this section. The definition of 'government department' includes any public body exercising a statutory function on behalf of the Crown. It is clear therefore that the provision has a particularly broad reach which could extend beyond central government departments to include Quasi Non-Governmental Management Organisations and Arms Length Management Organisations.

Section 35 is a class based exemption meaning that if the information requested falls within any of the aforementioned categories it is exempt. Section 35 is also a qualified

exemption which requires the data controller to engage the s.2 public interest test. The Information Commissioner has produced guidance on the correct operation of s.35.[568] With regards to the 'formulation of government policy' the Commissioner defines 'policy' as:

> "The development of options and priorities for ministers, who determine which options should be translated into political action and when."[569]

In defining the terms 'formulation' and 'development' the Commissioner notes that this should refer to something happening – the exemption cannot apply to a 'finished product or a policy which has been agreed to' and has been put into operation or is already implemented.[570]

The Commissioner identifies that the arguments for exempting information regarding the formulation of government policy are that that the threat of public exposure would lead to 'less candid and robust discussions about policy.'[571] In addition to this, the Commissioner recommended that in engaging the public interest test the data controller consider whether the release of the information would make civil servants less likely to provide 'full and frank advice or opinions and would thus harm working relationships. He advised that data controllers should consider whether the prospect of future release would inhibit consideration of the 'full range of policy options' - thus preventing discussion of options which may appear extreme. Finally he suggested that the controller should consider whether release of the information would result in Civil Servants having to defend everything that has been raised.[572]

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[568] Guidance Note 24, Information Commmissioner's Office, Version 2, 2008: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/formulationofgovernmentpolicy.pdf (accessed 07/08/11).
[569] *Ibid*, B.
[570] *Ibid*, C.
[571] *Ibid*, D.
[572] *Ibid*, F.

In considering arguments in favour of disclosure the Commissioner identifies two essential arguments, the first relating to public participation and the second relating to the accountability of government decisions. With regard to the first argument, the Commissioner identifies that participation 'cannot be meaningful' without access to the relevant information,' without allowing the wider public the opportunity to participate potential is given to 'selected individuals' to have an 'unduly privileged position' in the decision making process.[573] Essentially, the Commissioner suggests that information which has been disclosed prior to a decision being taken will 'lead to more informed public debate.'[574]

With regard to the second public interest argument, that disclosure of information may aid public accountability, the Commissioner advises that it may:

> "Disclose wrongdoing, or the fact that wrongdoing has been has been dealt with, or dispel suspicions of wrongdoing."[575]

The Commissioner further advises that information made accessible under FOIA which has not been 'spun by government media units' would assist the public to make an 'objective judgement on the facts.'[576] He advises that disclosure should also be made where a decision taken is likely to lead to large amounts of public expenditure on a particular project and where a particular has been taken as a result of deviation from routine procedures.[577]

[573] *Ibid*, F.
[574] *Ibid.*
[575] *Ibid.*
[576] *Ibid.*
[577] *Ibid.*

5.4.8 Information Prejudicial to the Effective Conduct of Public Affairs[578]

Section 36 FOIA applies to information not already exempt by s.35 (above). A public authority is exempt from the duty to communicate information where in the 'reasonable opinion of a qualified person' disclosure of that information would or would be likely to prejudice:

> "(a) (i) The maintenance of the convention of collective responsibility of Ministers of the Crown; or(ii) the work of the Executive Committee of the Northern Ireland Assembly; or
> (iii) the work of the Cabinet of the Welsh Assembly Government;(b) would or would be likely to, inhibit-(i) the free and frank provision of advice; or(ii) the free and frank exchange of views for the purpose of deliberation; or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

The duty to confirm or deny is also exempted to the extent that, in the reasonable opinion of a qualified person, compliance with that duty would, or would be likely to have any of the prejudicial effects set out in s.36(2). According to s.36(5)(o) a 'qualified person' must be either a Minister or a person authorised by a minister for the purposes of s.36.

The Information Commissioner has produced detailed guidance on the operation of s.36 FOIA. In particular, the Commissioner notes several considerations which may count against disclosure of the information. The provisions echo the advice given in relation to s.35 FOIA:

> "In this particular case, would release of this information make civil servants less likely to provide full and frank advice or opinions on policy proposals? Would it, for example, prejudice working relationships by exposing dissenting views? Would the prospect of future release inhibit the debate and exploration of the full range of policy options that ought to be considered, even if on reflection some of them are seen as extreme?

[578] Note that this section does not consider information held by the Houses of Commons or House of Lords which confers an absolute exemption. Consideration of this would reach beyond the purpose of this study which is to consider the effect of freedom of information and its relationship to Crown Servants. For a critical analysis of FOIA and the Houses of Parliament see in particular R.Winnett & G.Rayner, *No Expenses Spared*, (2009, Bantam Press, London), Chapter 1.

Would the prospect of release put civil servants in the position of having to defend everything that has been raised (and possibly later discounted) during deliberation?"[579]

The reasoning identified by the information may be contrasted to the legal justification for candour in *AG v Jonathan Cape Ltd*, whereby it was argued that by allowing the contents of such discussions to be disclosed in the public domain, ministers and civil servants would not feel able to engage in full and frank discussion and that this would result in harm caused to the public interest.[580]

4.5 Delay

It should be indentified that public authorities have obligations under FOIA to provide a formal response within a specified time frame. Section 10 (1) requires a public authority to respond promptly and no later than the twentieth date of receiving the request. The Information Commissioner has produced guidance suggesting that it is good practice for public authorities to formally acknowledge receipt of the request. Under s.1 (3) FIOA public authorities may seek to clarify the request with the applicant. In this case the time would begin when a response to the clarification has been received. The Information Commissioner's guidance indicates that where a public authority has failed to comply with the time period set out in s.10 (1), the Commissioner may issue an enforcement notice.

Currently, the reality is that a number of government departments have been quick to acknowledge receipt of requests, but have often failed to comply with the time period set. Several other Whitehall departments have been subject to formal monitoring,

[579] The guidance can be accessed on the ICO's webpage http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx (accessed 03/02/12).
[580] [1976] 1 QB 752.

between the months of October and December 2010. The ICO monitored the Cabinet Office, the Home Office and the Ministry of Defence.[581]

In 2010, the Information Commissioner required the Permanent Under-Secretary of State for the Ministry of Defence to comply with the time limit set out in s.10. The Information Commissioner identified that less than 75% of requests to the MOD were dealt with within the time limit. In the same year, the Information Commissioner required the Finance Director of the Cabinet Office to sign an undertaking that the Cabinet Office would be compliant with s.10. The undertaking identifies that less than 85% of FIOA requests received a formal response within the required timescale.[582] The Commissioner required another undertaking to be signed in 2011 because of ongoing concerns that the Cabinet Office had still failed to comply with the time limits, noting that still less than 85% of FOIA requests received a formal response within the time period.[583] The Commissioner noted that more formal action would be 'disproportionate at this stage.'

It is submitted that the delays caused by central government departments who flagrantly disregard the time limit set out in s.10 undermine the spirit of the legislation. If the department responds by applying an absolute or partial exemption to the information requested, the delay caused will then lead to further delay and time spent challenging the decision using the internal appeals procedure. Delays may prove detrimental to those who wish to participate in democratic society, for those seeking the truth may not have

[581] Information on the monitoring can be accessed via the ICO's website: http://www.ico.gov.uk/global/search.aspx?allwords=cabinet%20office%20monitoring&collection=ico&start=0 (accessed 23/02/12).
[582] The undertakings can be accessed via the ICO's website: http://www.ico.gov.uk/Global/Search.aspx?collection=ico&keywords=undertaking (accessed 23/02/12).
[583] http://www.ico.gov.uk/Global/search.aspx?collection=ico&keywords=undertaking&start=40 (accessed 23/02/12).

access to the information when it is required.[584] A journalist seeking to determine the truth on a particular subject may be unable to do so before the news agenda has moved on, as both the ECtHR and domestic courts have identified 'news is a perishable commodity.' The difficulties caused by delay and the time frame required to receive a response may provide a strong indicator that whistleblowers based within the government department may be the only means by which those requesting the information could obtain access. It is submitted that where government departments are not being compliant s.10, those departments should be subject to enforcement notices per each request which has not being received within the time limit set. This discussion will now progress to identify how enforcement notices are made.

4.6 Enforcement

Section 77 provides that it is a criminal offence for a public authority and for a person employed by that authority to alter, deface, block, erase destroy or conceal any record held by a public authority, with the intention of preventing the disclosure of the information.[585] It is a summary offence which is therefore subject to s.127 (1) Magistrates Court Act 1980. The Campaign for Freedom of Information have engaged in debate as to impact of s.125 following a statement by the Deputy Information Commissioner that action could not be taken action to prosecute individuals concerned in the loss of climate data held by the University of East Anglia.[586] He identified that s.125 required action to be taken with six months of the committal of an s.77 offence. It should be noted, however, that s.125 provides that a Magistrate's Court shall not hear a complaint unless the complaint was made within six months from the time when the

[584] Based upon the theoretical reasoning of Birkinshaw and Habermas, see further chapter one of this thesis.
[585] Note that s.77 came into force in 2005.
[586] See *Time Limit for Prosecution under s.77*: http://www.cfoi.org.uk/fois77offence290110.html (accessed 08/08/11).

offence was committed, or 'the matter of the complaint arose.' It is submitted therefore that the provision allows scope for a prosecution to be brought after six months has passed since the offence was committed, provided that magistrate's court proceedings take place within six months of the date in which the complaint was made.

It is further submitted that s.20 Theft Act 1968 would provide scope to prosecute an individual who dishonestly 'with a view to gain for himself or another,' or with the intent to cause loss to another,' destroys defaces or conceals any original document which belongs, or is filed or deposited in any court of justice or any government department. The offence is indictable and, if convicted, an individual may be liable to imprisonment of a term not exceeding seven years.

With regard to possible enforcement action taken by the Information Commissioner, Section 50 FOIA provides the statutory basis for an applicant to seek assistance. According to s.50:

> "Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of [Part I of the Act]."

The Commissioner is then required to make a decision provided that the application for information was not made with 'undue delay,' is 'frivolous' or 'vexatious,' or the complainant has failed to exhaust the internal complaints procedure made available by the public authority.[587] Where the Commissioner decides that a public authority has failed to provide information or in its duty to confirm or deny it must issue a 'decision notice' on the authority.[588] The notice will detail what steps the public authority must

[587] Section 50 (1) FOIA.
[588] Section 50 (4) FOIA.

take to be complaint with the Freedom of Information Act. The Commissioner may serve an 'information notice,' requiring the public authority to provide him with information relating to the application or in compliance with the various provisions in the Act.[589] The Commissioner may also serve an 'enforcement notice' if he is satisfied that a public authority has failed to comply with their duties under the Act. The notice requires a public authority to act in order to be complaint with their duties under FOIA within a specified time period.

The Information Commissioner's Office had previously received criticism from the Campaign for Freedom of Information for having a backlog of cases awaiting investigation.[590] The ICO has attempted to rectify the situation and reported in its 2010 annual report that 82% of cases closed were now less than a year old. The CFOI have responded positively to the improvements.[591] Moreover, the Information Commissioner has issued a regulatory action policy, which identifies that it will 'name and shame' public authorities that regularly delay responses to the Freedom of Information Act by publishing the details on the ICO website. The policy identifies that the Information Commissioner may issue a 'practice recommendation' if he feels that a public authority is failing to abide by a code of practice issued under FOIA.[592]

4.7 Ministerial Veto

Section 53 (1) provides an exception to comply with a decision notice or an enforcement

[589] Section 51 (1) FOIA.
[590] http://www.cfoi.org.uk/pdf/foidelaysreport.pdf (accessed 08/08/11).
[591] *ICO FOI Caseload Progress*, http://foia.blogspot.com/2010/07/ico-foi-caseload-progress.html (accessed 08/08/11).
[592] *Freedom of Information Regulatory Action Policy*, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/freedom_of_information_regulatory_action_policy.pdf (accessed 08/08/11).

notice. The provision is arguably the most controversial aspect of the Freedom of Information Act, allowing a Minister to veto a decision made by the Commissioner. In order for the veto to apply a notice must have been served on a government department, the Welsh Assembly government, or any public authority designated for the purposes of the section made by order of the Secretary of State.[593] The notice must relate to a failure, 'in respect of one or more requests for information' to comply with the general right of [594]access to information contained in s.1 (1) (a) in respect of information which falls within any of the exemptions listed in Part II of the Act stating that the duty to confirm or deny does not arise; or a failure to comply with s.1 (1) (b) the duty to communicate information on the basis that it is exempt.

Section 53 (2)(b) provides that the notice shall cease to have effect if, not later than the twentieth working day following the effective date the Minister concerned gives the Commissioner a certificate signed by him stating that he has:

"On reasonable grounds formed the opinion that, in respect of the requests concerned, there was no failure [to provide information]."

Section 56 FOIA requires that the applicant must be provided with the reasons why the Minister has issued the veto. However, according to s.57 FOIA, reasons do not have to be given where doing so would reveal exempt information. The certificate must then be laid before Parliament.

At the time of writing the ministerial veto has been used on three separate occasions. The veto was first used to prevent the release of Cabinet minutes relating to the decision taken to go to war in Iraq. The Commissioner issued a Decision Notice under s.50 FOIA

[593] Section 53 (1)(a) FOIA.

which ordered the Cabinet Office to disclose the minutes of two Cabinet meetings where the Attorney General's legal advice concerning the military action had been discussed. The Cabinet Office appealed to the Information Tribunal.[595]

The Information Tribunal held that the convention of collective Cabinet responsibility 'affords considerable benefits' to good decision making in government. It identified that the benefits afforded by the doctrine would be lost or severely reduced if 'official records of Cabinet discussions were disclosed prematurely' or without engaging in a thorough analysis of the public interest test. However, the tribunal identified that the convention 'was not a rigid dogma' and decided to uphold the Commissioner's decision. They identified that at the heart of their reasoning was the fact that Parliament had decided to categorise the section 35 exemption as 'qualified' not 'absolute.'[596]

The Tribunal found the public interest factors in favour of disclosure to be 'very compelling.'[597] The decision to commit UK armed forces to the invasion of another country was 'momentous in its own right' but was further increased by criticisms which had been made, particularly in the Butler Report of the 'general decision making process in Cabinet at the time' and criticisms of the Attorney General's legal advice and the fact that it had not been made available to the Cabinet until the 'last moment.'[598] Crucially, the Tribunal held that the approach adopted during Cabinet meetings who were privy to the Attorney General's first legal opinion 'as well as those who were not' was of:

> "Crucial significance to an understanding of a hugely important step in the nation's recent history and the accountability of those who caused it to be taken."[599]

[595] *Cabinet Office v Information Commissioner* [2008] EA/2008/0024 and EA/2008/0029.
[596] *Ibid* para 77.
[597] *Ibid* para 79.
[598] *Ibid.*
[599] *Ibid.*

Despite the detailed and clear ruling by the Information Tribunal to release the information, Jack Straw MP, then Secretary of State for Justice, used the ministerial veto to prevent disclosure. The certificate issued provides little if any justification as to why the decision to exercise the veto was made other than that 'public interest favoured non-disclosure.'[600]

It is submitted that use of the Ministerial veto is contrary to the spirit of the legislation. The decision to suppress information relating to the controversial decision making process which led to the second Iraq war is particularly significant because Jack Straw was Foreign Secretary at the time and thus played an integral part in any decision being made. The veto allows ministers with a vested interest in the information to decide not to release it, allowing the potential for abuse whereby the information concerned may lead to criticism or may identify wrongdoing. Whilst the veto is part of the legislation, and is thus an expression of the will of Parliament, to allow a minister to disregard a judicial decision is contrary to a fundamental principle of the rule of law that all subjects should be treated equally before the law.[601]

The second and third ministerial vetoes concern attempts to disclose Cabinet minutes relating to devolution in Scotland. In 2009 the UK government was due to appeal the decision of the Information Commissioner to disclose the documents before the Information Tribunal. However, before the hearing took place Jack Straw, acting as Justice Secretary, vetoed the decision.

[600] http://www.justice.gov.uk/news/docs/section53-certificate.pdf (accessed 25/02/2012).
[601] For example the decision of the court in *M v Home Office* [1994] 1 AC 377, which identified that a minister could not disregard a court order by virtue of his position.

The Information Commissioner took a more considered approach in response to a second request for the information, ruling that the minutes should be disclosed but that the identities of individual ministers involved should be redacted. Central to his decision, the Commissioner identified the public interest in transparency and openness and noted that 12 or 13 years had passed by the time that the request of information had been made. This was sufficient to negate the risk to the doctrine of collective Cabinet responsibility.[602]

The government was due to appeal the decision before the Tribunal but instead exercised the ministerial veto on 22nd February 2012. The Commissioner has expressed regret that the issues will not be tested before the Information Tribunal and has stated that will submit a special report to Parliament.[603]

5.8 Public Interest Immunity

Finally, it should be noted that any hearing of the Information Tribunal to which the government attends may be subject to the issue of a certificate of Public Interest Immunity by a minister of the Crown. Chapter Two of this thesis identified that the issue of Public Interest Immunity certificates has been considered as justifiable by the courts, in order to protect candour, the full and frank exchange of views and uninhabited decision making. The nature of proceedings should be considered against the comparable work of the Investigatory Powers Tribunal, whose remit will be considered later in this analysis.

[602] The decision notices can be accessed via the Information Commissioner's website: http://www.ico.gov.uk/news/latest_news/2012/statement-ico-response-government-decision-veto-disclosure-devolution-08022012.aspx (accessed 26/02/12).
[603] *Ibid.*

Because the tribunal operates a system of closed hearings with a provision for the use of special advocates, Lord Brown has identified that a Public Interest Immunity Certificate cannot be introduced in proceedings before the IPT.[604] One must question therefore, whether the Information Tribunal is the most appropriate forum to consider the disclosure of official government information. Section 35, of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 identifies that proceedings may be held in private. Furthermore, s.14 of the Rules, allows the Tribunal to prevent the disclosure of any documents which may identify an individual who the Tribunal considers should not be identified, if it believes that disclosure will lead to a risk of serious harm to the individual or it is in the interests of justice to do so. Even if the aforementioned provisions are not sufficient to allay fears that the provision of public interest immunity certificates is necessary, it is submitted that the Investigatory Powers Tribunal provides an alternative, whereby the matters complained of concern information regarding the security and intelligence services.[605]It is submitted that in order to give the Freedom of Information Act much needed teeth, the use of public interest immunity certificates before the Information Tribunal should not be allowed. A provision worded to this affect should be added to the tribunal procedure rules. It should be reiterated however that currently, ministers of the Crown are more likely to exercise the ministerial veto than use a PII certificate before the Information Tribunal. However, in removing the ministerial veto power, removal of the PII certificate will also be required.

[604] *R (on the application of A) (Appellant) v B (Respondent)* [2009] UKSC 12, para 14.
[605] Precedent for this can be identified in the case of *Frank-Steiner v The Data Controller of the Secret Intelligence Service* IPT/06/81/CH.

5.9 Analysis and Application to Analytical Model

The right of access to information provides a strong theoretical justification for whistleblowing. According to Birkinshaw, an individual's moral and ethical evaluation is dependent upon information acquired by his or his predecessor's experiences.[606] In the context of government information, a freedom of information regime if exercised properly can provide much needed scope for analysis, not only by academics or historians but by members of the public. Here as Birkinshaw identifies, disasters may be avoided and accidents prevented.[607] The information may therefore be consistent with the arguments from truth and democracy.

Exercise of the ministerial veto may be seen as counter to the theoretical justifications outline above. The information concerning the decision making process which lead to the highly controversial decision to invade Iraq would have served the need for truth and would have enhanced democracy. As many of the Cabinet ministers involved in the decision making process still sit as MPs, albeit many on the back bench, information as to the decisions made may assist members of the general public in determining whether they should vote for the individuals or party concerned. More generally, the information could assist those with an active interest in such matters to develop and further understanding which may assist and inform decision makers if faced with a similar scenario in the future.

This analysis may be counter balanced with the theoretical arguments for secrecy and security. In particular, Simmel identifies that citizens elect officials to act on their behalf

[606] P.Birkinshaw, Freedom of Information: the Law the Practice and the Ideal (2001, Butterworths, London) 16.
[607] *Ibid.*

and in doing so bestow the power to make decisions on those individuals. Neocleaus argues that it is for the official to discern the most appropriate course of action and consequentially to determine which information should be suppressed in the public interest.[608] This reasoning would support the use of a ministerial veto, or indeed public interest immunity certificates. Yet, as Sedley correctly identifies, mechanisms of fact holders are 'almost always self interested' meaning that information is disclosed as the fact holders see fit.[609] Exercise of the ministerial veto places the ultimate responsibility in the hands of the fact holders, which in the absence of an overarching judicial oversight framework leaves the system open to abuse.

The degree of control afforded to the 'fact holders' is further identified in a number of provisions in the Freedom of Information Act which, as a consequence, has severely weakened the legislation first proposed by the white paper. Particular exemptions regarding the formulation of government policy, conduct prejudicial to the effectiveness of public affairs and information regarding international relations do not provide an opportunity for a public body to determine whether there is a public interest value in the information. Whilst it has been argued in chapter two of this thesis that blanket disclosure of all information regarding government decision making and advice may lead to a breakdown of government because of fears of working in a Panopticon, the legislation must provide scope for the countervailing interests to be assessed.

The difficulty with the Freedom of Information Act is that regardless of how easy the legislation makes access to information available, the citizen will still require a level of subject knowledge in order to know what information to request. As Neocleaus

[608] *Above*, n 24, 101.
[609] S.Sedley, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP, Oxford), Editors J.Beatson and Y.Cripps, 241.

identifies, society lacks a 'spying machine' to provide the public with information to which they may not know exists.[610] Crown servant whistleblowers may therefore be able to provide the public with the missing information. As a consequence however, the Crown servant may place himself in a dangerous position which may impact upon his working life and potentially even his liberty. Bok correctly identifies that a whistleblower 'shoots his bolt' by taking information to the public first.[611] It can therefore be argued that society cannot be reliant upon whistleblowers to achieve government accountability alone. Greater transparency may be better served by adopting a model of proactive rather than reactive disclosure. The raising of concerns by whistleblowers may be most easily justified whereby the Crown servant uncovers a situation whereby information has been requested by a member of the public and despite being acceptable to disclose the information under the Act, the department covers up the information or provides the applicant with false information. In such circumstances, a Crown servant would be justified in releasing the information on the basis that the communication is justified by the argument from truth. In circumstances whereby the information requested has been deliberately delayed by the department a Crown servant may be justified in leaking the information if the disclosure is necessary to prevent an immediate risk of harm to people and property.[612]

With regard to legal analysis of the law of freedom of information, it should be identified that whilst article 10 ECHR confers the right to communicate information in the public interest and the right of the audience to receive such information, article 10 ECHR does not currently extend to protect the right to access the information. Thus, it was identified

[610] *Above*, n 24, 95.
[611] *Above*, n 44, 221.
[612] For consideration of the justifications for necessity and duress of circumstances see further chapter one of this thesis.

in *Leander v Sweden* that article 10 did not confer a right of access to information, nor does it 'embody an obligation on governments to impart such information to the individual.'[613] Fenwick correctly reiterates this position by identifying that the wording of art.10 ECHR 'speaks in terms of the freedom to receive and impart information' this, she identifies, appears to 'exclude from its provisions the right to demand information.'[614]

In the absence of further judicial reasoning, it is suggested that, in the context of official information, art.10 places emphasis on Crown servants to impart the information. This reiterates the importance of providing adequate safeguards for Crown servants to raise concerns. It is suggested that the Public Interest Disclosure Act 1998 provides the scope to protect whistleblowers that raise concerns about breaches of the Freedom of Information Act. Such concerns would be a 'breach of a legal obligation' under the Act. Disclosures are further protected if raised to the Information Commissioner who is designated as a prescribed person to receive concerns under the Act.

It is submitted that in order to improve the current freedom of information regime, a new provision should be made in the Civil Service Code to recognise that concerns raised regarding breaches of the Freedom of Information Act will be covered. In order to further bolster the protection, it is submitted that the Information Commissioner should be designated under the Code to receive concerns as an alternative to the Civil Service Commissioners. The motivation for this recommendation is two-fold. Firstly, as the Civil Service Commissioners do not have the power to investigate or act on FOIA matters it makes sense to provide the Information Commissioner as an independent regulator.

[613] [1987] 9 EHRR 433.
[614] H.Fenwick, Civil Liberties and Human Rights (Routledge-Cavendish, London, 2007) 191.

Second, by adding the Information Commissioner in the Code, the level of protection is enhanced as the ICO will become a 'person designated under the policy.' Therefore an individual making the disclosure will have the least evidential requirement to satisfy in making the disclosure, further reiterating the importance of freedom of information to the public interest. This section will now progress to consider the protection of official information.

4.10 Part II: the Protection of Official Information

Part two of this analysis will consider the history of the legislation used to protect against unauthorised disclosures, namely s.2 Official Secrets Act 1911.The analysis will then progress to consider the Official Secrets Act 1989 and the common law offence of misconduct in public office before discussing the civil law alternative of breach of confidence. It will question the grant of injunctions to restrain disclosures in the age of the internet before providing recommendations and conclusions based upon the analytical model provided in chapter one of this thesis.

4.10.1 A History of Section 2 Official Secrets Act 1911

Prosecutions under section 2 were relatively few; indeed one could view the section as largely symbolic.[615] Section 2 (1) of the Official Secrets Act 1911 provided:

> "If any person having in his possession or control [any information…] which has been entrusted in confidence to him by any person holding office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract…(a) communicates the [code word, pass word,]

[615] The 'deterrent effect' of section 2 was highlighted in the Franks Report. *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Volume 1, Report of the Committee, 1972, Cmnd 5104 at 17.

sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the state his duty to communicate it,…that person shall be guilty of a misdemeanour."

The 1911 Act was passed in haste, it took one afternoon and 30 minutes of debate.[616] Following the unsuccessful prosecution of Jonathan Aitken in 1971 the Franks Committee was established to consider possible reforms. The report provided a definitive look at the Act and suggested some very plausible improvements.[617]

The Franks committee found section 2 'a mess,' that its scope was 'enormously wide and that any law which 'impinged on the freedom of information in a democracy should be much more tightly drawn. It found that the Attorney General's discretion to prosecute left a 'feeling of unease.' Ultimately the committee found that people were not sure what the provision of section 2 meant, 'how it operated in practice' or 'what actions posed a risk of prosecution under it.'[618]

The Franks report received a lukewarm response from Edward Heath's Conservative government. Home Secretary, Robert Carr accepted the recommendations of the report but stated that the government needed further time to consider them.[619] The Conservative government was defeated at the 1974 general election before any reforms could be implemented.[620] The Labour Party manifesto had detailed plans to abolish s.2 with a new 'Official Information Act' which would be based upon the recommendations of the

[616] D. Hooper, *Official Secrets: The Use and Abuse of the Act* (Secker & Warburg, London, 1987) 30.
[617] *Ibid*, 2.
[618] *Above*, n 615, para 37.
[619] For discussion of this see D. Hooper *Above*, n 616, 293. For the House of Commons debate on the Franks Report see Hansard (Commons) 29th June 1973 col 1885-1973.
[620] Most interestingly Christopher Andrew states that as Prime Minister Edward Heath was 'even more secretive about intelligence matters than the Secret Service itself' and when intelligence chiefs requested that their successes were publicised he would refuse. C. Andrew, *Secret Service: The making of the British Intelligence Community* (William Heinmann, London, 1985) 696. This may suggest that if Heath's government had remained in power the reforms may not have been forthcoming.

Franks Report, however once in power the Labour government failed to go further than giving backing to a private member's Bill introduced by Liberal MP Clement Freud.[621]

Sarah Tisdall was the first person to be sent to prison for unauthorised disclosure under s. 2 since 1970. She leaked easily traceable copies of the documents to The Guardian, choosing to disguise their origin with only a marker pen. Tisdall chose to plead guilty and in doing so and received a prison sentence for six months. By failing to destroy the documents in question, the Guardian failed to protect its source. The newspaper was advised to not return the documents if asked and that they would have a defence under section 10 of the Contempt of Court Act 1981.

In 1984 Civil Servant Clive Ponting leaked documents to opposition MP Tam Dalyell which identified that the government had misled Parliament over the circumstances surrounding the sinking of the General Belgrano during the Falklands conflict. Ponting's defence was that it was in the 'interests of the state' for Parliament to be informed that it was being misled, by ministers and that ministers planned to further mislead a select committee.[622]

The Ponting case had a lasting effect that can still be observed today. Following the acquittal and before the eventual demise of s. 2 the Crown Prosecution Service decided in 1985 not to prosecute Cathy Massiter, a former member of the Security Service, MI5, who made claims in a Channel 4 documentary that MI5 had bugged the telephones of trade union members. It also resulted in a number of internal changes, the civil service and ministerial codes and perhaps most notably the Armstrong Memorandum.

[621] The Official Information Bill, 1978-1979, Bill 96.
[622] *Ibid* at 5.

Before considering analysis of s.1 Official Secrets Act 1989, one should take note of the Spycatcher affair[623]. The case involved a civil action for breach of confidence rather than a breach of section 2.[624] As Fenwick suggests, this may have been because of a lack of confidence in the section after Ponting.[625] It was believed that civil proceedings would be more convenient and less risky. Peter Wright, a former MI5 officer, made allegations of illegal activity in his book entitled Spycatcher. The Guardian and Observer started to print extracts of the book. The Attorney General imposed several injunctions to prevent publication. The Government eventually lost the action and the episode reaffirmed the need for a reliable criminal sanction.[626]

4.11 The Official Secrets Act 1989: From Catch All to Specified Categories of Information

"There could not conceivably be a prosecution under the Bill on the ground of embarrassment to a British minister."

Douglas Hurd MP.[627]

The Official Secrets Act 1989 replaces the complete ban on the unauthorised disclosure of all official information by servants of Her Majesty by limiting the information to six categories. Section 1 concerns security and intelligence information, section 2 concerns information regarding defence; section 3 concerns international relations, section 4 concerns crime and special investigations (which include information regarding interception of communications). Section 5 concerns information resulting from

[623] *AG v Guardian Newspapers* Ltd (No2) [1990] 1 AC 109.
[624] Discussed in further detail below.
[625] H. Fenwick, *Civil Liberties and Human Rights* (Cavendish, London, 2002) 339.
[626] *Ibid* at 39.
[627] HC Official Report (6th Series) Col 428, 15 February 1989.

unauthorised disclosures or entrusted in confidence and section 6 concerns information entrusted in confidence to other States or international organisations. This section will start with an analysis of Section 1.

4.11.1 Section 1 (1) (a) and (b): the Unauthorised Disclosure of Security and Intelligence Information.

Section 1 (1) (a) Official Secrets Act 1989 places current and former members of the security and intelligence services under a lifelong duty to remain silent. Furthermore under Section 1 (1) (b) the Act includes persons 'notified' by the Secretary of State (discussed below). It provides that a current or former member or notified person is:

> "(1)…guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force

Moreover section 1 (2) provides:

> The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure."

From the aforementioned passage it can be observed that there is no available damage test and therefore any unauthorised disclosure made by the above category of persons, regardless of content will constitute an offence under section 1 (a).

Part (b) includes 'persons notified' of the provisions contained in section 1. The process of notification is defined in section 1 (6) which provides:

> "Notification that a person is subject to subsection (1)…shall be effected by a notice in writing served on him by a minister of the Crown;

and such a notice may be served if, in the minister's opinion, the work undertaken by the person in question is or includes work connected with the security and intelligence services and its nature is such that the interests of national security require that he should be subject to the provisions of that subsection."

Persons who are most likely affected by such a notification are members of the Joint Intelligence Committee and the Intelligence and Security Committee, whose work brings both committees into contact with information regarding national security and intelligence matters[628] and Crown Servants on related work in the Foreign and Commonwealth Office, the Home Office and the Ministry of Defence. The Intelligence Services Commissioner and the Interception of Communications Commissioner would also constitute notified persons under the aforementioned definition.[629]

During debate of the Official Secrets Bill, at Committee stage, section 1 (1) received considerable criticism. Firstly, with regard to a lifelong duty of non disclosure, it was suggested that the duty was imposed as a reactionary measure after the government's failure to suppress the Peter Wright book, Spycatcher.[630] The resulting Act would have the potential to make a member or former member of the intelligence services criminally liable for writing a book about their experiences without authorisation.[631] It is noticeable that the old s.2 Official Secrets Act 1911 already had widely defined statutory provisions to secure such an objective and yet it did not deter Crown servants such as Peter Wright

[628] The exact terms of reference of the JIC can be viewed at: http://www.intelligence.gov.uk/central_intelligence_machinery/joint_intelligence_committee/jic_terms.aspx (accessed 10/08/08) For information regarding the work of the Intelligence and Security Committee see: http://www.cabinetoffice.gov.uk/intelligence (accessed 10/08/08).

[629] Information regarding the exact terms of reference for both Commissioners can be found at: http://www.intelligence.gov.uk/accountability/commissioners_and_tribunal.aspx (10/08/08)

[630] Roy Hattersley MP 25th Jan 1989, Hansard, HC Debs Cm 198889 Col 1049: "Some cynics suggest that one reason why the Prime Minister allowed the Bill to be introduced at all was her obsessive determination to vindicate her paranoid behaviour in the case of Mr. Peter Wright and *Spycatcher*."

[631] The Official Secrets Act 1989 did not prevent the former Director General of MI5 Dame Stella Rimington from publishing her memoirs. Despite controversy caused by the publication, the Home Office did not go further than voicing 'regret and discontent' for her decision to publish see further: S.Carrell, *Rimington Calls For Independent Vetting of Spy Memoirs,* The Independent, 9th September 2001. The publication of official memoirs is considered below.

from publishing his memoirs. Two fundamental issues arose during the debates at Committee stage, the first is that of the members or former members of the security and intelligence services who wish to publish accounts of their time in the services and second is that of the whistleblower who intends to report illegality or maladministration.

5.11.1 Blowing the Whistle and the Public Interest

With regard to the second consideration of the debates at the Committee Stage, the position of potential whistleblowers, it was argued that the Bill had no public interest defence. The white paper outlined the government's position for not including such a reform:

> "First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so. There is adequate provision for a current or former member of the Security and Intelligence Services to expose illegality."[632]

One of the longstanding debates surrounding s.2 Official Secrets Act 1911 had been whether or not it could be interpreted to include a public interest defence. It is self evident from consideration of the aforementioned passage that the government intended to put an end to such debate. Whether or not the 1989 Act achieves clarity in the law and in its application without the inclusion of a public interest defence is still open to question. It shall be illustrated at a later point in this chapter that instances of decisions not to prosecute individuals or to discontinue proceedings, despite clear breaches of the Act suggest that there are inherent difficulties in the clarity of its application, particularly

[632] See further: White Paper, *Reform of Section 2*, Cm 408 at para 36 onwards.

in cases involving issues relevant to the public interest. Such difficulties may have been remedied by the inclusion of a public interest defence.

In the White Paper on the Reform of Section 2 it was stated that:

> "The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives—though these may be a factor to be taken into account in sentencing—but on the nature and degree of the harm which their acts may cause."[633]

The above justification is problematic for two reasons. Firstly, one must ask whether criminal prosecution for the unauthorised disclosure of information protected by the Official Secrets Acts can be considered alongside 'other criminal offences.' A contrast can be drawn if one considers a person who commits an offence of spying under s.1 Official Secrets Act 1911 alongside persons who make an unauthorised disclosure of information contrary to either the old s.2 provision.

A person who commits an act of spying would fall under s.1 OSA 1911. For example, Kim Philby the MI6 operative who became a double agent to spy for the Russians chose to do so because he supported the Communist regime and believed it was the right thing to do, yet his actions were clearly wrong and detrimental to the national interest and the reputation of the Service.[634] This should be contrasted to the examples of Winston Churchill and Clive Ponting. Churchill disclosed information contrary to the Act in order to warn Members of Parliament that the air defences in the run up to the Second World War were inadequate; the disclosure enhanced the defence of the realm. Ponting's

[633] *Ibid* at para 30.
[634] See for example: S.J. Hamrick, *Deceiving the Deceivers* (Yale University Press, New Haven) 2004.

disclosure of information regarding the sinking of the Belgrano caused great embarrassment to the government and yet gave opposition MPs and the general public information which they should have been made aware of the government. Such information is an essential feature of the democratic process. Under the new provisions contained in the Official Secrets Act 1989, the disclosures made by Churchill and Ponting would most likely be subject to a harm test under one of the provisions considered below.

4.11.2 Section 1 (3) Damaging Disclosures of National Security and Intelligence Information.

Section 1 (3) concerns persons who are Crown servants but who are not members of the Security and Intelligence Services. It provides:

> "A person who is or has been a Crown servant or government contractor shall be guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to national security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above."

A definition of what constitutes a 'damaging disclosure' is contained in section 1 (4) whereby the test will be satisfied if the disclosure causes damage to the 'work of, or of any part of the security and intelligence services.' Furthermore, under s.1 (4) a disclosure will be 'damaging' if:

> "(a) It causes damage to the work of, or of any part of, the security and intelligence services; or-
>
> It is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents, or articles the unauthorised disclosure of which would be likely to have that effect."

It is clear from the wording of the aforementioned test that it is both widely defined and easily satisfied.[635] The White Paper indicates that the public interest is relevant as to whether a disclosure is damaging. In considering the evidential burden on the prosecution to prove the necessary harm to satisfy the test, the then government stated that 'evidence may need to be adduced' which involves 'a disclosure which is as harmful as or more harmful than the disclosure which is the subject of the prosecution.'[636]

The above argument provided a justification for not adducing such evidence in court. Instead it was held to be sufficient to state that the document or information concerned was of a "certain class or description." The question of what constitutes a damaging disclosure of a certain class or description, or indeed who decides which documents belong to which class are a cause for confusion. The classification of documents is an established and integral feature to the control of official information. There are four essential classifications. 'Top Secret' means exceptionally grave damage to the nation if disclosed unauthorised, 'Secret' is identified as serious injury to the interests of the nation. 'Confidential' means prejudicial to the interests of the nation and the lowest classification 'Restricted' means that the document is undesirable to the interests of the nation.[637]

The White Paper expressly stated that the classification of the document will not be of 'evidential relevance' to the jury or of the degree of harm caused by the leaks.[638] The classification therefore only provides evidence of the person's opinion of the importance

[635] For an analysis of this point see H. Fenwick and G.Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford) 2007 at 933 An example of the wide interpretation can be found in the case of *A-G v Blake* [1997] Ch 84 whereby Sir Richard Scott speaking in obiter suggested that the offence was committed regardless of whether or not the disclosure was damaging to the 'national interest.'
[636] Cm 408 para 39.
[637] See further, Cabinet Office, *Security Policy Framework*, accessible via: http://www.cabinetoffice.gov.uk/resource-library/security-policy-framework (accessed 06/02/2012).
[638] *Ibid* at para 30.

of the document at the time of classification. The White Paper also stated that the classification of the document may provide evidence to suggest that the defendant knew that his unauthorised disclosure was likely to cause harm but the prosecution would be required to adduce further evidence to prove that the disclosure was likely to cause harm.[639] During the committee stage of the Official Secrets Bill, Roy Hattersley MP expressed the opinion that the Home Office had wrongly equated the test for damaging disclosure with the specific harm test for each offence. He further stated that:

> "Equating those two things was wholly unjustified because the definition in the Bill gives a whole new, much wider and, I would argue, more vacuous meaning--if, indeed, it has any meaning at all--to the word "damaging" as the Bill intends it to be understood." [640]

It appears that if a Crown servant or former Crown servant made an unauthorised disclosure under s.1 (3) the test fails to allow for a full consideration of the damage caused by the disclosure and also the harm to the public interest. Firstly, regardless of the evidential value placed on the security classification of documents, disclosure of such documents will undoubtedly give evidence that the defendant knew of the potential for harm caused such a disclosure. It therefore fails to give adequate consideration to the particular worth of the document in question and moreover, does not consider the individual's motivation for classifying the document in a certain way. The government's justification for not adducing documentary evidence in court because of the potential harm caused by those documents is very much a moot point. The unauthorised disclosure of the documents may already be freely available in the public domain if disclosed to the media for example, thus the harm of adducing such evidence is diminished.

Secondly, the potential to cause damage to the work of, or to any part, of the security and

[639] *Ibid* at para 36.
[640] R. Hattersley MP. Hansard, HC Debs, 24th January 1989 Col 1050.

intelligence services is a test easily satisfied. Arguably any unauthorised disclosure of material protected under the Official Secrets Act 1989 can be said to cause damage to the services. It will undoubtedly cause adverse publicity but also undermine the integrity of those services and the level of trust needed to undertake intelligence activities. Thirdly, therefore, in the absence of any test to determine the public benefit of such a disclosure s.1 (3) provides little relief from the absolute nature of the other aforementioned provisions contained in Section 1. As we shall see from consideration of the other sections of the Act which include damaging disclosure tests, the tests for harm appear to be more clearly defined.

4.11.3 Section 2 OSA: Unauthorised Disclosure of Defence Information and Section 3 OSA: Disclosure of Information relating to International Relations.

Section 2 (1) states:

> "A person who is or has been a Crown servant or government contractor shall be guilty of an offence, if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defence which is or has been in his possession by virtue of his position as such."

The test for damage is contained in Section 2 (2), whereby it states that a disclosure is or is likely to be damaging if:

> "(a) It damages the capability of, or any part, of the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damages to equipment or installations of those forces; or
> (b) Otherwise than as mentioned in Para (a) above it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the united kingdom of those interests or endangers the safety of British citizens abroad; or
> (c) It is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects."

A definition of 'defence' is given in Section 2 (4).[641] It can be observed that the damaging disclosure test in section 2 is far more specific than the damaging disclosure test in section 1 (4) as it clearly defines the potential of harm to members of the armed forces and their equipment. However, section 2 (b) is open to particularly broad interpretation. Endangering the 'interests of the United Kingdom abroad' remains undefined. This omission is of particular concern. During parliamentary debate on the White Paper, Mr Leon Brittan MP identified that a clear definition of harm to defence matters would allow for an 'ingenious defence' of the accused as the definition could be used to illustrate that the prosecution did not make its case except in the 'clearest possible cases of damaging disclosure.' Unfortunately, the impact of such a defence is greatly diminished by the provision contained in section 2 (b). The broad and ambiguous wording of section 2 (b) effectively reduces any benefit to the specific wording of section 2 (a) thus weakening any defence argument put forth.

Section 3 relates to the damaging disclosure of international relations information. In particular s.3 (a) concerns any information, document or other article relating to international relations whilst s.3 (b) concerns any confidential information, document or other article which was obtained from another state or international organisation. Section.3 (2) replicates the provision contained in section 2 (b). Section 3 (6) gives a definition of 'confidentiality':

> "For the purposes of this section any information, document or article obtained from a state or organisation is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the

[641] Section 2 (4) Official Secrets Act 1989:

> "(a) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown;(b) the weapons, stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it;(c) defence policy or strategy and military planning and intelligence;(d) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war."

circumstances in which it was obtained make it reasonable for the state or organisation to expect that it would be so held."

The combination of section 3 (2) and section 3 (6) provides for an easily satisfied harm test. Section 3 (6) is particularly restrictive in scope. Firstly, the section gives no indication as to the circumstances in which documents should be held in confidence and in the absence of express instruction from another state on how the information is to be handled, the section infers that any disclosure of information obtained from other states is damaging. Secondly, the lack of a clear definition in the wording of section 3 (6) is a cause for confusion. This chapter has already indicated that there is a classification system for official documents, to which 'confidential' is listed as the third most harmful category. However, under the definition of section 3 (6) information harmful to international relations is to be regarded as confidential. This gives no recognition to the classification already in place, nor does it fully recognise the substance of the information concerned. The information may be of a particular low level of importance, yet this is not taken into account by the section. Furthermore information which is protected by the Official Secrets Act 1989 may not be protected in the same way by the other states' domestic legislation. Indeed, the other state may not have an equivalent to the UK Official Secrets Act, it may not protect information relating to international relations or any such legislation may have a public interest defence.[642]

The 1988 White Paper gave an example of a disclosure which would damage the UK interest abroad:

[642] Leon Brittan MP voiced concern on this point (Hansard HC Deb 22 July 1988 vol 137 col 1455):

> "Some of the information derived from other Governments and international organisations is, frankly, highly trivial. Some of the information derived from other Governments and international organisations in confidence is material which, under the law of those countries, it is not a crime to publish abroad."

"A disclosure which disrupts relations between this country and another state may result in measures by that State against British interests and resident British citizens, or anti-British public reaction within that State, putting at risk the property or even the lives of British citizens."

The above example assisted the government to provide a justification for the inclusion of section 3 into the 1989 Act. It has been suggested, however, that the national interest should be treated as synonymous with the government of the day. This contention has proven particularly problematic when the actions of the United Kingdom government have been called into question.

The controversial trial of Derek Pasquill brought the operation of s.3 into question. Pasquill was a Civil Servant in the Foreign and Commonwealth Office (FCO). He was charged with six breaches of s.3 Official Secrets Act 1989 after leaking several documents to Martin Bright, a journalist who used the information to write several articles in The Observer and New Statesman between August 2005 and February 2006.[643] Pasquill disclosed information relating to important and highly topical issues in the wake of the July 7th bombings in London. The first concerned FCO policy on the handling of contact with Islamic groups. Pasquill alleged that a Civil Servant within his department had expressed sympathies for a number of individuals who, upon further research he believed to have a record of expressing an extremist viewpoint. The Civil Servant had then pressed for a policy forging links with the individuals and Islamic Groups, the result of which according to Pasquill would have been a 'catastrophic policy for Britain.'

In further disclosures, Pasquill delivered a document to Bright which contained the

[643] Unreported, See D.Pasquill, *I had no Choice but to Leak*, New Statesman, 17 January 2008,

views of a senior official within the FCO that the Iraq war and British Foreign policy had radicalised Muslim youth. Pasquill made another leak which is perhaps the most controversial information disclosed by Pasquill and would undoubtedly constitute the principle motivation for a prosecution under s.3. He leaked information regarding top secret extraordinary rendition flights of terrorist suspects by the Central Intelligence Agency, which also identified that the flights had landed on UK soil to refuel, despite the fact this had been denied by then foreign secretary Jack Straw. The case was dropped at trial after it was admitted by counsel for the Government that there was 'no realistic prospect of prosecution.' This followed disclosure of a series of internal written papers within FCO which indicated that the leaks had not been damaging and had instead promoted positive debate. The documents had not been disclosed to the defence until the day before the case was dropped, 20 months after the police investigation had started.[644]

4.11.4 Section 4 OSA: Disclosure of Information relevant to Criminal Proceedings.

Section 4 OSA 1989 makes it an offence for a person who is or has been a Crown servant of government contractor to disclose any information relevant to criminal proceedings to which Section 4 (2) applies. In order to understand the interrelationship between the sections it is necessary to quote the next sections in their entirety. Section 4 (2) states that:

"This section applies to any information, document or other article—
(a) the disclosure of which—
(i) results in the commission of an offence; or
(ii) facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or
(iii) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or

[644] R. Norton Taylor, *Civil Servant who leaked Rendition Secrets Goes Free*, The Guardian, 10th January 2008

(b) which is such that its unauthorised disclosure would be likely to have any of those effects."

Furthermore the section also applies to:

> "(a) any information obtained by reason of the interception of any communication in obedience to a warrant issued under section 2 of the [1985 c. 56.] Interception of Communications Act 1985, or under the authority of an interception warrant under section 5 of the Regulation of Investigatory Powers Act 2000, any information relating to the obtaining of information by reason of any such interception and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such interception; and
> (b) any information obtained by reason of action authorised by a warrant issued under section 3 of the [1989 c. 5.] Security Service Act 1989, any information relating to the obtaining of information by reason of any such action and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such action."

It can be observed that the above provisions contained in section 4 do not provide a test for harm. Instead, for an offence to be committed under s.4 it is required that the disclosure results in the commission of an offence, escape from custody etc under ss.4 (2) (i) to (iii). This has the effect of creating an implied harm test, yet this too can be easily satisfied. An unauthorised disclosure of information which is leaked to a journalist or a publisher would mean that the person in receipt of the information would commit an offence under section 5 Official Secrets Act 1989 (see below). Furthermore, there is nothing contained within the provision to suggest that the 'commission of an offence' has to be the act of another person as a result of the disclosure. Therefore, a member of the Security Service, the Secret Intelligence Service or GCHQ would commit an offence under s.1 and consequentially engage s.4. Former MI5 officer David Shayler was convicted for offences under both ss.1 and s.4.

Section 4 also has a particular impact upon police officers. The Public Interest Disclosure Act 1998 (PIDA) which protects employees from recrimination for making disclosures in the public interest had originally excluded police officers from

whistleblowing protection. It was not until s.37 Police Reform Act 2002 inserted a new section 43K into the Employment Rights Act 1996 that police officers received the protection. However schedule 2 Public Interest Disclosure Act removes access to whistleblowing protections for any persons who have been convicted of an offence under the Official Secrets Act 1989 or who are likely to be convicted of an offence. Whilst one may argue that it is entirely proper that unauthorised disclosures of this nature are not protected by PIDA, one should also consider controversy surrounding the Regulation of Investigatory Powers Act. RIPA is widely framed and allows not only the Security and Intelligence Services, the police, local councils, job centres and other local service providers (794 in total according to 2008 figures) to carry out surveillance. Originally intended to cover investigations regarding terrorism or serious crime, the Act has been used to carry out covert surveillance on persons for allegedly committing very minor offences.

Because of the inherent uncontrollable nature of the Act one can surmise that there is significant potential for improper surveillance activities to take place. However, if a police officer were to disclose information regarding such an act to the media or to a Member of Parliament in opposition, for example, he would potentially be guilty of an offence under s.4 and would also lose the protection under PIDA, even if the surveillance activities in question related to a person who poses no risk to national security at all. Also the police officer may also be charged with the common law offence of 'misconduct in public office' this would further bring the officer under the remit of s.4 (2) (a) (i) as his disclosure would have resulted in the commission of an offence.

4.11.5 Section 5: Information Resulting in Unauthorised Disclosures or entrusted in

Confidence.

Section 5 applies to persons who have received information by a Crown Servant or government contractor under one of the following three circumstances under s.5 (1) (a):

"(a) any information, document or other article protected against disclosure by the foregoing provisions of this Act has come into a person's possession as a result of having been—

(i) disclosed (whether to him or another) by a Crown servant or government contractor without lawful authority; or

(ii) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or

(iii) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted as mentioned in sub-paragraph (ii) above…"

An offence is committed when a person makes an unauthorised disclosure of the information which is damaging and which he knows or has reasonable cause to believe would be damaging under sections 1 to 3,[645] provided that the disclosure is an offence under those sections.[646] Section 5 carries a further safeguard whereby persons in receipt of information as a result of a breach of s.1 Official Secrets Act 1911 will be subject to the provision.

Section 5 is primarily aimed at journalists who receive unauthorised disclosures from Crown Servants and publish the information in the public domain. It should be noted however that s.5 is used more for the threat of prosecution in order to attempt to restrict the publication of leaked documents or to determine the source of the leak. At the time of writing there is yet to be a successful prosecution under s.5 OSA 1989. Section 5 will of course cover any person in receipt of information under the circumstances contained in

[645] S.5 (3) Official Secrets Act 1989.
[646] S.5 (1) (b) Official Secrets Act 1989.

the provision and would therefore cover for example, Members of Parliament or even the Defendant's legal counsel, if the information were to be repeated outside of conference.

It should be noted that s.5 (3) identifies that the test as to whether the disclosure is damaging is the same test that would be provided to Crown servants. However it should be noted as Fenwick and Phillipson correctly identify, the Court will need to give substantial consideration to free speech rights of the press by 'reading down' the provisions of s.5 OSA 1989 in line with Article 10 ECHR.[647] A proportionality test will therefore be engaged whereby the public interest in disclosure will be weighed against the public interest in non-disclosure.

It is submitted that the unauthorised disclosure of information published or reported upon in the public domain which uncovers information that does not appear to be harmful to national security but is evidence of malpractice or maladministration will be arguably non-damaging. The potential for damage caused by the unauthorised disclosure has therefore already been tested in the public domain. The defence may also suggest that the defendant did not know that the disclosure of such information would be damaging, which would be further supported by the fact that the very nature of a journalist's work in democratic society is to inform the public and hold the executive to account. This should be contrasted to the position of a Crown Servant who has made an unauthorised disclosure to another person but is caught before any information is published. In this position the prosecution could raise an argument that the information is damaging and that by virtue of the Crown servant's position he needs to be punished and prevented

[647] For a detailed consideration of this point see further, Fenwick and Phillipson *Above*, n *2* at 934.

from making further disclosures. In these circumstances a damaging disclosure test will be easily satisfied, despite the fact that the information in question will not be tested. It is further submitted, therefore, that in the circumstances of a journalist or editor, a full analysis of whether or not the information in question is damaging gives rise to an implied public interest defence. This analysis shall now progress to consider s.8 Official Secrets Act which primarily concerns the loss of information protected by the Official Secrets Act.

4.11.6 Section 8: Safeguarding Information.

Section 8 (1) provides:

"(1) Where a Crown servant or government contractor, by virtue of his position as such, has in his possession or under his control any document or other article which it would be an offence under any of the foregoing provisions of this Act for him to disclose without lawful authority he is guilty of an offence if—

(a) being a Crown servant, he retains the document or article contrary to his official duty; or

(b) being a government contractor, he fails to comply with an official direction for the return or disposal of the document or article,

or if he fails to take such care to prevent the unauthorised disclosure of the document or article as a person in his position may reasonably be expected to take."

Section 8 is a summary offence with a maximum penalty of imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale or both. The case of Richard Jackson is the first time that a person has been prosecuted under s.8 Official Secrets Act 1989.[648] On 9th June 2008 Jackson, a senior Civil Servant on secondment from the Ministry of Defence, mistakenly took two confidential reports, one

[648] Unreported see: (Author Unknown) *Civil Servant Fined for leaving documents on Train, Independent,* 28th October 2008.

entitled ‘Al-Qaeda vulnerabilities’ and marked ‘top secret,’ the other with a lower level two classification, from his desk and returned home. Upon realising his mistake he made the decision to return the documents when he went to work the following day. The documents did not reach their intended destination. Instead Jackson had left them on a train at Waterloo station. By the time Jackson had discovered that he had forgotten the documents, the train had already departed towards Surrey. After making enquiries at the lost property office he returned to work whereby he failed to inform his superiors as both persons were on holiday. The documents, contained in an orange folder, were discovered by a concerned member of the public who passed the folder on to the BBC’s security correspondent.

Jackson pleaded guilty to an offence of failing to take proper care to prevent unauthorised disclosure of the documents under s.8 Official Secrets Act 1989 at Westminster Magistrates Court. It was stated to the court that this was the first time that the provision had been used since the Official Secrets Act had been passed. Jackson received a fine of £2,500. District Judge Timothy Workman concentrated upon the degree of harm caused by the loss of the documents and stated that had there been a ‘real risk’ to national security a custodial sentence, perhaps suspended would have been inevitable. Jackson was allowed to retain a position, albeit at a much lower level, at the Ministry of Defence and has subsequently lost his security clearance.

R v Jackson may provide the catalyst for future prosecutions of security breaches of this nature. The year 2008 saw an unprecedented level of official data loss reported in the news media. Several instances could have potentially been covered by the ‘forgoing provisions’ detailed in the Official Secrets Act 1989 and would therefore constitute an

offence under s.8.[649] In January 2008, the loss of data regarding 600,000 persons interested in joining the UK Armed Forces by the MOD may have constituted a damaging disclosure of defence information contrary to s.2.[650] In June 2008, the theft of a laptop owned by the then Cabinet minister Hazel Blears which contained details relating to religious extremism, resulted in calls from the Conservative opposition for a police investigation under s.8 on the basis that Ms Blears should not have held the information on the laptop in the first instance.[651] Furthermore there have been several reported instances of laptops being lost or stolen, owned by members of the security services and in September 2008 a mobile telephone sold on the internet auction website eBay was found by the new owner to have photographs and information relating to terrorism investigations which had not been deleted by the previous owner, an operative in MI6.[652] Such instances would be covered under s.1, the disclosure of security and intelligence information. Despite clear breaches of s.8 Official Secrets Act 1989, such persons who misplace or mishandle information pertinent to national security remain to be prosecuted.

The case highlights the need for consistency in the way in which unauthorised disclosures of information covered by the Official Secrets Act 1989 are handled. Section 8 is a relatively minor summary offence in relation to the provisions in sections 1 to 4 of the Act which all carry a maximum penalty on indictment a term of imprisonment not exceeding two years or fine or both or a term not exceeding six months or both if tried summarily. Yet section 8 is entirely reliant upon those 'forgoing provisions' of the Act to

[649] *'MOD admits loss of secret files,'* BBC News Website, http://news.bbc.co.uk/1/hi/uk/7514281.stm (accessed 15/11/09).
[650] *'MOD computer hard drive missing*,' BBC News Website, http://news.bbc.co.uk/1/hi/uk/7662604.stm (accessed 15/11/09).
[651] '*Blears PC Loss*, BBC News website,' http://news.bbc.co.uk/1/hi/uk_politics/7459579.stm (accessed 17/07/09).
[652] *'MI6 Photos Sold on Auction Site*,' BBC News Website, http://news.bbc.co.uk/1/hi/uk/7643374.stm (accessed 15/11//09).

provide the basis of the offence.

It is submitted, therefore, that regardless of whether an unauthorised disclosure of national security information is made intentionally or by a failure to reasonably take care of the information the potential impact on national security once the information is disclosed will undoubtedly be the same. A lighter sentence may be justified because an s.8 offence does not require evidence of intention. However, the provisions contained within the Official Secrets Act 1989 act in a different way to a number of other offences governed by the English Legal System. Ss.1 (1) to (3) and 1 (4) do not require evidence of intention, merely evidence of disclosure. Similarly, the other provisions contained in the Act which apply harm tests, focus upon the harm caused by the disclosure, not the intention to cause harm by the making of a disclosure.

The Jackson incident gives rise to an unsatisfactory proposition whereby any would be whistleblower may be inclined to 'misplace' documents they wish to be in the hands of the news media because the consequences of doing so may be far less impacting upon their career. The inconsistencies between s.8 and its relationship to the 'forgoing provisions' of the Official Secrets Act 1989 should be urgently reviewed.

4.11.7 Authorisation to Disclose

The circumstances whereby a Crown Servant is deemed to have made a disclosure with lawful authority are detailed in s.7 Official Secrets Act 1989. With regard to Crown servants, s.7 (3) states that a disclosure is deemed lawful 'if and only if' it is made:

"(a) to a Crown servant for the purposes of his functions as such; or

(b) in accordance with an official authorisation."

In the Shayler judgement, Lord Bingham considering the making of disclosures in the public interest suggested that if a Crown servant had information relating to malpractice or abuse he could seek authorisation to disclose the information. This was particularly important in cases whereby the information would reveal matters 'scandalous or embarrassing' but would not damage any national security or intelligence interest. It was suggested that in considering a request for authorisation officials should make a decision:

> "…bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate."[653]

The aforementioned suggestion provides a solution to the difficulties posed by disclosures in the public interest by utilising the existing statutory framework. However, the solution is reliant upon the official making an objective judgement. The authorisation decision will undoubtedly involve a senior civil servant and the relevant minister to the department in question or in the case of the Security and Intelligence services, a senior member of those services. If the information concerned is 'scandalous or embarrassing' one must ask if a person making the decision can truly be objective. In the case of ministers, the political implications for the disclosure may be too great and the ability to refuse the disclosure too easy. The suggested framework outlined above considers proportionality, essentially weighing the public interest in disclosure against the public interest in non disclosure and thus engaging Article 10 ECHR. The test which is rooted in Convention jurisprudence is very much a legal test and yet whilst the minister or official in question may seek legal advice from the Government Legal Service, there is no statutory requirement to do so despite the fact that s.6 Human Rights Act 1998 binds

[653] *R v Shayler* [2002] UKHL 22 at para 29.

public authorities to act in accordance with Convention rights.

It is submitted that the decision to disclose information is far more complex than to be taken by one official and requires careful consideration of the legal principles. It is also submitted that considering the potential embarrassment or scandalous nature of the intended disclosure, the official is not in a position to make a wholly objective judgement. One way of alleviating the potential for a conflict of interest would be to introduce an independent mechanism for disclosure with a similar make up to the 'Publications Review Board,' the unsuccessful amendment to the Official Secrets Bill which would have formed an independent body to view requests to publish memoirs of former members of the Security and Intelligence Services. Lord Bingham did however indicate that if a request is denied under the current framework, the Crown servant would be entitled to seek judicial review a course which the Official Secrets Act 1989 does not 'seek to inhibit.'[654]

4.11.8 Available Defences: Expressly defined by statute.

A common feature throughout the sections of the Official Secrets Act 1989 is the defence available, namely that it is a defence for a person charged with the offence to prove that he:

> "…At the time of the alleged offence he did not know and had no reasonable cause to believe that the information, document, or article in question related to (the relevant provision)."

The case of *R v Keogh*[655] provides the most up to date and leading judgment on defences contained in the OSA 1989 and where the burden of proof lies. The case involved the

[654] *Ibid* para 31.
[655] [2007] 1 W.L.R. 1500.

leaking of a memo detailing communications between President George W. Bush and the former Premier Tony Blair. It was alleged to contain discussions of the situation regarding the war in Iraq, however the exact content of the memo was never disclosed, including during the trial proceedings. Keogh passed the memo on to a friend of his, Leo O'Connor, a researcher working for the Labour MP for Northampton South, Tony Clarke who voted against the war in Iraq. O'Connor passed the memo on to Clarke who immediately contacted the Police. David Keogh was convicted and sentenced to six months imprisonment for offences under ss.2 and 3 OSA 1989 O'Conner as receiver of the information (s.5 OSA 1989) was convicted and sentenced to three months imprisonment.

The case of *Keogh* is significant because the defence appealed the decision of the preparatory hearing that the defences contained in ss.2 (3) and 2(4)[656] were compatible with the presumption of innocence guaranteed by Article 6 ECHR. The appeal was allowed. Lord Phillips of Worth Matravers focussed his analysis on the fact that ss.2 and 3 OSA 1989 required 'attention to be given to the defendant's state of mind' this was despite the fact that ss. 2(3) and 3(4) required the defendant to show a lack of knowledge that he has committed the offence. [657] Lord Phillips stated that the 'most crucial question' was whether or not the reversal of the burden of proof was a necessary element in the operation of ss.2 and 3, if it was not he could not see how placing the burden of proof on the defendant could be justified.[658] This would create an 'unbalanced position' whereby the prosecution could wait until the defendant advanced his case (as per s.2 (3) and s.3 (4)) before using such evidence to advance their own case in relation to the mens rea of

[656] Namely that the defendant had to prove that 'he did not know' and 'had no reasonable cause to believe' that his disclosure related to defence or international relations and that the disclosure would be damaging.
[657] *Ibid* para 19.
[658] *Ibid* para 26.

ss.2 and 3. It was held therefore that the OSA could 'operate effectively' without the reversed burdens imposed by the defences contained in ss.2 (3) and 3(4) and that to interpret the sections with their ordinary everyday meaning would be incompatible with Article 6 ECHR. The sections should therefore be 'read down' as to be compatible with the Convention right as per s.3 Human Rights Act 1998;[659] this has the effect that the accused has only an evidential burden rather than a legal burden. Because the wording of the defence is a common feature of all provisions of the OSA 1989 requiring 'damaging disclosure' the judgement should be seen as applicable to all defences under each respective section. Bailin suggests that the Court of Appeal's willingness to 'read down' the reverse legal burden is an indication of how draconian it viewed the prosecution's powers under the Act.[660] The situation post the Keogh judgment still affords the prosecution with sizeable powers.

It can be observed that the aforementioned harm tests for 'damaging disclosures' are still easily satisfied. Furthermore, it would be particularly difficult for a Crown servant to assert that he did not know that his disclosure would be damaging, firstly, because he will have already signed the Act in recognition that he is aware of his statutory obligations under it. Secondly, because of the nature of the work he is involved in which brings the servant into contact with the information (and the appropriate security clearance he received to become party to the information). Thirdly, because the legal test only focuses on harm rather than any benefit arising from the disclosure (therefore the tests do not allow for situations where the servant was aware of the potential consequences of the disclosure but this was outweighed by the benefit of disclosure) and fourthly because the classification system used to identify the importance and risk of

[659] Section 3 Human Rights Act 1998.

[660] A. Bailin, *The Last Cold War Statute* [2008] Crim LR 625.

disclosure is clearly visible to the reader.

Given the nature of the expressly defined defences available to Crown Servants this chapter shall now consider the Common Law defence of 'necessity' to consider whether such a defence is available under the OSA 1989 and whether it will give rise to a more substantial defence than those expressly defined by statute.

4.11.9 An Implied Necessity Defence?

From analysis of the Official Secrets Act 1989 one can ascertain that the unauthorised disclosure of any such material covered by the provisions of the Act will highly likely result in the commission of an offence. It should however be considered whether or not it can be acceptable to break the law in order to secure a greater good. This in effect becomes a defence of necessity.[661]

With regard to the whistleblower, the defence of necessity was considered by the House of Lords in *R v Shayler.* Lord Bingham took a pragmatic approach to the necessity question, to which he believed should be decided on a case by case basis.[662] He also limited the availability of the defence to instances whereby a person commits an 'otherwise criminal act' to avoid an imminent peril of danger to life or serious injury 'to himself or towards somebody for whom he reasonably regards himself responsible.'[663] Lord Bingham disagreed with the trial judge Moses J[664] who believed that ss.1 and 4 (1)

[661]It is important to note at this stage that had Katherine Gun's case proceeded to trial, her defence would have rested upon a 'necessity to prevent loss of life.' See further, *The Threat to Press Freedom*, The Guardian, 24 November 2005 and related articles.
[662] [2002] UKHL 11, para 46.
[663] *Ibid*, para 48.
[664] For the conflicting opinion of Moses J see *above* n 662, para 43.

OSA 1989 did not allow scope for a necessity defence, instead choosing to rely upon the reasoning of the Court of Appeal in *R v Pommell* which stated that 'unless and until Parliament provides otherwise,' the 'defence of duress, whether by threats or from circumstances, is generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason.'[665]

Lord Bingham, however, identified that the position of David Shayler did not fall under the definition of necessity as he was unable to provide evidence of imminent peril of danger to life; instead his unauthorised disclosure was motivated by a desire to expose malpractice and thus create greater accountability in the Security Service.[666] Lord Bingham's reasoning that the defence of necessity applies to the Official Secrets Act is particularly significant. Firstly, Lord Bingham stated that the defence applied to the Official Secrets Act, he did not provide any exceptions to this. He therefore incorporates the most restrictive provisions of the Act which do not provide a harm test and can be identified as 'absolute' in nature, ss.1 (1) and 4 (1). Secondly, one must remember the government's reasoning for not including a public interest defence in the White Paper on the reform of s.2:

> "The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives"

The allowance of a necessity defence to unauthorised disclosures which fit the criterion outlined by Lord Bingham, namely to avoid an imminent peril of danger to life or serious injury, is clearly against the reasoning of the White Paper. One must consider why Lord

[665] [1995] 2 Cr App R 607, para 615.

[666] *Above*, n 662 para 66.

Bingham chose to disregard the document. The White Paper led to the passage of the Official Secrets Act 1989, an Act which was passed with Parliamentary approval and without a public interest defence. This factor is particularly notable considering that Lord Bingham pays particularly close attention to the White Paper (including the above quotation) at an earlier point of the judgement. Furthermore, the House of Lords is not bound by judgments made in the Court of Appeal and the reasoning in *R v Pommell* is by no means definitive. It is submitted that Lord Bingham's reasoning in Shayler is a noticeable attempt at providing an implied defence, albeit confined to a strictly controlled set of circumstances.

Post *Shayler* the defence of necessity for alleged offences under the Official Secrets Act 1989 is yet to be tested; however the case of Katherine Gun is a significant indicator as to the possible effect of such a defence.[667] Katherine Gun was a GCHQ translator who disclosed a request by the US National Security Agency to intercept the communications of countries voting on whether to take action against Iraq at the United Nations. Gun was charged under s.1 OSA 1989. When the case advanced to trial the prosecution declined to offer evidence and the trial was dropped. It emerged that the day before the trial the defence had asked the government for disclosure of any documentation relating to the advice it had received as to the legality of the war in Iraq. Such a disclosure would have allowed the defence to argue that the reason for the disclosure was to stop an illegal war and thus prevent loss of life. This may have constituted a defence of necessity as per Lord Bingham's reasoning in *Shayler*. However it may be argued that Gun lacked sufficient proximity from the persons in 'imminent peril' and the persons who would prevent the war. Gun's act may be considered to comprise of three stages: firstly, the

[667] Unreported see: http://news.bbc.co.uk/1/hi/uk/3485072.stm (accessed 25/03/10).

disclosure will be published, secondly, the publication will lead to overwhelming public pressure, and thirdly, the public pressure will prevent war. Media speculation at the time suggested that the prosecution had been dropped because of fears that evidence surrounding the legality of the war in Iraq would be made public.

5.12 The Official Secrets Act 1989: Compliance with Article 10 values

In *Shayler*, when Lord Bingham considered the appropriate Strasbourg jurisprudence, he identified that reasoning that employees of the Security and Intelligence services and the 'special nature of their work' imposes duties on them within the meaning of art.10 (2). Lord Bingham then suggested that a 'blanket ban' which 'permitted no exceptions' to the rule of non disclosure would be inconsistent with art.10 (1). It would not, he opined, survive the 'rigorous scrutiny' required to give effect to art.10 (2). Lord Bingham held that the fact that unlawfulness and irregularity could be reported to a number of authorities prescribed by the Act, if properly applied, were sufficient to be Convention compliant. For this reason, Lord Bingham held that the Official Secrets Act 1989 did not provide a blanket ban against disclosure because the employee, or former employee, could seek official authorisation from his superiors to disclose the information and if it were to be refused he could challenge the decision by way of judicial review.

Lord Bingham held that if the wording of the Official Secrets Act 1989 were incompatible with Shayler's Convention rights, the incompatibility must be left to Parliament to resolve. He did not believe that the legislation could not be interpreted

compatibly with s.3 Human Rights Act 1998.[668] Whilst Lord Bingham identified that there may be some doubt as to whether a whistleblower could persuade the authorities to take his allegations seriously, he suggested that the effectiveness of the system had not been tested as Shayler had chosen not to use the mechanisms available. Furthermore, he noted that the Act was defective in the fact that it did not identify the criteria that officials should follow when deciding on whether information should be authorised, but was still satisfied that the Act was Convention compliant. Lord Bingham did not seek to identify whether the official mechanisms were effective.

It is submitted that because Lord Bingham placed such a strong emphasis on the availability of the authorised mechanisms, he neglected to consider whether the OSA could be compliant with the Convention even though the various sections contain little, if any scope for analysis of the public interest value of the speech. Neither s.1 OSA nor s.4 OSA provide the opportunity to test the value of the information; this is inconsistent with art.10 values which aim to protect information of a high value to the public interest. Proportionality balancing thus requires a court to thoroughly assess the public interest in the disclosure against the public interest in non disclosure. If it is impossible for the legislation to provide such scope for analysis by reading down the sections to align them with article 10 values, the court should then make a declaration of incompatibility, as per s.4 HRA 1998.

Post *Guja v Moldova* it is submitted that a domestic court will need to place emphasis upon the effectiveness of the mechanisms available. In Shayler, both Lord Bingham and

[668] *Above*, n 662, para, 53.

Lord Hope placed great emphasis on the fact that Shayler had not attempted to use those mechanisms but did not fully question why this was the case. Applying the *Guja* framework, a public servant may bypass the official mechanisms if he believes that he will suffer mistreatment as a result of raising the concern. Public disclosure would also be acceptable 'as a last resort.' The *Guja* framework does not fully account for disclosures concerning national security information. It is submitted that in the proportionality analysis the special nature of employment in the security and intelligence services will shift the balance strongly in favour of the requirements identified in art.10 (2). However, where the information concerned is disclosed as a 'last resort' it may be sufficiently high to outweigh the special duty of confidence owed by the servant. Lord Bingham drew reference to the fact that the Official Secrets Act did not prevent Shayler from mounting a duress of circumstances defence, whereby the disclosure would be necessary to prevent the immediate risk of harm. Yet, by placing emphasis on the requirement in the Act that prior authorisation is needed in disclosure, both Lord Bingham and Lord Hope failed to adequately consider whether the lack of a codified public interest defence rendered the Official Secrets Act incompatible with the convention. It is submitted that following *Guja v Moldova*, the lack of a codified public interest defence is likely to make the Official Secrets Act incompatible with the Convention.

A domestic court may seek to disregard the reasoning in *Guja v Moldova* on the basis that national security information falls within the 'special circumstances' principle established in *Ullah v Special Adjudicator*. It should also be noted that in Shayler Lord Hope had identified that a regime which favours official authorisation subject to judicial review is within the 'margin of discretion which ought to be accorded to the legislature.' In *Financial Times v UK* the Grand Chamber of the European Court of Human Rights

reiterated that margin of appreciation will be circumscribed by the interest of a democratic society in a free press and that such an interest would weigh heavily in the proportionality analysis.[669] This reasoning if transposed to cases involving public servant whistleblowers suggests that the interest of a democratic society in whistleblowers who disclose information of a high value to the public interest would outweigh the margin of appreciation owed to the domestic authority. This is because in *FT v UK* and *Guja v Moldova*, the effects of restraining such expression were markedly similar, thus in the context of journalistic sources, the 'chilling effect' caused by the grant of an order for source disclosure may dissuade individuals from providing the press with public information. In the context of the employee as a whistleblower, the dismissal of an employee for raising concerns may cause a 'chilling effect' dissuading other potential whistleblowers from raising concerns.[670]

4.13 Misconduct in Public Office

The Act's predecessor s.2 Official Secrets Act 1911 was considered particularly draconian in that it criminalised the disclosure of a vast amount of official information and was considered a 'catch all' provision. The main improvement brought by 1989 Act was that it reduced the protected information into specific categories of information with prescribed harm tests. Maurice Frankel, the Director of the Campaign for Freedom of Information has suggested that the Damien Green incident has 'turned back the clock' to a protection of information more likened to information covered by the 1911 Act.[671]

[669] *Above*, n 310, para 60.
[670] *Ibid*, para 70.
[671] http://www.timesonline.co.uk/tol/comment/letters/article5281629.ece (accessed 07/02/12).

The difficulty with the common law offence of Misconduct in Public Office is that unlike the Official Secrets Act 1989, there is no prescribed class of information.[672] This means that in theory, any person who as a public officer makes an unauthorised disclosure of official information may be liable to prosecution, despite the content of the information concerned.

Currently, the CPS guidelines set out in November 2007, state that the elements of misconduct in public office are:

"(a) A public officer acting as such.
(b) Willfully neglects to perform his duty and/ or willfully misconducts himself.
(C) To such a degree as to amount to an abuse of the public's trust in the office holder.
(d) Without reasonable excuse or justification."

There is no clear definition of what amounts to 'misconduct' other than to 'abuse the public's trust in office.' Historically, the cases have involved a variety of different acts. These have ranged from police officers imparting information held on the police national computer,[673] the receipt of bribes, blackmail and embezzlement.

Most recently, the offence of Misconduct in Public Office has been used as a means to arrest and or prosecute public officers for leaking information. The Damian Green/ Christopher Galley incident is an illustration that there is no clear definition as to what constitutes a 'public officer' in a misconduct offence.

In 2003 the Court of Appeal declined to provide a precise definition as to what position constituted a public office, furthermore the court suggested that private employees doing

[672] For information of the offence and its uses see generally: House of Commons Research Note: Lucinda Maer, *Misconduct in Public Office*, 30 December 2008, SN/PC/04909. http://www.parliament.uk/commons/lib/research/briefings/snpc-04909.pdf
[673] For example: *R v Keyte* [1998] 2 Cr. App. R. (S.) 165, *R v Kassim* [2005] EWCA Crim 1020.

similar work to public employees should be covered by the offence. This means that the offence can be widened not only to cover the work of MPs (as illustrated by the Damien Green incident) but also be potentially widened to cover the work of persons working in private organisations carrying out public work and also beyond the sphere of Crown Servants and 'Government Contractors' as defined by the Official Secrets Act 1989. This means that information that would not be covered by the OSA 1989 may still be covered by the offence of Misconduct in Public Office. The failure to provide a precise definition can only cause further confusion.

In 2007 a civilian worker at Scotland Yard was convicted and sentenced to 8 months imprisonment for leaking information about a planned al-Qaeda attack on the West to a journalist at the Sunday Times.[674] Lund-Lack pleaded guilty to an offence of Misconduct in Public Office and not guilty to and offence under the Official Secrets Act 1989. The fact that both offences were run side by side is a worrying development.

In *R v Kearney*,[675] a former Thames Valley Police detective Mark Kearney was charged with misconduct in public office for disclosing information to Sally Murrer, a journalist for the Milton Keynes Citizen. Murrer was charged with aiding and abetting misconduct in public life, alongside another journalist Derek Webb and Mr Kearney's son Harry. The information had concerned the bugging of conversations between MP Sadiq Khan and a terrorist suspect at Woodhill Prison in Milton Keynes. The trial collapsed because the judge held that the prosecution had breached the right to freedom of expression, Article 10 European Court of Human Rights. The case is worrying because it illustrates

[674] *Police worker admits secrets leak*, BBC News Website, (18/07/09), http://news.bbc.co.uk/1/hi/uk/6763377.stm, (accessed 15/11/09).
[675] Unreported, see '*Detective Sergeant Mark Kearney: 'Refusing to bug inmates made me a thorn in their side'* http://www.timesonline.co.uk/tol/news/uk/crime/article5254216.ece (accessed 06/07/10).

that the offence is capable not only of extending criminal liability to the person who leaks the information but also to the person who receives it.

The recent Damian Green/Christopher Galley incident has highlighted notable confusion in the use of both the Official Secrets Act 1989 and Misconduct in Public Office. It was stated that the justification for the arrests was that national security had been put at risk as a result of the leaks. However, David Davis told the BBC that if the leaks were a risk to national security then charges should have been brought under the Official Secrets Act 1989.[676] The New Statesman suggested that there were yet to be any charges brought under the Official Secrets Act 1989 and this suggested that "the leaks were not especially serious."[677] Such confusion highlights a difficult contradiction between the two offences.

The Public Administration Select Committee report 'Leaks and Whistleblowing and Whitehall' stated that the use of the Misconduct in Public Office to prosecute Crown Servants who leak information meant that the 'boundaries established by the 1989 Act may be becoming blurred' and that it was important that the offence is not used to 'subvert the clearly expressed will of Parliament' in 'limiting the scope of offences under the Official Secrets Act.'[678]

It is submitted that where the Official Secrets Act 1989 does not apply the offence Misconduct in Public Office should not be used to prosecute leaks of information. As an alternative, it is submitted that the civil law doctrine of breach of confidence should be

[676] *'Tories Colluded Over Leaks, Mandleson Claims'* http://www.telegraph.co.uk/news/newstopics/politics/conservative/3544428/Tories-colluded-with-Damian-Green-Peter-Mandelson-claims.html (accessed 06/07/10).
[677] *'Government Needs Secrecy But the Public Needs Whistleblowers'* http://www.newstatesman.com/politics/2008/12/green-british-information (06/07/10).
[678] Above, n 435, para 46.

used and it should not be forgotten that a leak of information would breach a Servant's duty of confidence under the Civil Service Code paragraph 6. The next section considers the law of confidence.

5.14 Breach Of Confidence

The civil law remedy of Breach of Confidence seeks to protect information entrusted in circumstances where there is an obligation not to disclose the information unless authorisation has been sought from the person who imparted the information. Whereas the Official Secrets Act 1989 is used as a means to prosecute after an unauthorised disclosure has been made, the civil remedy of Breach of Confidence allows for the possibility of obtaining an injunction both at the interim stage, and later once a full trial has been decided to prevent further disclosures from taking place. In this sense, Breach of Confidence may be considered as an alternative protection of official information to the Official Secrets Act 1989. Modern technological advancements have meant that it is now very easy for an employee to make an unauthorised disclosure to an online outlet such as *Wikileaks*, leading to the swift dissemination of material across the globe. As a consequence, this analysis will seek to evaluate whether the traditional remedy of an injunction is now obsolete.

It should be reiterated that breach of confidence actions are not only used for the purpose of securing an injunction. An action in breach of confidence may also be considered as a way of seeking to obtain damages from the Crown Servant where the individual has sought to profit from the information he has obtained in the course of his employment,

such as by publishing memoirs.[679] Parallels may therefore be drawn with Mosley case which concerned an action for misuse of private information, which emanates from the law of confidence. In *Mosley* it was determined that an injunction would not prevent the further publication of a video identifying the claimant involved in a sexual act.[680] By the time that the court had considered the matter, the video had spread across the internet. Despite this, the action was used to obtain damages from the News of the World for the breach.

In addition, it should be noted that the Crown may also bring a breach of confidence action against a third party who may have received the information from a Crown Servant, a provision which perhaps provides a civil law equivalent to s.5 OSA1989. This would allow potential for the UK government to take a breach of confidence action against *Wikileaks* or similar organisations. There are many notable comparisons to be made between the Official Secrets Act 1989 and Breach of Confidence. Both mechanisms aim to protect confidential information and candour yet do so in markedly different ways. It can be observed that at times the Official Secrets Act 1989 has been used in Breach of Confidence cases to illustrate that the Crown Servant in question owed a duty of confidence to his employer, this is regardless of the fact that the 'signing' of the OSA 1989 has a symbolic rather than contractual basis. This section will start by considering breach of confidence decisions prior to the Human Rights Act 1998.

4.15 The Situation Pre- Human Rights Act 1998.

During the 1980s the government made several

[679] *Attorney General v Blake* [2001] 1 AC 268, see also *Blake v UK* (2006) (Application no. 68890/01).
[680] Considered further below, also see Chapter Two.

attempts to prevent the publication of *'Spycatcher'* a book written by former MI5 officer which detailed various descriptions of wrongdoing by the Security Service, including allegations that Head of MI5 Sir Roger Hollis, was in fact a KGB operative and several named individuals within the service had plotted to assassinate President Nasser and bring down the Wilson government. Most notably the *'Spycatcher'* affair concerns two House of Lords decisions, the first, *Attorney General v Guardian Newspapers Ltd*[681] dealt with interlocutory injunctions, the second, *Attorney General v Guardian Newspapers (No2)*[682] dealt with permanent injunctions.

The first attempt to restrain publication of the book was in 1985. By 1986 temporary ex parte injunctions were granted to prevent further disclosure after extracts were published in The Guardian and Observer newspapers in the run up to the hearing. By 1987 the affair had started to appear an embarrassing episode for the government as the book had become widely available in the US and many copies had found their way into the United Kingdom. However, the House of Lords made the decision to continue with the injunctions on the basis that the Attorney-General still had an arguable case for obtaining permanent injunctions to ban the material.

In *A G v Guardian (2)* The House of Lords considered the justification for permanent injunctions against further publication of the *'Spycatcher'* material. The Attorney General argued that the public interest in maintaining confidentiality outweighed the public interest in free speech. In giving evidence for the Crown, Sir Robert Armstrong identified several factors of which be believed to be detrimental to the protection of

681 [1987] 3 All ER 316.
682 [1990] 1 AC 109.

national security.[683] He indicated that the unauthorised disclosure of information was likely to damage the trust with which officers have in each other, and that as a result of the publication of *'Spycatcher,'* moral in the service had been damaged. He further argued that intelligence agencies of friendly foreign countries would lose confidence in the service if permanent injunctions were not granted and that informers to the service would have their confidences damaged as a result of publication.

Essentially, Sir Robert's arguments centred on the preservation of efficiency in MI5.[684] He believed that permanent injunctions were required regardless of the fact that the information concerned had become widely available. However it was because of this fact that the majority of Sir Robert's justifications were rebutted, the Court highlighting that the granting of permanent injunctions would have little effect on changing the aforementioned factors. If there was the potential to cause damage to the Security Service, widespread publication had already allowed for this to be done. Indeed, further to widespread publication in other jurisdictions, including the Republic of Ireland, Europe, the United States and Australia, the *Observer* noted that *Heinemann U.K.* had estimated that 10,000 copies of Spycatcher were entering the United Kingdom every week.

The House of Lords engaged in a lengthy balancing exercise in order to determine what constitutes the public interest. Lord Goff highlighted that in a free society there was 'a continuing public interest that the workings of government should be open to scrutiny and criticism.'[685] Furthermore Lord Griffiths conceded that:

"if a member of the service discovered that some iniquitous

683 *Ibid* at 169.
684 *Ibid* at 142.
685 *Attorney General v Guardian Newspapers* Ltd (No 2) [1988] 3 WLR 776 at 807.

course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any members of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger. However, no such considerations arise in the case of Spycatcher"[686]

Lord Griffith's comments provide a consideration for the actions of the whistleblower intending to expose iniquity. The actions of the whistleblower can be easily distinguished from this case. Whilst Peter Wright's book contained allegations of malpractice, it has been duly noted that these allegations were nothing new. [687] Furthermore, the allegations were published in a book rather than a newspaper, the purpose being to capitalise on the information disclosed rather than to instigate investigations into the practices of MI5. It can therefore be argued that the primary purpose of serialisation of the *Spycatcher* book in the newspapers was to generate publicity for the book and increase sales of the newspapers. Again, prior publication of the material is evidential in this. If the purpose of publishing the material was to expose information of malpractice, this had been already achieved. Spycatcher is in marked contrast to the events surrounding the way in which Clive Ponting disclosed information of malpractice. Lord Griffiths' view of acceptable disclosure ultimately require that the motives for disclosure are pure; Peter Wright had stated in the book that his motivation for later conceded that his allegations were 'unreliable.'[688]

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686 *Ibid* at 795.

687 See further D. Burnett and R. Thomas, *Spycatcher- The Commodification of Truth,* (1989) *J.Law & Soc* 16 2 210:

> "Many of its revelations are thinly disguised regurgitations and the only really serious piece of new information- concerning the British Security Service's attempt to destabilize the Wilson Labour Government- is offered up in a quite unsatisfactory manner."

688 See further *MI5: The Security Service*, HMSO 3rd Edition 1998, para 40:

> "In his book Spycatcher, the former Security Service officer Peter Wright claimed that up to 30 members of the Service had plotted to undermine the former Prime Minister Harold Wilson. This allegation was exhaustively investigated and it was concluded, as stated publicly by Ministers, that no such plot had ever existed. Wright himself finally admitted in an interview with BBC1's Panorama programme in 1988 that his account had been unreliable."

In the Court of Appeal, Templeman LJ focused upon the role of the press and their obligations to the confidence issue in question. The Attorney General had argued that as a third party in possession of information obtained as a result of a breach of confidence,[689] the newspapers had an obligation to keep the information confidential. However he explained that newspapers 'have a legitimate role in a free society in bringing before the public information which might not otherwise be accessible to the public' and the balance to be stuck as between the government and an ex-officer of MI5 is not, in my view, an identical balance to that which has to be struck between the government and the press.[690]

It is submitted that Templeman LJ was correct in distinguishing the responsibilities of the press from the responsibilities of Peter Wright to keep information learnt in the course of his employment secret. Wright had signed the Official Secrets Act and was therefore obliged to maintain a life long duty of secrecy. This raises an important consideration with regard to the role of the media in dealing with confidential information. Editors are required to make judgements based upon their own reasoning. Again, this requires one to question the motivation of the disclosure. Scott J provided a further cautionary note:

> "It is in my judgement, unacceptable that newspapers and their editors should be judges in their own cause of the restraints on freedom of the press that the national security may require. It is equally unacceptable that the government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press"[691]

It is submitted that whist the public interest of allowing the information to be published was considered, the deciding factor was ultimately that the information was widely

[689] *Above* n 685, para 138.
[690] *Ibid* para 156.
[691] [1990] 1 A.C. 109 at 144.

available. This meant that the Crown's motivation for pressing for the injunctions was to illustrate to Crown servants and to the general public that unauthorised disclosures of this type were far from acceptable rather than to suppress the information concerned.

In *AG v Guardian*[692]the House of Lords held that the decision concerning the interim injunctions still stood. The newspapers in question applied to the ECtHR which believed that the injunctions in force before the publication of the book in the US were proportionate in order to prevent the publication of material which may have caused harm to the Security Service. The injunctions granted after the publication of the book in the US were regarded as disproportionate as the Attorney General's aim became more of an exercise in the preservation of the Service's reputation and to deter other officers or former officers from making such disclosures. The information had become readily available in the public domain and therefore the justification for continually granting injunctions was found to be a breach of Article 10.

The Court recognised the important role of the press stating that:

> "Whilst it must not…overstep the bounds set…it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas, the public also has a right to receive them."[693]

It is submitted that this position is in direct contrast to *AG v Guardian (2)* which, as has been previously identified by this discussion, placed the rights of the press alongside private individuals. However, despite the ECHR placing the role of the media as an independent watchdog the Court still appeared to be influenced with the reasoning of *AG v Guardian (2)* which placed the prior publication of the material rather than the

[692] [1990] 1 AC 109.
[693]*The Observer v United Kingdom* (1991) 14 E.H.R.R. 153 Para 59, see also I. Leigh, *Spycatcher in Strasbourg* [1992] *PL* 208.

justification of publication and the role of the press as the deciding factor. Whilst there were dissenting opinions which indicated that all of the injunctions were disproportionate, one can envisage a very different outcome in both the House of Lords in *AG v Guardian (2)* and subsequently at the ECtHR had the book not received widespread publication in the US.

The final case worthy of note in the pre HRA era, concerns another book by a former intelligence officer detailing work of the security and intelligence services entitled 'No Other Choice'. In *Attorney General v Blake*[694] the autobiography had been written by George Blake, who was in the words of the House of Lords 'a notorious self-confessed traitor.'[695] In the 17 years that he worked for the SIS he became an agent for the Soviet Union and disclosed several documents and secret information harmful to national security and his fellow intelligence officers. In 1961 He pleaded guilty to five charges of unlawfully communicating information contrary to S.1 (c) of the Official Secrets Act 1911 and was sentenced to 42 years imprisonment. He later escaped from Wormwood Scrubs prison and fled to Moscow. In 1989 Blake wrote his autobiography containing certain parts which detailed his time in the Secret Intelligence Service and was to receive three separate payments of £50,000, the first for signing the contract, the second on delivery of the manuscript and the third on publication.

The book was published without notice to the Security and Intelligence services or to the Government. The motivation behind this case is of particular interest as the court highlighted that the information contained in the book was 'no longer confidential' and

[694][2001] 1 AC 268.
[695]*Ibid* at para 1.

'nor was its disclosure damaging to the public interest.'[696] Instead the Attorney General sought to recover an amount in the region of £90,000 which was yet to be paid by the publisher. The court found in favour of the Attorney General, Blake then appealed to the House of Lords and lost. Lord Nicholls of Birkenhead focussed upon Blake's signing of the Official Secrets Act 1911, noting the fact that it was contractually binding and had he not signed the Act he would have not been employed by the service. Furthermore, by failing to submit his manuscript in order to obtain clearance he had breached that contract.[697]

Most importantly, Lord Nicholls placed great importance on Blake's lifelong obligation to maintain the confidence he had agreed to upon joining the service. He stated:

> "When he (Blake) joined the Secret Intelligence Service Blake expressly agreed in writing that he would not disclose official information, during or after his service, in book form or otherwise. He was employed on that basis. That was the basis on which he acquired official information. The Crown had and has a legitimate interest in preventing Blake profiting from the disclosure of official information, whether classified or not, while a member of the service and thereafter. Neither he, nor any other member of the service should have a financial incentive to break his undertaking. It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence."[698]

Lord Nicholl's comments give rise to a deterrent effect, whereby the legitimate interest in preventing Blake from profiting from his unauthorised disclosures is intended to prevent others from doing the same.[699]

The justification that members of the security services should have complete confidence

[696] *Ibid* at para 2.
[697] *Ibid* at para 14.
[698] *Ibid* at para 55.
[699] Blake later applied to the ECtHR on the basis that the legal proceedings had taken 9 years and 10 months to complete. The Court accordingly found a violation of Article 6 (1) of the Convention *Blake v UK* (2006) (application no. 68890/01).

with each other echoes the sentiments of the government's justification for the Official Secrets Act 1989. Breach of Confidence effectively compliments the OSA 1989 here. Where the OSA 1989 can give rise to a criminal prosecution, thus providing a deterrent to other Crown Servants who may be considering leaking information, the existing legislative framework does not allow for the recovery of profits obtained as a result of the disclosure.[700] The successful development of the Breach of Confidence doctrine is indicative in the fact that the United Kingdom Special Forces, namely the SAS have opted for confidentiality agreements which give rise to breach of confidence actions over rigid enforcement of the Official Secrets Act 1989.[701]

One must consider whether the outcome of the Blake case would have been any different if the information concerned had detailed malpractice, justifying disclosure in the public interest. It is submitted that in cases involving national security, the courts have focussed upon the duty of confidentiality and whether or not the information has already reached the public domain. As will be illustrated in the next case involving the former Secret Intelligence office Richard Tomlinson, the courts have been less inclined to consider the quality of the information in question and the benefit of it reaching the public domain.

[700] The Crown would have access to the provisions of the Proceeds of Crime Act 2002 however this is yet to be tested for unauthorised disclosures of official information. Furthermore, this discussion has considered the recovery of profits for the purpose of a deterrent to prevent other Crown Servants from making unauthorised disclosures. As a mechanism for the recovery of profits does not appear in the Official Secrets Act or in related literature any such deterrent effect is lost.

[701] See further chapter 6 of this thesis. See also *R v Her Majesty's Attorney-General for England and Wales Respondent from the Court of Appeal of New Zealand*, Privy Council, Appeal No 61/2002 delivered 17th March 2003 whereby the publication of a former SAS soldier's memoirs was granted but all profits of the book were awarded to the Crown.

4.16 Post Human Rights Act 1998

In *AG v Times Newspapers*[702] the case concerned a former SIS officer Richard Tomlinson. Similarly to Peter Wright, Tomlinson wrote a book detailing his time in the service. The book entitled The Big Breach had been published in Russia but on a relatively small scale, the Attorney General then applied for an injunction to prevent further publication. Again, the issue for the court to decide was whether the information had reached the public domain and subsequently whether the injunctions could be justified. On appeal it was upheld that the requirement to seek clearance from the Secret Intelligence Service should not be imposed, instead it was for the newspaper editor to decide whether he believed that the information was already available in the public domain. Conversely, it was therefore the requirement of the Attorney General to demonstrate that there was a public interest in restricting publication.

The newspaper had argued that the injunction proposed by the Attorney-General would be disproportionate to the aim pursued and in doing so relied upon Article 10 ECHR and sections 12 (3) and (4) HRA. The court considered *Bladet-Tromso and Stensaas v Norway*[703] which focused upon the fact that it was the media's task to impart information to the public. Lord Phillips MR stated clearly the importance of informing the Secret Intelligence Service before publishing sensitive information, which may damage the Service or be capable of endangering those who serve in it.[704] However, he then noted that:

> "I do not, however, think it right to impose on TNL (the publisher of the Sunday Times) the requirement that they should seek confirmation from the Attorney General or the Court that facts that they intend to republish have been

[702] [2001] 1 WLR 885.
[703] (1999) 6 BHRC 599 for further discussion see below.
[704] *Ibid* at para 34.

sufficiently brought into the public domain by prior publication so as to remove from them the cloak of confidentiality. That is a matter on which an editor will be in a position to form his own judgement and he should be left responsible for exercising that judgement. That is consonant with Article 10 of the European Convention on Human Rights and s 12 of the Act…"[705]

Lord Phillips MR effectively imposes two obligations upon the newspaper editor, to inform the SIS of his intention to publish information relating to work of the service or persons working within the service and to make his own judgement as to whether the information has already been brought into the public domain. These obligations are beneficial to the newspaper as it would not have to got to the lengths of informing the Attorney General, who (as the experiences of the Spycatcher injunctions have shown us) would be highly likely to argue against publication and seek an injunction.

The obligations are in keeping with the spirit of Article 10 and in particular Article 10 (2). Lord Phillips MR is effectively stating that if an officer of the security and intelligence services first seeks approval from the service, there is no harm to national security and the officer's freedom of expression will be protected. In these circumstances any action against publication will be disproportionate. However, for such a proposition to be effective, the newspaper editor is faced with a large burden of responsibility. By informing the SIS he may well endanger the source of the information and may also risk an injunction if he proceeds to publish. If the intended article contains information of serious malpractice within the Service, the editor may face a lengthy battle to which he must argue that the public interest of the information outweighs the requirement to maintain a confidential relationship of which the protection of national security is paramount.

[705] *Ibid.*

If the source chooses to remain confidential, the newspaper editor can then face a variety of different statutory provisions[706] in order to identify the source. If the discloser of the information chooses to go 'on the record' he would undoubtedly face prosecution under the Official Secrets Act. One may therefore argue that if the newspaper editor felt morally compelled to publish the information without the consent of the SIS, he would face the same criminal and civil liability as had he informed the Service, the underlying difference being that the information would reach the public domain.

Lord Phillips MR also gave particular focus to the comments made in the judgment of Eady J who stated that:

> "I wish to make one thing very clear about the decision I am about to make. It is not at all based on any argument to the effect that what the Sunday Times wishes to do is in the public interest. I see no evidence of that whatsoever. The situation is simply the other way about. It is in practical terms for the Attorney General to demonstrate, particularly perhaps in the light of the European Convention, that any restriction on freedom of expression sought to be imposed, or continued, can itself be justified by some countervailing and substantial public interest. In the light of what is today going to be readily available in the public domain in Russia, the United States and elsewhere in the world, I am afraid I am not persuaded that the public interest requires the Sunday times to be restricted, for reasons based on a duty of confidence."[707]

The requirement of the Attorney General to justify that an injunction is still needed despite the information reaching the public domain is a rather difficult justification to achieve. This ultimately falls in favour of the newspaper editor wishing to publish to story. However, by shifting the focus to determine whether prior notification was required, Eady J failed to afford sufficient weight to the public interest in the information concerned. It is submitted that the analysis conducted should have provided a rigorous balancing of the public interest value of the information against the public interest in restricting the expression by granting an injunction. Whilst the prior publication of the

[707] *AG v the Times* [2001] EWCA, Civ 97, 11.

information in a number of jurisdictions is likely to provide the tipping point to identify to the court that the grant of an injunction to prevent the communication of information already readily available will be disproportionate, the reasoning in Bladet- Tromso and *Stensaas v Norway* identifies that a court must have sufficient regard to the public interest in the information concerned.[708] The domestic court gave reference to this reasoning but failed to apply it in a sufficiently rigorous fashion.

In cases where there is evidence of prior disclosure there can be little point in attempting to obtain an injunction as the information will have already reached the public domain. This contention is supported by the judgement in AG v Times because it reflects that an injunction will be unlikely to be granted where even a small amount of prior disclosure has taken place. It is submitted, that had the Spycatcher litigation happened today, the UK government may have faced significant difficulty in obtaining an injunction against publication. Books can very often be purchased in an electronic format from anywhere in the world. A Portable Document Format file or 'PDF' as it is more commonly known can be made accessible for download by individuals located all over the world with relative ease. Unless prior notification of the disclosure is made, so that a government may seek an injunction prior to publication, there will be little point in granting an injunction at the interim stage. This makes the obtaining a permanent injunction once the full trial has been conducted a highly unlikely outcome. This section will now progress to consider the protection afforded by s.12 HRA with particular reference to interim applications.

5.17 Section 12 HRA and Injunctions

Section 12 HRA applies to any proceedings whereby a court is considering whether to

[708] (1999) (Application no 21980/93) at para 62.

grant any relief which, if granted, might affect the right to freedom of expression.[709] This section will primarily focus upon injunctive relief, however it should be noted that the provision of damages awarded against an individual or a newspaper would also be covered by s.12.

Section 12 (2) provides a safeguard whereby relief will not be granted unless the court is satisfied that the applicant has taken 'all practical steps to notify the respondent' or that 'there are compelling reasons why the respondent should not be notified.' The purpose of this section is to provide a safeguard whereby an interim injunction is sought on an ex parte basis. If interim relief is granted without the knowledge of the respondent, the individual will be prevented from further communicating on the subject and will not have been the provided with the opportunity to make his representations known as to why the information should not be subject to an injunction.

Ex parte hearings require the most careful scrutiny by the courts as the courts will need to have regard to the high standard of protection Strasbourg affords to art.10 and will need to determine the public interest value of the communication without giving the respondent an opportunity to make representations as to why the particular information is of value. Section (4) bolsters the protection afforded by s.12 (2) by requiring that the court must have particular regard to the importance of the Convention right to freedom of expression where the proceedings relate to material to which the respondent claims 'or which appears to the court to be':

"journalistic, literary or artistic material (or to conduct connected with such material), to—
(a)the extent to which—
(i)the material has, or is about to, become available to the public; or

[709]Section 12 (1) HRA.

(ii)it is, or would be, in the public interest for the material to be published;
(b)any relevant privacy code."

It is submitted that domestic courts should consider section 12 (4) when determining information obtained as a result of an unauthorised disclosure by a Crown servant where publication is intended. With regard to information disclosed to a traditional media outlet based in the domestic jurisdiction, the court must apply s.12 (4) as the information concerned will be journalistic material. It is argued that an injunction application made to prevent the publication of information on a website such as *Wikileaks* must also be considered by s.12 (4). An online disclosure outlet should be able to argue that the intended publication of material is for journalistic purposes. However, even if the online outlet had difficulty in convincing the judge that the information was for a journalistic purpose, s.12 (4) also covers 'conduct connected with such material.' This conduct could be argued to include *Wikileaks* or a similar organisation acting as a conduit to provide information to a traditional media outlet as a partner.

If an online disclosure outlet has already published unauthorised material and the information has been downloaded and disseminated across the globe by the time that the interim hearing has been reached it is unlikely that an injunction will be granted as s.12 (a) (i) requires the court to have regard to the extent to which the information has, or is about to, be made available to the public. It is submitted that in considering this section the court must also consider whether the grant of an injunction will be effective to prevent the disclosure information which is about to be available to the public. This effectively asks, if publication is imminent, whether an injunction can prevent it.

When granting an injunction against an online disclosure outlet based outside the

jurisdiction the question of whether such an injunction can be effectively enforced will undoubtedly arise. If an application for injunctive relief is made prior to the disclosure of the information it is likely that the court will be faced with, firstly, questions relating to service of the court order and second, whether the injunction will be recognised by the jurisdiction in question.

The Civil Procedure Rules, pt 40.4 indentify that once a judgment or order has been made by the court it must be served on the respondent. Despite the fact that the respondent may reside outside of the jurisdiction, UK courts have been particularly flexible in allowing service to be conducted by electronic means. The Civil Procedure Rules, pt 6.2 (e) allow for service by fax or 'other electronic communication.' Therefore service may be conducted by email. Most recently a court has served an order on the social networking website, *Facebook*.[710] Prior to this, a UK court had given authorisation to serve documents on *Twitter*.[711]

As identified in Chapter two of this thesis, service of a court order may not prove difficult but the enforcement of such an order is likely to be problematical. Brussels Regulation I, Article 2 allows a judgment made in one EU member state to be enforced in another. Yet, Article 34 identifies that a judgment may not be enforced where recognition of it is 'manifestly contrary to public policy in the Member State in which recognition is sought.' Again, using the Swedish Freedom of the Press Act as an example, Article 2 of the Act requires that no 'written matter shall be scrutinised prior to printing nor shall it be permitted to prohibit the printing thereof.' In addition the Article states that it will not be

[710] Unreported, see further: British Lawyer uses Facebook to serve Court Summons, 14th March 2011, http://www.telegraph.co.uk/technology/facebook/8382570/British-lawyer-uses-Facebook-to-serve-court-summons.html (accessed 24/02/2012).
[711] *Blaney v Persons Unknown* (2009) (unreported).

permitted for a public authority or other public body to take any action not authorised under the Act to prevent the printing or publication of the material or its dissemination on the grounds of its content. Enforcement in Sweden or in any other country with similar laws is likely to be difficult. The problem with extraterritorial enforcement is that it will of course take time for the respective procedures to take place and for proceedings to begin. With regard to online outlets, the enforcement of an order becomes very much a moot point if an organisation chooses to disregard an order and goes ahead and publishes the material anyway. The nature of the internet means that the information can be swiftly published and disseminated. The question of service and enforcement becomes even more difficult when the first publication has been made online and an injunction has been sought to prevent further publication. The court will be faced with attempting to serve orders against potentially unknown actors in multiple jurisdictions, creating many difficulties for subsequent enforcement. Lord Philips MR's reasoning in *AG v Times* will most readily apply.

Section 12 (3) specifically concerns the grant of interim relief and states that no such relief is to be granted to restrain publication before trial unless the court is satisfied that the applicant is 'likely to establish that publication should not be allowed.' Interpretation of this section was considered at length in the leading judgment of Cream *Holdings v Banerjee*.[712] The case is particularly significant for the purposes of this analysis as the information in question concerned allegations made by a whistleblower.

In *Cream Holdings* the respondent worked as a chartered accountant for the Cream group, a well known entertainment company. The respondent was dismissed in 2001 and

[712] [2004] UKHL 44.

when she left she took copies of documents with her that she later claimed showed illegal and improper activity by her former employers. The first respondent then passed the documents to the Liverpool Echo newspaper who later published articles regarding alleged corruption between a company director at *Cream Holdings* and a local council official.

Following the publication the Cream group sought injunctive relief to prevent further publication. The applicants were granted an interlocutory injunction by the High Court. The respondents (Banerjee and the newspaper) appealed the decision on the basis that the term 'likely' should be interpreted as 'more likely than not.' The Court of Appeal disagreed. Lord Nichols sitting in the House of Lords gave focus to the meaning of 'likely' in s.12 (3). Lord Nichols held that to interpret 'likely' to mean 'more likely than not' would set the bar higher than Parliament had intended.[713] Lord Nichols instead suggested that s.12 (3) had the effect that the court is not to make an order unless 'satisfied that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case.'[714] He identified that courts should be slow to make interim restraint orders where the applicant has not satisfied the court he will more likely than not succeed at trial.[715]

Most importantly for the purposes of this analysis, Lord Nichols held that the aforementioned test must be met before the court embarks on exercising its discretion 'duly taking into account the relevant jurisprudence on article 10.'[716] Lord Nicholls identified that there may be circumstances where a lesser degree of likelihood will

[713] *Ibid*, para 20.
[714] *Above* n 712, para 22.
[715] *Ibid.*
[716] *Above* n 712, para 22.

suffice.[717] Earlier in the judgment, Lord Nicholls identified that such circumstances may include where the adverse consequences of disclosure would be 'extremely serious such as a grave risk of personal injury to a particular person.' Lord Nicholls gave an example of an individual who had given evidence against an individual in a criminal trial and had received threats. In such circumstances, Lord Nicholls opined that the consequences of the disclosure may be serious whereas the applicant's claim to confidentiality may be weak.[718]

It is submitted that Lord Nicholl's assessment of the test contained in s.12 (3) requires the most careful analysis. In order to be Convention compliant, it is essential that the court correctly engages proportionality balancing. It will not be sufficient for the court to engage the aforementioned test and then, if the test is satisfied, engage the proportionality test. In applications or an interim injunction whereby the information has already been made available over the internet, a court is unlikely to find the applicant's prospects of success at the trial sufficiently favourable, if the motivation is to obtain a permanent injunction. However, by placing such an emphasis on apparent success of an injunction, the court will not place sufficient regard to whether the information is in the public interest and what countervailing rights, if any, should be engaged. This creates a similar difficulty to the concerns identified in Eady J's analysis in *AG v Times.*

There is also the concern that the court will upon finding that the chance of the applicant obtaining a permanent injunction to be slim, will make a finding that interim relief is still required because the applicant has convinced the court that further disclosures of information will result in harms caused to an individual without the court conducting a

[717] *Ibid.*
[718] Above n 712 para 19.

thorough review to identify whether the harm in allowing further information to be disclosed should outweigh the harm caused by an injunction to disclosure.

A thorough proportionality analysis is also required when competing convention rights are engaged. The *Wikileaks* disclosures resulted in the publication of personal details relating to the names and addresses of individuals who had assisted the United States government by acting as informants. The publication of the diplomatic cables contained information regarding the private lives of public officials. Such information, if it were in reach of the jurisdiction of the ECHR and a UK domestic court, would likely engage art.8. Here the court should apply the 'new methodology' test developed in *Re S*.

It is submitted that Lord Nicholl's reasoning, if applied to applications for injunctions to prevent the dissemination of material published on a website such as *Wikileaks*, identifies that if the information pertains to national security or the disclosure may cause harm to an individual it is likely that an injunction will still be granted at the interim stage. It is suggested that whilst the grant of an interim injunction is unlikely to prevent the further unauthorised publication of documents, such an injunction may prevent newspapers within the United Kingdom from reporting or providing the information in an accessible form to their readers. Again, the difficulty is that the information may already be widely accessible in the public domain, or members of the public may wish to breach the injunction by giving the subject further publicity by utilising a variety of available social media websites, many of which are based outside of the jurisdiction.

In 2011, the Football player Ryan Giggs obtained a so-called 'super injunction' to

prevent the publications of details that he had an extra-marital affair.[719] The injunction prevented newspapers from reporting upon any details of the parties involved and details of the proceedings. The identity of Giggs as the applicant in the case was posted and later re-published over 30,000 times on the social networking website 'Twitter.'[720] As the rumour of the identity of the football player spread, foreign media began to publish that Giggs was the applicant. News Group Newspapers applied for the injunction to be lifted; this application was refused on two occasions by Eady J who argued that the publication of the facts in national newspapers would be more intrusive than disclosures over the internet.[721] Eady J eventually lifted the order, yet by this stage the identity of Giggs as the applicant was widely known.[722]

Whilst it is suggested in the aforementioned discussion that injunctions may still be granted by the courts to prevent further disclosures, it is clear that judicial reasoning developed at a time of paper based publication is not sufficient to prevent disclosures utilising social media or online outlets such as *Wikileaks*. As a consequence, it is submitted that 'traditional' breach of confidence actions or those for misuse of private information are likely to be concerned first and foremost with the obtaining of damages, rather than the obtaining of an injunction. In legal proceedings whereby a government department seeks to obtain damages against a civil servant for breach of confidence, the motivation for doing so could be to deter other employees from making unauthorised disclosures. Where the disclosure has been made for the purposes of monetary gain, the principle motivation may be to recover the profits made as a result of the disclosure to

[719] *CTB v News Group Newspapers Ltd and Anor* [2011] EWHC 1232.
[720] O.Wright, 30000 Twitter Users Could Face Legal Action over Gag Breaches, Telegraph, 23 May 2011: http://www.independent.co.uk/news/media/online/30000-twitter-users-could-face-legal-action-over-gag-breaches-2287787.html.
[721] *CTB v News Group Newspapers Ltd and Anor* [2011] EWHC 1326.
[722] *CTB v News Group Newspapers Ltd and Anor* [2011] EWHC 3099.

send a clear message to others intending to do the same that such action will not be tolerated. It is suggested that novel and innovative solutions are required to tackle the issue of online disclosure, whereby such disclosure is likely to be harmful and proportionately restricted by art.10 (2).

5.18 Possible Solutions

The extraterritorial application and enforcement of injunctions to restrain publication, is reliant upon international co-operation. Chapter two of this thesis identified some of the difficulties that UK domestic courts would face. Many of the difficulties are caused by uncertainty in the interpretation and application of domestic and international laws in an area which is yet to be fully tested by the courts. Proposals to extend and clarify treaties concerning international jurisdiction or a multilateral treaty which establishes uniform jurisdictional rules have been considered by academics writing in the area. The difficulty with implementing such proposals is that different countries have different laws relating to the protection of national security or official information and different protections for freedom of expression. Such difficulties may be overcome where European member states are signatories to both the European Convention on Human Rights and various European Union Directives. However, for internet regulation to be a success it must be universal. The global nature of the internet means that there is nothing to stop an individual who wishes to publish information to simply publish in a jurisdiction where a scheme does not reach.

A possible example of where international co-operation may assist is the Internet Watch Foundation. The organisation was established in 1996 as a regulator tasked with the

monitoring of child sexual abuse and violent content. It is funded by the European Union and a number of 'internet service providers, mobile operators, content providers, hosting providers, filtering companies, search providers, trade associations and the financial sector.'[723] The organisation operates a 'self regulatory' system whereby the members involved are part of a 'notice and takedown' scheme whereby a list of offending website addresses or URLs is provided for the purposes of blocking the content. The United Kingdom could set up an independent blocking and monitoring agency to deal with unauthorised disclosures.

The blocking of web content may appear to provide a solution to combat unauthorised disclosures. According to J.S. Mill, the suppression of free speech may be justified to prevent harm to others. Dworkin believes that this is acceptable if the state can demonstrate that there is clear and substantial risk to citizens or property. The difficulty will such arguments is that a government will claim that a document classified using the established criterion and subject to the Official Secrets Acts automatically poses a risk to society, however, as Neocleaus argues, society has no way of testing or checking these claims without extensive knowledge of the subject matter. As a consequence information may be blocked or suppressed when it is in the public interest for such expression to be known. Fenwick and Phillipson argue that 'rating or vetting and filtering systems' are problematic because they 'limit consumer choice' and are 'frequently over-inclusive.' The author agrees with this position. Whilst one would hope that the blocking of child abuse images would be supported by society, the blanket suppression of official information may receive a markedly different response. The 'catch all' nature of national security protections mean that were such expression to be blocked by electronic means

[723]See further, Internet Watch Foundation website: http://www.iwf.org.uk/about-iwf (accessed 20/02/2012).

the public may be prevented from receiving information which may be valuable. As J.S. Mill opined, the suppression of truth leads to falsity.

A way of legitimising the blocking process may be to make the proposed blocking of any websites subject to an injunction. Thus, a government department could apply for an order to block the website, the court would then need to conduct a detailed proportionality analysis and determine whether there are any countervailing privacy interests. The first difficulty with such a proposal would be the length of time required to apply for an order, when the information could be published and downloaded at the click of a mouse. The second difficulty is the jurisdictional reach of the blocking mechanism and the injunction itself. International co-operation of such a scheme would take time, yet the speed in which the *Wikileaks* disclosures have taken place, and the use of social media to bypass court injunctions, has identified that a solution needs to be found without delay. The blocking of content in the home jurisdiction where it is freely available elsewhere would be disproportionate.[724] Moreover, with regard to national security, the provision of Official Secrecy legislation is first and foremost used to prevent the disclosure of information which would be useful to the enemy. Blocking of the information in the home jurisdiction would not achieve this aim. Furthermore, blocking of the information in the home jurisdiction may serve as an indicator to the enemy that the information is genuine and useful to them.

It is submitted that whilst governments across the globe attempt to grapple with the question of internet regulation, a workable interim measure can be achieved. It was identified in chapter two that members of the public will generally need to locate the

[724] Based upon the reasoning in *AG v Times*.

information and may use a search engine to do so. *Google* receives content removal requests from governments across the globe. In the period January to June 2011, the organisation received 28 requests from the United Kingdom for content removal regarding its web search facility.[725] The exact justifications for the requests are not provided, yet the information is deemed to relate to 'privacy and security.' In the same period the organisation received 135 requests to remove content for reasons of national security on the *Youtube* website. The organisation reportedly 'fully or partially complied' with 82% of the requests. The social media website *Twitter* has recently adopted a country specific censorship policy, which allows the website to block websites at the request of a government in a home jurisdiction. The policy has received criticism for the implications that it will have for freedom of expression.

The aforementioned examples identify that the organisations are willing to exercise co-operation with governments. It is suggested that as happens in the United Kingdom with traditional media outlets, the DA Notice system could be extended as a way of providing advice to the online agencies of information, which if published, could be harmful to national security or the defence of the realm.

Whilst the scheme would require the organisation to exercise a form of editorial control on information posted on their respective websites, such editorial control is already in operation. Those who chose to join *Twitter* choose to agree to the terms and conditions of service, which identify that *Twitter*, reserve the right to remove content.[726] By choosing to partake in the facilities offered by those services, individuals voluntarily agree to a

[725] See further, Google Transparency Report: http://www.google.com/transparencyreport/governmentrequests/GB/?p=2011-06 (accessed 26/02/12).
[726] Twitter terms of service: https://twitter.com/tos (accessed 26/02/12).

potential restriction of their art.10 rights.[727] The proposed model is in keeping with the current trend of self-regulation of the internet. Thus, general notices of the categories of potentially harmful material could be published, with a mechanism for rapid contact with a designated individual at the organisation concerned via email. The Defence Advisory Committee could make itself available to the organisations where advice is required. This proposal is of course unlikely to prevent an organisation or individuals determined to publish unauthorised disclosures of official material. It is submitted that the difficulties identified in this section lead to the conclusion that the only way a leak can be prevented is at its source. Therefore a Crown servant should be provided with comprehensive and robust alternatives to unauthorised disclosures. This discussion will now progress to consider circumstances whereby a Crown servant may seek permission to disclose information.

4.19 Authorisation for disclosure

In *A v B*[728] a former member of the Security Service sought to challenge a decision made by the Director General of that service to refuse the publication of his memoirs on national security grounds. A commenced judicial review proceedings in order to challenge the decision on the basis that it was 'unreasonable' was 'vitiated by bias' and that it was contrary to Article 10 ECHR. A argued that he had a choice whether to bring judicial review proceedings either in 'the normal courts' or before the Investigatory Powers Tribunal. However, B argued that the only forum which had the jurisdiction to review the decision, following s.65 (2) (a) Regulation of Investigatory Powers Act 2000,

[727] This position, whilst untested by the courts, may be considered as a form of 'contractual waiver.' See further section 2.6.2 of this thesis for jurisprudential reasoning.
[728] *R (on the application of A) (Appellant) v B (Respondent)* [2009] UKSC 12 for the Court of Appeal decision see [2009] EWCA Civ 24.

was the Investigatory Powers Tribunal. The Court of Appeal ruled in favour of B and A appealed to the newly formed Supreme Court.

The Supreme Court grappled with the precise wording of S.65 (2) (a) which states that the jurisdiction of the IPT is 'to be the only appropriate tribunal for the purposes of Section 7 Human Rights Act 1998' in proceedings 'against any of the intelligence services.' A argued that the meaning of the word 'tribunal' meant that S.65 (2) (a) excluded matters to be heard in other types of tribunal but not in the courts.[729] A and the human rights charity JUSTICE[730] (intervening) submitted to challenge the decision only before the IPT would breach Article 6 ECHR because, firstly the 'entire hearing would be held in private,' secondly, that the submissions and evidence 'relied on respectively' by the claimant and the respondent 'may be considered at separate hearings' meaning that the IPT will lack the adversarial procedure of the normal courts, thirdly that the claimant will only be informed of the opposing case or given access to 'any of the respondent's evidence' with the consent of the respondent and fourthly, that no reasons will be given 'for any adverse determination.' Justice argued that the procedures of the IPT were contrary to the principles of open justice, whereby the right to a public hearing was a 'jealously guarded feature of the common law.'[731]

Lord Brown rejected the arguments put forward by A and Justice and stated that claims against the intelligence services 'raise special problems' and 'cannot be dealt with in the same way as other claims.' Lord Brown highlighted that this proposition was recognised by both Strasburg and the domestic courts, and chose to rely on a passage from *R v*

[729] *Ibid* para 1.
[730] The full text of the intervention is accessible via: http://www.justice.org.uk/ourwork/humanrights/index.html (accessed 07/01/2010).
[731] *Ibid* at para 25.

Shayler whereby Lord Bingham cites several cases heard before the ECtHR which recognised that there is a need to 'preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion,[732] and that the 'thrust of those decisions' was not to 'discount or disparage the need for strict and enforceable rules' but to 'insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question.' Lord Brown highlighted that neither A nor Justice were able to provide the Court with any 'successful article 10 cases' involving national security considerations 'save only for' *Sunday Times v UK (No.2)*, the *Spycatcher* case whereby the disputed material was already in the public domain.

Lord Brown held that there was 'some measure of flexibility in the IPT's rules to 'adapt its procedures' to provide 'as much information as possible consistently with national security interests' and that there were a 'number of counterbalancing provisions' to ensure that proceedings before the IPT are properly held and considered. s. 68 (6) imposes on the Crown the 'widest possible duties to provide information and documents to the IPT as they may require.[733] Most importantly, Lord Brown highlighted that Public Interest Immunity (PII) 'could never be invoked against such a requirement' and that Rule 11(1) allows the IPT to 'receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law.' The aforementioned provisions, Lord Brown opined 'were designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined, none of them are available in the courts.'[734] The Supreme Court held unanimously to dismiss the appeal.

[732] *R v Shayler* [2003] 1 AC 247, para 26. The majority of the cases mentioned appear in this chapter.
[733] *Ibid* para 14.
[734] *Ibid.*

The consequences of the decision in *A v B* will be most felt by former members of the Security and Intelligence Services who intend to publish memoirs of their time in the services. It is submitted that the reasoning of the Supreme Court is in line with the jurisprudence of the ECtHR regarding employees who, through the nature of their work, voluntarily agree to restrict their Article 10 rights. The use of Public Interest Immunity Certificates has long been seen as a way for the Crown to circumvent liability, the fact that PII certificates cannot be issued before the IPT is clearly advantageous to claimants. The fact that employees of the Security and Intelligence Services are expected to operate within a 'ring of secrecy' means that certain procedures are needed to ensure that requirements of national security are observed. This has been further reflected in the fact that whilst employees of the Services have recently obtained employment law rights, any Employment Tribunal claim to consider those rights must be held with procedures similar to those adopted by the Special Immigration Appeals Commission.

The practical implications of the decision are undoubtedly more of a concern. The fact that the procedures of the IPT appear somewhat restrictive in comparison to the procedures of the normal courts may result in former employees, frustrated in the failure to obtain clearance from the Director General, choosing instead to publish without authorisation. The risk of a future 'Spycatcher' type scenario may be more likely following the decision in *A v B*. There is a risk that an unauthorised publication could happen abroad, as happened in the case of Peter Wright's book or Richard Thomlinson and following technological advancements, the information can be easily published on the internet on a 'blog' or a website such as *Wikileaks*. In the year where the Security Service MI5 published its own official history, and the Secret Intelligence Service MI6 is due to follow suit, one must ask if more should be done to assess the authorisation of

proposed memoirs by former employees, particularly as in the past former Director General Stella Rimington, was allowed to publish her own memoirs.[735]

4.20 Proposal for a Publications Review Board

It was proposed unsuccessfully during the committee stage that the 1989 Act should include a Publications Review Board. The board would have consisted of a chairman and three members appointed by the Secretary of State. The respective clause would have prescribed that:

> "No information shall be disclosed, whether in books, articles or other media, by former members of the security and intelligence services without the approval of the Board."[736]

In submitting the material for approval, the board would then have had a six month period to decide whether or not the material should be authorised for publication. The Publications Review Board would have directly addressed the question of members or former members of the security services who wished to publish their own memoirs. Such a measure would have also addressed any future Spycatcher scenario. Indeed, the approach would also be advantageous from the point of view of accuracy, providing a way in which to clarify that any proposed disclosures were correct. It must not be forgotten that the *Spycatcher* text contained a number of allegations, which the author himself later admitted to the BBC's Panorama programme that much of the books content had been based more on fiction than fact.

The current approval process for Civil Servants who wish to publish their memoirs is

[735] The publication of memoirs is considered in more detail below whereby a panel to consider the publication of memoirs is proposed.
[736] Mr Harold Walker, Hansard, HC Debs, 25th January 1989, Col 1046.

detailed in Volume II of the Directory of Civil Service Guidance.[737] All books or other works which draw upon official experience must apply for permission to do so by submitting the text for approval by their respective department. The directory states that no Civil Servant may publish their memoirs whilst still in the service because 'public responsibility for the actions of their departments rests with ministers.'[738]

When the Civil Servant leaves the service he must still seek approval for publication from the Head of his former department. Once a decision has been made the current or former Civil Servant must abide by the decisions of the Head of the Department in respect:

> "not only of State secrets, or information whose disclosure would be prejudicial to the UK s international relations, but also in respect of matters of trust and confidentiality (official advice, the views of ministers or of colleagues, or judgements on the qualities or abilities of ministers or of colleagues) which fall within the period of 15 years recommended by the Radcliffe Committee"[739]

The principles established by the Radcliffe Committee date back to 1946 and remain unchanged this is despite the fact that the Public Administration Select Committee has been highly critical of the current procedures. The Public Administration Select Committee has suggested that a panel should be established to hear appeals from Crown employees who have had requests to publish material refused. The Committee suggests that the panel might contain privy counsellors, former experienced politicians from more than one political party, a former senior public servant and a member of the judiciary with membership agreed by the leaders of the political parties. The Committee's most recent report on the issue conceded that the establishment of another regulatory body

[737] http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/csg%20vol2.pdf (accessed 24/02/09).
[738] *Ibid.*
[739] http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/689/689i.pdf (accessed 24/02/09).

would be costly and perhaps disproportionate to the relatively small number of persons who would use the panel. It then suggests that the Office of the Information Commissioner would provide a ready and cost effective solution.

The Government's response to the Committee report stated that it was not the 'ultimate arbiter' of publication. This was because of the fact that the Cabinet Secretary has to consider and investigate the consequences to national security if the information is published and senior officials commented upon the possible damage caused to government by the remarks. If publication is refused there is a right to appeal to the Prime Minister.

Whilst there are noticeable benefits of an independent appeal panel there are several potential difficulties with such an ideal. If publication is refused on the grounds of national security there is a risk that the information would be improperly handled by the panel. All members of the panel would need to be given the highest security clearance. There is potential that the Security and Intelligence Services would not wish to impart information on the panel. This is most evident if one considers the current relationship between the Intelligence and Security Committee and the Security and Intelligence Services.

The make-up of the panel would be questionable. If former politicians are employed there is grave risk that decisions may be made with political motive. There is also the risk that the panel will lack the experience to adequately assess the protection of national security information. Finally with regard to the involvement of the Information Commissioner there is a distinct possibility that, as recently happened with the ICO's

decision to publish Cabinet minutes concerning the Belgrano incident, the Government may still veto the decision, thus undermining the benefits of implementing a new system.

It is submitted that the benefits of an appeals panel independent of the Government and Civil Service represent somewhat of an ideal which if implemented would potentially result in non cooperation between the government and panel concerned to the detriment of the official who wishes to have information published. The author suggests that a more appropriate panel is needed which assesses the requirements of freedom of information alongside those of national security and is kept 'in house' yet addresses the need to be independent of government. A comparative mechanism in the United States may provide the answer.

4.21 The Central Intelligence Agency Publications Review Board

In the United States, the Central Intelligence Agency has grappled with the aforementioned requirements. Following the outcome of the United States Supreme Court decision in *Snepp v United States*[740] the CIA established the Publications Review Board. The Board acts, not as an appellant panel but as a mechanism of approach in the first instance. The Board is staffed by five senior members of the CIA which represent each of the directorates: Administration, Intelligence, Operations, Science and Technology and the offices involved in cover and personnel security.

The Board has the jurisdiction to information contained in 'speeches, journal articles, theses, op-eds, book reviews, movie scripts, scholarly treatises and works of fiction.'

[740] 62 L ED 2d 704 (1980).

Review by the Board is compulsory for all intended publication of classified material and it is identified clearly in the CIA confidentiality agreement which is signed before employees undertake employment with the agency. If employees fail to seek permission from the Board the CIA can apply to court to prevent the publication of the material and seize the profits if publication has taken place.

In making a decision on the material in question the Board will either object or will simply state "no objections." This position means that the Board maintains a degree of impartiality and whilst gives an authorisation to publish is separate and distinct from giving an official endorsement. The Publications Review Board has taken a surprisingly liberal stance to the control of national security information this is most notable in the relatively small number of refusals given by the Board and also by the clearance of a book written by a former CIA officer which detailed the story of his operational career 'assignment by assignment' but 'stuck by the rules' by following the correct procedure and by not revealing the cover or identity of agents.

With regard to Crown Servants involved in national security matters the CIA Publications Review Board provides a suitable compromise between the demands of national security and free speech. There are significant advantages to such a scheme in that it recognises that there will be occasions where people will want to publish an account of their experiences but would also provides a means to control the disclosure in line with the protection of national security. Furthermore the fact that the Publications Review Board reviews all works intended for publication including works of fiction is advantageous. Whilst it may appear overly suppressive to review works of fiction, there is a justifiable need consider fictional works written by former members of the Security

and Intelligence Services.[741]

4.22 Establishing a UK framework

The present legislative framework contained in the Official Secrets Act 1989 allows for official authorisation of disclosure. Furthermore the common law doctrine of breach of confidence allows for the grant of an injunction to prevent publication and to obtain profits made through the unauthorised disclosure of national security information. A distinct advantage of the board is that it would utilise senior Civil Servants who would be required to be impartial because of their obligation to remain impartial under values of the civil service code.[742] As an added safeguard the author proposes that the board could publish quarterly reports containing the outcome of its decisions to be accessed by the Information Commissioner and the Intelligence and Security Committee.

In view of the Supreme Court decision in *A v B*[743] it is submitted that an internal mechanism would be a more appropriate forum to provide the necessary clearance to publish. Whilst the Investigatory Power Tribunal may be arguably the appropriate venue to appeal a decision to refuse clearance to publish it would also have a positive influence on any established publications review board who would need to be consistent in their decisions and should only restrict publication of information harmful to national security, they would not wish to be overruled by the tribunal, or for their decisions to be subject to negative judicial scrutiny.

[741] Several former members of the Security and Intelligence Services have written works of spy fiction, including Rudyard Kipling, Ian Fleming, John Le Carre, Stella Rimmington and others have all written fictional novels. A BBC documentary entitled *Spy Stories: Time Shift* (2006) gave a historical account of the relationship between factual details of work of the intelligence services and fictional portrayals. The programme argued that the distinction had become blurred due to the writing of spy novels by former members of the intelligence services influenced by their experiences.
[742] Civil Service Code, Paragraphs 12 and 13.
[743] [2009] EWCA Civ 24.

4.23 Conclusion

4.23.1 Theoretical Model

Part one of this chapter discussed freedom of information. Birkinshaw argues that freedom of information is necessary to ensure that citizens who participate in democratic society require access to the truth so that they may accurately assess information and distinguish between truths and lies. However, freedom of information, in contrast to government transparency, is reliant upon private citizens to know enough about a topic area to request the required information. From the outset, private citizens are placed at a tactical disadvantage because the 'fact holders' are in control of information which could be highly valuable to the public interest, yet those making the initial request may not know that such information exists. If the citizen is aware of the existence of the information, this chapter has identified that he may encounter a number of barriers resulting in an absolute or qualified exemption from disclosure.

Whilst the publicity of official deliberations may provide the connection between private citizens as voters and public officials as representatives, there may be circumstances whereby the blanket disclosure of such information may be detrimental to the public interest, because those in power and those providing advice may feel inhibited for doing so for fear of criticism in future. Yet, it must also be identified that circumstances may arise whereby information regarding decisions taken by our predecessors is vital to the development of moral and ethical evaluation and to learn the lessons of past mistakes. Where information has been deliberately concealed from the public, a Crown servant may

be best placed to provide the public with such information. His actions would be most readily supported by the arguments from truth and from participation in democracy.

Part two of this analysis considered the control of official information by the use of the Official Secrets Acts, the common law offence of Misconduct in Public Office and the civil law remedy of breach of confidence. It may be identified that all of these measures are intended to restrict freedom of expression. With regard to the Official Secrets Act, as J.S. Mill suggested, the restrictions imposed on Crown servants not to reveal such information may be justifiable to prevent harm to others. As Dworkin identifies, however, the state must be able to demonstrate 'a clear and substantial risk' of great harm to people or property. The difficulty with the Official Secrets Act is that, even though the 1989 Act limited harmful information to certain specified categories, the Act does not provide sufficient scope for a court to test whether a certain document perceived to fall within the specified document is in fact harmful. In contrast, the civil law remedy of breach of confidence does allow for such analysis to take place. It is submitted that the most draconian legal protection is provided by the common law offence of misconduct in public office. The offence does not allow for any determination as to whether the information is harmful but instead focuses on the act of disclosure by an individual who because of his position in public employment should not have communicated the information. The offence is contrary to the theoretical arguments for restriction of expression identified in chapter one of this thesis. This discussion will now turn to consider the legal model.

4.23.2 Legal Model

The Freedom of Information Act contains a number of absolute or qualified exemptions which prevent the release of official information. Section 35 which provides an absolute exemption for the disclosure of information relating to the formulation of government policy and s.36 which relates to information prejudicial to public affairs identifies the most controversial limitations of the Act. The protection of such information may be justified to maintain the longstanding convention of collective Cabinet responsibility and to maintain candour between civil servants and ministers. However, by providing an absolute exemption, the sections allow for the protection of so-called 'bureaucratic secrecy,' which as Aftergood correctly identifies allows the state to 'hoard information.' [744]

As identified in the aforementioned analysis using the theoretical model, there may be circumstances whereby the disclosure of such information may be justified in order to identify wrongdoing or allow society to learn from past mistakes. What is most apparent is that the Official Secrets Act 1989 does not reach as far as the Freedom of Information Act to overtly prevent the disclosure of documents relating to government policy (although such documents dependent on their subject matter may be covered by the categories of information in the OSA). It is therefore submitted that the Freedom of Information Act requires reform to readdress the initial aims and objectives of the Act by reconsidering the number of categories of information subject to exemptions. It may also be identified that several key Whitehall departments are simply choosing to disregard the requirements of the Act to provide a response within the specified time frame. Such failures must be actively enforced by the Information Commissioner, the provision of an undertaking may not be sufficient to rectify the situation and prosecution should be

[744] *Above*, n 227.

considered.

More generally, public officials should have a positive obligation to respond to requests; the New Zealand Official Information Act 1982 provides such an example. This obligation could be drafted into the Civil Service Code. Breach of the obligation could allow a Civil Servant to raise concerns when the Act has not been complied with. It should be reiterated that a breach of FOIA would constitute a breach of a legal obligation under s.43B Public Interest Disclosure Act; the Information Commissioner is also a prescribed person, thus affording protection to Crown servants who raise concerns to him. Inclusion of the obligation in the Civil Service Code would bolster this protection and would actively promote freedom of information as an important value in democratic society.

Part two of this chapter considered the control of Official Information. Crown servants working in national security matters voluntary agree to a restriction of their article 10 rights.[745] This may be highlighted in the symbolic gesture of signing the Official Secrets Act.

It is submitted that the House of Lords in *R v Shayler* placed considerable emphasis on a number of authorised channels for disclosure without providing consideration as to the public interest value of the information. It may be identified that the Official Secrets Act 1989 does not currently provide for such an assessment. As a consequence, it is argued that the Official Secrets Act 1989 is incompatible with art.10 which requires for a detailed analysis of competing interests in the proportionality analysis. Currently, the

[745] See generally *Hajianastassiou v Greece* (1992) 16 EHRR 219.

common law remedy of breach of confidence allows for the effective balancing to take place. As Feldman correctly identifies, a court will be required to determine the public interest in the information where they would not be able to in a criminal case involving the Official Secrets Act 1989.[746]

It is submitted that part of the difficulty is caused by the domestic courts historical reluctance to make a determination as to whether the restriction of information on national security grounds is justified.[747] Post Human Rights Act 1998, it will be necessary for the courts to determine the public interest value of the information.

In order to make the legislation convention compliant it is submitted that a delicate balance must be achieved to ensure that information which is labelled confidential and above is rightly classified and falls within the respective categories of the Official Secrets Act 1989. It is therefore suggested that the United Kingdom adopts the recommendations of the Franks report to bring the classification of documents in line with the harm tests contained in the Official Secrets Act.

It is submitted that the Official Secrets Act does not provide sufficient scope for the protection of 'last resort' disclosures which may be protected. A codified necessity defence should be provided to allow for disclosures to the public whereby the raising of concerns internally has failed or was impracticable in the circumstances. The provision should also allow the public interest value in the disclosure to be determined. It will be identified in chapter six of this thesis that the Canadian Security of Information Act 2001

[746] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd Edition, OUP, Oxford, 2002) 669.
[747] See generally, the Zamora [1916] 2 AC 77, 107 per Lord Parker: 'Those who are responsible for national security must be the sole judges of what the national security requires."

provides a model which, if implemented, would align with existing art.10 values.

Failure to implement the aforementioned changes is likely to result in future non compliance with art.10, as it may be indentified the *Guja v Moldova* framework requires consideration as to the severity of the sanction imposed for raising the concern. A criminal sanction is likely to weigh heavily against the government in a proportionality analysis were the *Guja v Moldova* framework to be used.

More generally, greater consistency is required in the decision to prosecute Crown servants for unauthorised disclosures. It cannot be acceptable that Crown servants can be prosecuted for making unauthorised disclosures of malpractice when other Crown servants have failed to adequately retain the information entrusted to them. Leaving documents marked top secret on a train can arguably create as much a risk to national security as an intentional unauthorised disclosure. Guidance should therefore be issued by the Crown Prosecution Service in order to ensure that where appropriate Crown Servants are prosecuted under Section 8.

The final proposal concerns the clearance of memoirs. The fact that a Crown Servant has attempted to obtain authorisation to publish rather than making an unauthorised disclosure must be acknowledged with a fair decision making process on the part of their former department. It is therefore suggested that publications review panels be set up to decide the authorisation of proposed memoirs. Such a proposal would only be successful if the panels are prepared to make liberal decisions which must be deemed to be a less costly alternative to unauthorised disclosure.

CHAPTER FIVE

OFFICIAL MECHANISMS: A COMPARATIVE ANALYSIS OF PUBLIC SERVICE WHISTLEBLOWING MECHANISMS

This chapter considers how other nation states deal with the issue of whistleblowing and the official whistleblower protections that they prescribe, with the aim of providing a contrast with the United Kingdom's own prescribed mechanisms of official disclosure. Firstly it is important to indicate to the reader that the chapter is not intended to provide a complete narrative of whistleblower provisions throughout the world, as to do so would stray beyond the remit of the thesis. Instead, the clearly defined terms of reference will be as follows: focus will be upon a comparison of states with a similar cultural and/or democratic makeup, these will include: New Zealand, Australia, the United States of America and Canada. Within this scope, this chapter will consider whistleblowing provisions primarily concerning public officials, followed by public officials involved in matters of national security. The purpose is, therefore, to provide a critical and contrasting analysis of these provisions in order to ascertain whether the officially prescribed mechanisms of disclosure and grievance reporting in the United Kingdom can be improved by adopting a similar model to one of the aforementioned nation states. We shall begin with a consideration of New Zealand whistleblowing provisions.

5.1 New Zealand: The Protected Disclosures Act 2000, New Zealand's Answer to PIDA?

Out of the four nation states considered in this study of available whistleblowing provisions, New Zealand has the most comparable whistleblowing provision to the

United Kingdom's own Public Interest Disclosure Act 1998 in the form of the Protected Disclosures Act 2000 (PDA). In a similar way to PIDA the PDA is a 'sector blind' provision in that it aims to protect employees regardless of whether they work in the public or private sector. The PDA aims to promote the public interest by 'facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation.'[748]

In order to qualify for protection under the PDA, the disclosure must be about 'serious wrongdoing,' reasonable belief that the 'information is true or likely to be true' and that the employee expresses a wish that the wrongdoing be investigated.[749] The employee must disclose information relating to 'serious wrongdoing' which is defined in section 3 of the Act as:

> "an unlawful, corrupt or irregular use of funds or resources in a public sector organisation, or an act, omission, or course of conduct that constitutes a serious risk to health and safety or the environment, an act omission or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial or an act, omission or course of conduct that constitutes an offence"

It is submitted that the aforementioned wording would most closely be associated with 'watchdog whistleblowing.' Most importantly for the purpose of this analysis, the definition proceeds to include 'an act, omission or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.' It is submitted that the New Zealand legislation proceeds further than the UK Public Interest Disclosure Act in that this definition clearly allows for the protection of value judgments. In particular, gross negligence or gross mismanagement

[748] Section 5 Protected Disclosures Act 2000.
[749] Section 6 Protected Disclosures Act 2000.

are likely to be matters to which the public servant, exercising his judgment based upon his experience could argue that a policy decision taken is fundamentally wrong. There is a strong theoretical argument to suggest that policy dissent may benefit both the communicator and audience by facilitating debate which will both enhance the public interest and further enhance participation in a democracy.

In contrast to PIDA the PDA requires employees to follow internal procedures before making a disclosure externally. At this point the relationship between whistleblowing provisions for the public and private sector differ as under s.11 PDA public sector organisations are statutorily obliged to have internal procedures in place whereas private sector organisations are not.[750]

The internal procedures must be compliant with both the New Zealand Human Rights Act 1993 and the Privacy Act 1993 in that they must be independent (in that the individual in control of the internal disclosure mechanism is not party to the wrongdoing himself) and that it is confidential. Confidentiality is promoted as a key protection in the PDA and is prescribed in section 19.[751]

It is particularly apparent that the Protected Disclosures Act does not provide an absolute guarantee to confidentiality; instead the person in receipt of the disclosure is expected to use 'his best endeavours.' This provision is perhaps the best acknowledgment of a common difficulty faced in all prescribed whistleblowing provisions, regardless of the

[750] In cases where there is no whistleblowing policy an employee may go straight to the head of the organisation.
[751] For full text see: http://www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html (accessed 02/04/10).

jurisdiction. The protection of confidentiality can never be regarded as absolute.

If a detailed investigation is conducted, the department or agency to which the malpractice is alleged will undoubtedly become aware that a complaint has been made against them. This acknowledgement should be viewed in direct contrast to the United States whistleblowing provisions (considered below) whereby a guarantee of confidentiality is given by federal law. It is also apparent that the existence of a 'sector blind' whistleblowing provision allows for the potential discloser to consider the protections available to him with considerable ease. This is again in marked contrast to the United States' whistleblowing provisions which are considerably more complex in nature.

Disclosures may be made externally to an 'appropriate authority' in circumstances where the head of the organisation 'is or may be' involved in the serious wrongdoing alleged in the disclosure, because disclosure to the authority is justified by reason of urgency or because of inaction on behalf of the organisation or internal whistleblowing process within 20 working days after the disclosure was made.[752] This requirement can be seen as more restrictive on the employee than the provision in s.43F PIDA which allows employees to make report a concern to a prescribed regulator provided that the disclosure is made in good faith and that the employee has reasonable belief that the information is substantially true. However, the NZ Ombudsman is listed as an

[752] Section 9 Protected Disclosures Act 2000. The following is a list of appropriate authorities: the Commissioner of Police; the Controller and Auditor-General; the Director of the Serious Fraud Office; the Inspector-General of Intelligence and Security; the Parliamentary Commissioner for the Environment; the Independent Police Complaints Authority; the Solicitor-General; the State Services Commissioner; the Health and Disability Commissioner; the head of every public sector agency; and the heads of certain private sector professional bodies having disciplinary powers over their members.

'appropriate authority' and does have powers to be involved in the investigatory process which may be seen as an advantage over the UK system as shall be considered below.

PIDA does not require organisations to have internal whistleblowing procedures, nor does it require organisations to investigate the concern in a certain way. In contrast the PDA places considerable emphasis on how the concern is dealt with once it is initially reported and in respect of public sector organisations, allows employees to escalate concerns to a minister of the Crown or the NZ Ombudsman provided that the disclosure is in respect of a public sector organisation and that the internal process or appropriate authority:

> "i) has decided not to investigate the matter; or
> (ii) has decided to investigate the matter but has not made progress with the investigation within a reasonable time after the date on which the disclosure was made to the person or appropriate authority; or
> (iii) has investigated the matter but has not taken any action in respect of the matter nor recommended the taking of action in respect of the matter, as the case may require; and
> (a) continues to believe on reasonable grounds that the information disclosed is true or likely to be true."[753]

In comparison s.43E PIDA allows for disclosure to a minister of the Crown without precondition provided that the disclosure was made in good faith. The involvement of the NZ Ombudsman in the process of public interest whistleblowing is the opposite of the role of the UK Ombudsman who has no involvement in the reporting or investigation of whistleblower concerns cannot be approached directly from a member of the public because of the 'MP filter.'

[753] Section 10 Protected Disclosures Act 2000.

The NZ Ombudsman may escalate a disclosure by referring it to a minister of the Crown or to an appropriate authority to investigate the concern. The NZ Ombudsman has the power to 'take over some investigations' or 'investigate in conjunction' with a public sector organisation provided that the organisation consents to the involvement.[754] The NZ Ombudsman cannot direct an organisation to act in a particular way but can review and 'guide' an investigation if he so chooses. Furthermore, the NZ Ombudsman may publish findings of the investigation in an annual report on the work of the NZ Ombudsman. Whether or not an employee chooses to report a concern to the NZ Ombudsman he can contact the Ombudsman's Office for confidential guidance on how to make a protected disclosure.[755] This may be seen as a useful resource because of the fact that the Ombudsman will have both the experience and contacts to provide informed advice. There is no official Parliamentary or governmental body in the United Kingdom which provides such a service. The approach taken in New Zealand is radically different to the approach taken in Australia (considered next), where the 'sector specific' whistleblowing provision contained in the Public Service Act 1999 have left public servants with inadequate protection.

5.2 Australia: General Whistleblowing Provisions and the constitutional makeup of the Commonwealth.

Before discussing the nature of available whistleblowing provisions in Australia, it is necessary to venture briefly into the democratic makeup of the country, the importance of which shall become clear. Australia exists as a Commonwealth consisting of six states, two major territories and other more minor territories. Each state or territory has

[754] Section 15A Protected Disclosures Act 2000.
[755] For further information see information pamphlet on protected disclosures: http://www.ombudsmen.parliament.nz/imagelibrary/100035.pdf (accessed 07/01/10).

its own Parliament and Legislature.

The constitutional significance of this is that the Commonwealth Parliament can override any legislation passed by the territories, but with regard to the states, can only override certain state legislation which concerns specific matters outlined under section 51 of the Australian Constitution. The consequences of the structure are twofold: firstly, the decentralised form of government has meant that the individual states have developed their own whistleblowing procedures, eventually influencing the federal legislation provided by the Public Service Act 1999. Secondly, it is submitted that as section 51 of the Constitution does not include whistleblowing provisions, thus the overriding impact of a uniform federal whistleblowing procedure, would be minimal. Furthermore, Lewis suggests that there are 'serious doubts' as to whether the Federal Government has the 'constitutional power' to enact a uniform whistleblower statute.[756] Current State or Territory legislation concerning government bodies, includes the: Whistleblowers Protection Act 1993 (South Australia) Whistleblowers Protection Act 2001 (Victoria) Whistleblowers Protection Act 1994 (Queensland) Public Interest Disclosure Act 1994 (Australian Capital Territory) Protected Disclosures Act 1994 (New South Wales) and the Official Corruption Commission Act 1998 (Western Australia).[757]

These constitutional difficulties have meant that the majority of Commonwealth public sector workers are without whistleblower protection.[758] The resulting legislation at

[756] D.Lewis, *Whistleblowing Statutes in Australia: Is it Time for a New Agenda?* [2003] *DeakinLRev* 16 para 1. There have been several attempts to introduce federal whistleblower legislation, see in particular: Whistleblowers Protection Bill 1991: Senator Jo Vallentine, 12 December 1991. Whistleblowers Protection Bill 1993: Senator Christobel Charmarette, 5 October 1993.

[757] These Acts refer to State officials only, thus state police involved in national security or intelligence matters would need to approach disclosure protection at state rather than federal level.

[758] See, R. Calland & G Dehn, *Whistleblowing Around the World: Law Culture and Practice* (Public Concern at Work, London, 2005) 121. Note that at the time of writing the Australian Government had announced a new Commonwealth protection for whistleblowers however the precise details of the proposed

federal level has provided a specific protection for members of the Australian Public Service (APS), the Australian equivalent to the UK Civil Service, in the form of the Public Service Act 1999. However, this legislation has been labelled 'narrow' and 'problematical.'[759] It is important to note that whilst considering the Australian perspective as a source of comparative material, the 'Australian Public Service' does not incorporate as wide a spectrum of agencies/departments as the UK definition of 'Crown Servant' provides. The Australian Defence Force (an amalgamation of the army, navy and airforce) is dealt with separately and is governed by the Defence Act 1903 and policing matters are governed at state level.

In contrast to the statutory provision in the United Kingdom, afforded by the Public Interest Disclosure Act (PIDA), Australian whistleblower legislation, both at federal and state levels has mostly separated the public and private sectors whereas PIDA encompasses both. The reasoning behind this separation has been considered as part of research produced by a national project, researching into the various mechanisms available in the Australian public sector.[760]

It is noted that the various investigatory mechanisms provided for in the legislation are particularly complex and would not easily apply to the private sector. PIDA is used as a comparative mechanism which offers a 'sector blind' approach and which focuses on whistleblower protection and compensation in the event of reprisal rather than 'detailed

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Bill are yet to be determined. See: http://www.abc.net.au/news/stories/2010/03/18/2849370.htm (accessed 10/04/10).

[759] *Caslon Analytics Guide: Secrecy and Accountability*, see www.caslon.com.au/secrecyguide11.htm (accessed 10/04/10).

[760] See further A.Brown, Public *Interest Disclosure Legislation in Australia: Towards the Next Generation*, Commonwealth Ombudsman, 2006, 15. See also research project: *Whistling While They Work-Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations,* Griffith University, http://www.griffith.edu.au/centre/slrc/whistleblowing/ (08/09/09).

investigative systems.'[761]Consideration was also given to the difference between the sectors in how 'public interest' disclosures are defined and how different agencies are expected to respond to such disclosures.[762]

The majority of Australian whistleblower protections deal specifically with public sector corruption. This became a reactionary measure after a series of highly publicised corruption inquiries in the late 1980s and early 1990s considered that whistleblowing could make a significant impact on malpractice.[763] The Whistleblowers Protection Act was implemented by Queensland, the first and leading State in developing whistleblower protection, who created the legislation as a 'direct consequence' to 'massive corruption' in the Queensland Public Service.[764] If one were to contrast these reactions to the reactions of significant inquiries, and notable Executive scandal in the United Kingdom in the 1980s and 1990s, one can surmise that a very different approach was taken. Whistleblowing in the British Civil Service was actively discouraged and furthermore significant advancements in internal concern reporting for allowing Civil Servants direct access to the Civil Service Commissioners did not occur until the latest Civil Service Code was issued in 2006, a total of six years from when the Public Interest Disclosure Act 1998 came into force.

Most interestingly, and in contrast, the background to the UK Public Interest Disclosure Act has been attributed not to instances of Executive maladministration but to a number of high profile public inquires into mostly private sector malpractice during the 1990s.

[761] *Ibid*, 15.
[762] *Ibid.*
[763] For an historical analysis of Australian whistleblower protection see: *Whistleblowing in Australia-Transparency, Accountability…but above all, the truth*, Research Note, Parliament of Australia Department of Parliamentary Services, February 2005, no.31, 2004-2005.
[764] See further: S.Groene, *Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia*, the United States and the United Kingdom, Public Service Commission of Canada October 2001.

This was despite a clear recognition for a need for greater accountability and enhancement in public standards by the Major government, responsible for the formation of the Committee for Standards in Public Life in 1994. One must therefore consider whether PIDA offers adequate protection to Crown Servants given that in the Australian legal jurisdiction significant emphasis is given to the distinction between the public and private sector. One must also consider whether there is a justification to provide a specific whistleblowing provision for Crown Servants given that Crown employees have a unique employment and Constitutional status which differs significantly from their private sector counterparts.

The benefits of 'sector-specific' whistleblowing legislation for those in public service may be observed as an enhanced recognition that the duties of those in office are different to those in the private sector, that those duties must uphold high standards[765] and that failure to do so will lead to maladministration which may be detrimental to the running of the department in question or the Executive as a whole. The Australian Public Service whistleblowing procedures seek to encourage whistleblowing in certain circumstances.[766] Section 16 Public Service Act 1999 gives protection to employees who report instances of 'suspected misconduct.' In a similar way to the UK Civil Service grievance reporting procedures and PIDA, a number of prescribed persons are specified including an Agency head, the Public Service Commissioner or the Merit Protection Commissioner, or persons nominated by the department (a role comparable to the UK

[765] For example, the 'Nolan Standards,' the *Seven Principles in Public Life*. See further: http://www.public-standards.gov.uk/about_us/the_seven_principles_of_life.aspx (accessed 09/08/09)

[766] For information on the mechanism see: Australian Public Service Commission, *Handling misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct*, Commonwealth of Australia, 2007.

Civil Service departmental 'nominated officers').

The conditions and procedures for making 'whistleblower reports' are contained in the Public Service Regulations 1999 (amended 2007). Section 2 (b) of the Regulations provides that the APS employee may report breaches of the Code of Conduct to his agency head or nominated person in the first instance. The Agency head is then required to investigate the claim unless it is considered 'frivolous' or 'vexatious.' If the APS employee is unhappy with the outcome he may then report the matter to the Public Service Commissioner. The 'Public Service Commissioner' is a statutory position with the responsibility for 'promoting and evaluating the implementation of the Australian Public Service Values and Code of Conduct.'[767] The employee may also approach the Merit Protection Commissioner (MPC). Similarly to the Public Service Commissioner, the remit of the MPC is enshrined in statute. However, considerable emphasis is made on the independence of the role. It has been stated that the MPC has a 'key role within the APS in providing independent external review of actions affecting individual APS employees.'[768]

Whilst the role of the Australian Commissioners is comparable to the UK Civil Service Commissioners (CSC) in that they are independent, there are key differences between the oversight bodies. With regard to the appeals mechanism, in the UK, the Civil Servant is required to complain internally to the head of department or 'nominated officer.' If he is unsatisfied he can then approach the Civil Service Commissioners. The position as to when the Commissioners will consider taking a complaint directly is unclear. In

[767] For general information on the role of the Public Service Commissioner see further: *About the Commission: The Public Service Commissioner,* Australian Public Service Commission Website, http://www.apsc.gov.au. (accessed 05/07/09)
[768] For a description of the role see further: *About the Commission: The Merit Protection Commissioner, Ibid.*

Australia, the Public Service Regulations provide for direct access to either of the Commissioners if it would be 'inappropriate to report to the Agency Head,' if this position is agreed with the respective Commissioner.

The Australian structure allows for the complainant to have greater control over the way in which the complaint is handled. It is perhaps most apparent that the Merit Protection Commissioner offers the APS employee the opportunity to disclose the matter to an external office, with a primary role or 'specialism' to handle 'whistleblowing' complaints. Whilst the semantic differences between the defined role of the UK and Australian Commissioners may be slight (the CSC focuses upon 'effectiveness' and 'impartiality' of the Service[769]), the complaints mechanism appears to be both modern and employee-focused. Furthermore, under the Commissioner's Directions,[770] Direction 2.5 (1) (d) requires the Agency head to not only ensure that the department has an adequate whistleblowing procedure, but that its use is actively encouraged in appropriate circumstances.

However whilst APS employees appear to have an advantage over their UK counterparts, the legislative framework provided by the Public Service Act 1999 restricts protection from reprisal to those who disclose via the prescribed avenues. There is no protection available for APS employees who make unauthorised disclosures to the media. In the UK the Public Interest Disclosure Act protects persons who make unauthorised disclosures to the media but only in 'exceptional circumstances.'

[769] See Civil Service Commissioners website: http://www.civilservicecommissioners.gov.uk/about_us.aspx (accessed 04/09/10).
[770] Public Service Commissioners Directions 1999. This was further incorporated by section 10 (1) (d) Public Service Act 1999.

5.2.1 Limitations on Speech

The prevention of unauthorised disclosures made in the public domain for information obtained by APS employees has been the subject of considerable controversy in recent years. As a result, significant amendments have been made to the Public Service Regulations. Regulation 7 (13) (now 2.1) had contained a draconian provision which prohibited an APS employee from disclosing any information concerning public business, which had been obtained during the course of employment. The regulation had remained largely unchanged since 1902. However in 2004 the provision was amended after a significant legal challenge in the Federal Court.

It was held in the case of *Bennett*[771]that the provision was 'catch all' in nature which prohibited disclosure regardless of the nature of the information, the consequences of the disclosure and where it was made publicly available. This was held to be an infringement of the freedom of 'political communication,' an implied right in the Australian Constitution which had developed from Australian Federal case law in the early 1990s.[772] Justice Finn stated that such a provision was inconsistent with the modern conceptions of open government but further acknowledged that the regulation of information for legitimate reasons, for example the 'effective working of government would be acceptable.' He also stated that if the regulation was invalid, 'an important part of Australia's official secrecy regime would be thrown into some uncertainty.' The case resulted in an amended Regulation which was intended to balance the needs of open

[771] *Bennett v President, Human Rights and Equal Opportunity Commission* (2004) 204 ALR 119.
[772] See in particular: *Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 567,* J. Stellios, *Using Federalism to Protect Political Communication: Implications from Federal Representative Government* [2007] 31 *Melb. U. L. Rev.* 239, S.Bronitt & J.Stellios Sedition, *Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* [2007] 30 *Melb. U. L. Rev.* 923, E. Willheim *Review of Australian Public Law Developments* [2006] 30 *Melb. U. L*. Rev. 269, D.Butler, *A Tort of Invasion of Privacy in Australia?* [2005] 29 *Melb. U. L. Rev*. 339.

government with the need to protect official secrecy. It restricts the disclosure of information prejudicial to the 'effective working of government,' and information communicated in confidence but does not prohibit the disclosure of information in the course of duties (such as authorised media comment) or with the authorisation of an Agency head or by law.

5.3 Whistleblowing in the United States of America

In the United States the unauthorised disclosure of material for the purposes of highlighting national security concerns has dramatically increased in the years following the terrorist attacks on September 11th 2001. By 2004 the Government Accountability Office reported an almost 50% increase in federal employees seeking protection for whistleblowing disclosures annually.[773] However, the Federal employees who made the disclosures have received little or no protection from the whistleblowing provisions available to federal employees despite the fact that they have a duty to report waste, fraud or abuse to an appropriate authority.[774]

A distinctly common feature in both United States and United Kingdom whistleblowing protection is that private sector employees are at a greater advantage over those working in Civil Service roles. This is greatly illustrated with the passage of the Sarbanes-Oxley Act which essentially protects corporate whistleblowers.[775]

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[773] Government Accountability Office, US Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be provided to Congress, March 2004. See also: Project on Government Oversight, Homeland and National Security Whistleblower Protections: The Unfinished Agenda, April 28 2005.

[774] Executive Order 12731, accessible via National Whistleblowers Center website: http://www.whistleblowers.org/storage/whistleblowers/documents/eo12731%282%29.pdf (accessed 15/04/10).

[775] *Ibid.*

The Civil Service Reform Act 1978 was not intended to protect whistleblowers 'who disclose information which is classified or protected by statute from disclosure.'[776] The Act covers all executive agencies but did not include the Federal Bureau of Investigation the Central Intelligence Agency, the Defense Intelligence Agency and as determined by the President, any Executive agency or unit thereof the principle function of which is the conduct of protecting whistleblowers runs to all Government instrumentalities.

The Civil Service Reform Act of 1978 created the institutions of the Office of Personnel Management (OPM) the Merit Systems Protections Board (MSPB) and the Office of Special Counsel (OSC) as a way of providing protections for whistleblowers against reprisals. However, by the late 1980s it had been observed that the established mechanisms were ineffective. In 1989 the Whistleblower Protection Act was passed to strengthen the provisions and in 1994 Public Law 103-424 extended the protections offered to employees of government corporations and employees in the Veterans Administration. To the present day, a number of legal challenges have rendered the Whistleblower Protection Act particularly ineffective.

The Whistleblower Protection Act 1989 (WPA) was introduced to bolster whistle blowing provisions as a reaction to several loopholes in the Civil Service Reform Act created by the Courts and government agencies.[777] The Act again exempts those involved in national security and defence. The WPA has significant limitations, the statute exempts the following federal agencies: the US Postal Service, the Postal Rate

[776]See further, Senate Committee on Governmental Affairs, S.Rept. No. 95-969, 95th Cong., 2nd sess. 8 (1978) See also: L.Fisher, *National Security Whistleblowers*, CRS Report for Congress, RL33215, 30th December 2005.
[777] See further: Project on Government Oversight. *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, 28th April 2005, 8.

Commission, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defence Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency and any other 'executive entity' that the President determines 'primarily conducts foreign intelligence or counter-intelligence activities.[778] Following an unsuccessful attempt to strengthen the Act in 2008, a new Whistleblower Protection (Enhancement) Act is currently making its way through the Congress. This section will now consider the work of the Office of Special Counsel.

5.3.1 The Office of Special Counsel

The Office of Special Counsel is an independent, federal and prosecutorial agency. Its primary role is to investigate complaints by federal employees who allege 'Prohibited Personnel Practices' (PPPs) against them as a result of making disclosures on perceived instances of malpractice. The twelve PPPs which are contained in S. 2302(b) of title 5 of the United States Code (USC) detail a range of retaliatory behaviour from giving an 'unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;'[779] to 'engaging in reprisal for whistleblowing.'

The Complaints Examining Unit is the initial point of contact for the employee. The Unit will analyse the complaint and discuss the basis of the claim with the employee. It will then inform the complainant by letter as to whether it will refer the complaint to the Investigation and Prosecution Division (IPD) or that it cannot proceed with the matter on the basis that it falls out of the department's jurisdiction. If the matter is successfully

[778] 5 USC S2302(a)(2)(c) See also CRS Report for Congress, *The Whistleblower Protection Act: An Overview*, RL33918, 2007.
[779] Section 2302(b).

referred to the IPD, it will conduct a thorough investigation.

The IPD has the authority to access records and interview persons involved and any witnesses to the matter in question. If the matter is unresolved after the investigation is complete, the investigation can then undergo a legal review to establish whether or not there is evidence of a violation of law, rule or regulation, and whether the matter warrants corrective action, disciplinary action or both. The OSC will offer the employee Alternative Dispute Resolution as an alternative to the IPD investigation above.

The OSC also has a dedicated 'Disclosure Unit' which allows a federal employee to disclose information in a safe and confidential manner. The OSC may then direct the agency head to investigate and make a report on the disclosure. Following the investigation and subsequent report the OSC must then send a copy to the President of the United States and Congressional oversight committees.

Whilst the above described mechanism may infer that the federal employee is given a comprehensive and safe avenue of disclosure, in which he can contribute to the report, the mechanism has significant limitations. The protection of confidentiality is not absolute and is potentially misleading. Firstly, the OSC may reveal the name of the discloser if it is 'necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.'[780]Secondly, the identity of the discloser may be revealed as a consequence of his disclosure regardless of whether or not his identity is protected, as he may be the only person who is aware of the information, or is part of a

[780] 5 USC S.213 (h).

limited class of persons, whereby the identity of the whistleblower can be easily deduced. It should also be noted that any anonymous disclosures will be referred directly to the Inspector General of the respective agency.

There is a clear inconsistency between the work of the Complaints Examining Unit and the Disclosure Unit. The CEU has the power to conduct a thorough investigation in order to determine whether a prohibited personnel practice has occurred as a result of a whistleblowing disclosure whereas the DU has no such powers, it can only refer the matter to the agency head to conduct the investigation.

The OSC has been the recipient of strong criticism over recent years. In 2004 the Government Accountability Office (GAO) had failed to handle the majority of cases within the statutory limit of 15 days. It identified it only met the 15 day limit "about 26 percent of the time" meaning that there was a substantially high backlog of 95 to 97 percent of cases.[781] The time frame of which cases are investigated is a significantly important requirement of any affective whistleblowing provision. Complaints must be dealt with quickly and efficiently in order to prevent further retaliation from taking place. Furthermore, a significant delay would give those involved in any alleged wrongdoing time to conceal evidence or 'cover their tracks', particularly if the department is notified of the complaint by the OSC.

In 2004 it emerged from a series of leaks to the media that the OSC was considering

[781] Government Accountability Office, *US Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress*, Press Release, March 2004.

whether or not to continue to protect workers from discrimination on the grounds of sexual orientation. After voicing his disquiet over the leaks, the head of the OSC, Scott Bloch circulated an email to all OSC staff which forbade employees from discussing sensitive matters without approval. This not only prevented employees from discussing matters externally from the OSC but also from advising other federal departments on the issue. Bloch was later forced to resign.[782]

Is most unnerving to consider that the federal agency given the task of protecting freedom of speech in the workplace would be subject to the same controversy concerning censorship and leaks that it seeks to investigate. The incident also raises the prospect of OSC staff becoming whistleblowers themselves. In 2005 The GAO highlighted that an aggrieved OSC employee would be required to complain in the same manner as any other general federal employee, to the Office of Special Counsel.[783]

5.3.2 The Merit Systems Protections Board

The Merit Systems Protections Board in an independent agency which deals with appeals from current or former federal employees where the applicant alleges that they have been subject to a 'prohibited personnel action' as a result of making a whistleblowing disclosure. Like the OSC the MSPB also exempts federal employees involved in national security. There are two prescribed avenues with which to seek access to the Board: an 'Otherwise Appealable Action'[784] and an 'Individual Right of Action.'[785]

[782]See Project on Government Oversight news feature and analysis: http://www.pogo.org/pogo-files/alerts/whistleblower-issues/wi-osc-20081022-1.html (accessed12/01/10).
[783] See in particular: Government Accountability Office, *US Office of Special Counsel: Selected Contracting and Human Capital Issues*, GAO-06-16 November 2006, 22.
[784] This means that the federal employee is subject to a personnel action and claims that the action was taken because of his whistleblowing. The employee may then seek direct access to the Board after the

It can be observed that the MSPB is procedurally complex to the detriment of the potential federal whistleblower. The complexities of the MSPB application procedures and the inconsistencies surrounding the OSC do not show a whistleblower protection mechanism in good order. Whilst there are benefits to allowing a complainant the right to appeal to the MSPB if the OSC have failed to resolve the complaint, the allowance to seek relief from either the OSC or the MSPB in the first instance for a personnel action is particularly confusing if one considers that MSPB places itself above the OSC in the hierarchy.

In the Board's introductory literature the MSPB is described as 'the judge' to the OSC's 'prosecuting authority.'[786] With this in mind, one would assume that if the federal employee fits the outlined criteria to apply to either agency, he is best served by lodging the complaint with the MSPB. However, in doing so the complainant is actually in a worse position. By lodging the complaint with the OSC he has both the potential benefits of being able to comment upon the report and also the potential to appeal to the MSPB if the OSC fails to take a corrective action for his complaint, thus effectively having the opportunity to exhaust two agency mechanisms with the benefit of a full 65 or 120 days with which to appeal. If he applies to the MSPB directly he has only one course of action.

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personnel action is taken.

[785] The 'Individual Right of Action' has two possible strands. An employee may be subject to a personnel action to which he attributes to a whistleblowing disclosure, however the action is not one which is directly appealable to the board. He may then only appeal to the board, if the complaint is lodged via the Office of Special Council and the Office fails to seek a corrective action. The second strand involves a federal employee who is subject to a personnel action which is directly appealable to the MSPB, but the employee chooses to file a complaint for the personnel action via the OSC.

[786] See further U.S. Merit Systems Protection Board website: http://www.mspb.gov/ (accessed 09/04/10).

The inherent problems of the above mechanisms, which are themselves largely constituted by a significantly weak statutory provision in the form of the Whistleblower Protection Act 1989 do not provide an adequate method of protecting federal employees against whistleblower reprisals. This discussion will now progress to consider Canada which has created Public Sector Integrity Canada, a new body established to receive and investigate concerns from public servants.

5.3 Canada

In Canada, high level corruption has led to a drastic overhaul of public service oversight and accountability mechanisms, at the forefront of these reforms has been the long awaited recognition of the importance of whistleblowers to public life. As the whistleblowing mechanism is very much in its infancy, the purpose of this section will be to give an outline of the events surrounding the motivation behind the Act before evaluating whether or not the new system will successfully contribute to the oversight of Executive bodies with the aim of combating and discouraging further instances of malpractice.

The Gomery Report,[787] which is regarded to be the catalyst for the reforms, was the result of a thorough investigation into a Liberal Party Quebec sponsorship programme which was intended to promote federalism and Canada's profile by way of advertising. Adam Cutler, a procurement officer for the Public Works Department, became a whistleblower after refusing to be involved in malpractice in his department. Cutler

[787] Justice John H. Gomery Commissioner, *Commission of Inquiry into the Sponsorship Program and Advertising Activities*, 2005, accessible via: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/ffr/ff_eng_full.pdf (accessed 09/09/09).

suffered retaliation for his refusal to participate and subsequently lodged a complaint which initially led to a departmental audit. He then produced a dossier of incriminating evidence which led to the instigation of the Gomery Inquiry. It was discovered that a total of $100 million had been given to a number of advertising agencies for the sole purpose of generating commission and for rewarding loyal support of the party. It further emerged that one advertising agency had paid salaries to Liberal party members who had never worked for the company. During the Gomery investigation the RCMP also conducted enquires which led to a number of convictions. The advertising scandal left the Liberal Party, then in government, in disrepute. The Prime Minister Paul Martin had agreed to call an election 30 days after the Gomery Report had been published. As a result of the election the Liberal Party was ousted from office.

When the advertising scandal erupted the Liberal government introduce the unsuccessful Bill C-25 the 'Disclosure Protection Act'. The government then drafted a new Bill, C-11 which was hastily pushed through the Senate shortly before the Parliamentary recess for the election.[788] The Bill succeeded in gaining the approval of the Senate and the resulting legislation; the Public Servants Disclosure Protection Act became law.

The 'second phase' Gomery report, which detailed a number of recommendations for reform, including the need for an ethical code of conduct, stated that whilst the Commission commended the Canadian Parliament for passing whistleblower legislation it believed it 'might not have the desired effect.'[789] It was argued by a number of

[788] For a historical analysis of whistleblowing in Canada see further, Federal Accountability Initiative for Reform, *the Canadian Experience*: http://fairwhistleblower.ca/wblaws/canadian_experience.html.
[789] See further Gomery Report, Phase 2, Section D: Whistleblower Legislation, accessible via the Commission's website: http://www.parl.gc.ca/information/library/PRBpubs/prb0560-e.htm (accessed 06/08/08).

interested parties and former whistleblowers alike that the legislation did not go far enough to protect whistleblowers, and in essence was a tool to protect ministers rather than hold them accountable for their actions.[790] The succeeding government, led by the Conservatives gave the election promise of strong accountability reforms. By building upon the recommendations of phase two of the Gomery report, Prime Minister Stephen Harper promised considerable reform to the Public Servants Disclosure Protection Act and new legislation in the form of Federal Accountability Act.[791]

The new Act attempts to achieve this aim by offering the opportunity for employees of the Canadian Public Service to raise concerns internally by a person designated under the Act and a new and external route to disclose information relating to wrongdoing in the form of an independent body called 'Public Sector Integrity Canada' (PSIC). This analysis will start by identifying what types of information may be protected by the Public Servants Disclosure Protection Act before considering the work of the Public Sector Integrity Commissioner in more detail.

5.4.1 The Public Servants Disclosure Protection Act

Section 8 of the PSDPA defines 'a wrongdoing' to include: a contravention of any Act of Parliament or any Regulation, a misuse of public funds or public asset, a gross mismanagement in the public sector, an act or omission which causes danger to life, health or safety of persons, harm to the environment, a serious breach of a code of conduct or knowingly directing or counselling a person to commit a wrongdoing.

[790]See further: 38th Parliament 1st Session, Standing Committee on Government Operations and Estimates, minutes of evidence, February 2005.
[791]Conservative Party Manifesto 'Stand up for Canada,' accessible via: http://fairwhistleblower.ca/faa/2006-01-13-Stand_Up_For_Canada_Platform.pdf (accessed 06/08/09).

Section 10 of the Act requires that Chief Executives of government departments must establish whistleblowing procedures and designate a senior person to receive and deal with whistleblowing concerns.[792] Section 11 provides that the Chief Executive must establish procedures to ensure the confidentiality of any concerns received. The section further provides a positive obligation for the Chief Executive to comply with the principles of procedural fairness and natural justice, protect the identity of persons involved in raising the concern, including the whistleblower, witnesses and any persons alleged to be responsible for wrongdoing. Following a finding of wrongdoing, the Chief Executive is obliged to provide public access to the wrongdoing in order to ensure transparency. Any investigations of wrongdoing carried out internally are reported and monitored on a yearly basis by the Treasury Board, information on wrongdoing is published on the website of the respective department and is monitored by the Treasury Board who produce yearly analysis of the publications. Sections 12 and 13 of the Act provide access to the internal mechanism and Commissioner respectively.

Section 16 of the Act provides a public interest exception whereby a disclosure may be made to the public if there is not sufficient time to make the disclosure via the prescribed channels and the servant believes 'on reasonable grounds that the subject matter of the disclosure is an act or omission' constitutes a 'serious offence under an Act of Parliament,' or that the disclosure constitutes an 'imminent risk of a substantial and specific danger to the life, health and safety of persons or to the environment.' The drafting of s.16 bears similarity to the public interest offence contained in the Security of

[792] Note that the section will not apply where the Chief Executive argues that due to the size of his department establishment of a senior person to receive concerns will be reasonably impractical, s.10 (4) PSDPA.

Information Act, which protects official information.[793]

Section 16 PSDPA has identifiable similarities to s.43 (B) of PIDA (UK) which defines what constitutes a 'qualifying disclosure.'[794] However there is considerably more emphasis on the justifications of 'a lack of sufficient time' or 'imminence of danger' in the Canadian legislation. As a consequence, it would be easier to obtain protection under the Public Interest Disclosure Act 1998.

The most identifiable difference between the UK provisions in PIDA and the Canadian PSDPA is that the Canadian legislation is capable of protecting concerns raised regarding gross mismanagement. No further definitions of gross mismanagement are provided in the Act. It is submitted that gross mismanagement is likely to require the public servant to make a value judgement based upon his own knowledge and experience of the working environment to which he is in. The PSDPA can therefore protect value judgements. However, 'gross mismanagement' is not covered by s.16, meaning that public servants cannot raise such concerns externally to the public. It is submitted that this creates inconsistency in the disclosure regime afforded by the PSDPA and furthermore places emphasis on the available internal mechanism and the Commissioner to be effective. If either of those mechanisms fails the servant will have no means of 'last resort' protection.

[793] This legislation will be considered in more detail below in the section pertaining to national security interests.

[794] "(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

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

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

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

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

5.4.2 The office of Public Sector Integrity Commissioner

The Public Sector Integrity Commissioner was established in 2007 and has wide ranging investigatory and reporting powers. The Commissioner is appointed as an 'Agent of Parliament' by an Order in Council and is then approved by resolution of both the Senate and House of Commons.[795]

Public Sector Integrity Canada offers a prescribed route to make whistleblowing disclosures for employees of the public sector and also to members of the public who observe instances of wrongdoing. However, there are notable exceptions, the Canadian Military forces; the Communications Security Establishment and the Canadian Security Intelligence Service are all exempt from the jurisdiction of the Commissioner.[796] The Royal Canadian Mounted Police (RCMP) are included in the remit for the purposes of allowing the PSIC to investigate complaints of reprisal, however the legislation requires the RCMP Officer to first exhaust internal mechanisms before approaching the Public Sector Integrity Commissioner (discussed below). The public sector employee may also be entitled to independent legal advice, paid for by PSIC to the value of $1,500 or exceptionally to a maximum of $3000.

The Commissioner may conduct complaints of wrongdoing and also complaints of reprisal. In a similar way to how the UK Parliamentary Ombudsman conducts her

[795]Section 39 (1) Public Servants Disclosure Protection Act, for general information on the Commissioner see Public Sector Integrity Canada website: http://www.psic-ispc.gc.ca/doc.php?sid=7&lang=en (accessed 05/09/08).
[796] For accountability mechanisms for security and intelligence see, Chapter Six, Section 6.7 of this thesis, for Armed Forces see Chapter Seven, Section 7.9.

investigations, there is an emphasis on informality.[797] The Commissioner may appoint a conciliator to attempt to resolve the complaint between the parties. If this is unsuccessful the Commissioner may refer the complaint to the Public Servants Disclosure Protection Tribunal. The Commissioner may also make recommendations of corrective action to the relevant Chief Executive of the department, and if this does not resolve the matter she may refer the matter to the Tribunal, produce a special report to Parliament, or both.

It is submitted that the remit of the Commissioner to consider reprisal complaints may provide a suggested reform to the current remit of the Civil Service Commission in the United Kingdom. Currently, the UK Employment Tribunal system may take up to a year to be decided. This creates a difficulty for claimants who are taking a detriment claim but still work in the organisation. The Tribunal process will also be costly to both the claimant and the respondent who often require legal advice and representation. Claimants often represent themselves and this places them at a disadvantage if the respondent has legal representation. The Civil Service Commission could provide an independent mechanism to mediate and resolve disputes.

However, a consequence of the procedurally rigid system in Canada is that public servants have no direct access to the tribunal. This places the emphasis entirely on the effectiveness of the Commissioner. Decisions of the Commissioner can only be challenged by judicial review. The Commissioner has been the subject of fierce criticism. Between the years 2007-2010 the Commissioner had found no cases of wrongdoing or reprisals. The first Commissioner, Christine Quimet, left the organisation shortly before the Auditor General conducted a review into the Commissioner's

[797] Advice for Public Servants, Public Sector Integrity Canada Website: http://www.psic-ispc.gc.ca/doc.php?sid=9&lang=en#toc_11 (accessed (09/08/08).

activities. The review was prompted after three of Quimet's own staff raised concerns about her. The Auditor General's report found that the Commissioner had taken retaliatory action against at least one member of staff who raised concerns to the Auditor General. The Auditor General made findings of mismanagement and evidence of a reluctance to investigate complaints received by the PSIC.

A new Commissioner has appointed since the report and is currently conducting a review of all case files. At present the tribunal is considering the first two cases referred by the Commissioner. The tribunal panel consists of four independent members of the judiciary, one of whom acts as chairperson, and who must decide whether or not there is evidence of reprisal against the employee who has made the whistleblowing disclosure. With regards to making a ruling the panel has several options. It can permit the complainant to return to his or her duties; reinstate the complainant or pay compensation in lieu of reinstatement if the relationship of trust between the parties cannot be restored; rescind any measure or action, including any disciplinary action and or compensate the complainant.[798]

One cannot identify the effectiveness of the rulings of the tribunal as it is yet to make a ruling on its first case. It noticeable, however, that the tribunal represents the last possible means of action at the Commissioner's disposal. It is also evident that without the ability to apply to the tribunal to make a ruling on the corrective action, the Commissioner would have to rely on her own powers, which are limited to making recommendations and reports. One could therefore draw experience from the UK Parliamentary Ombudsman, who only has the power to make recommendations if she finds an instance of wrongdoing in a public department.

[798] See further, tribunal website: http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/prt/prt01-eng.asp (accessed 09/09/09).

The Commissioner is required to report to Parliament by producing annual reports with strict instructions as to the content.[799] He is also required to produce case reports of investigations if there is a finding of wrongdoing and to make recommendations to the chief executive of the respective department.[800] If one contrasts this aspect of the Commissioner's role with another UK accountability mechanism provided by the UK Civil Service Commissioners, one can argue that Canadian public servants are at an advantage over their UK counterparts. In the UK, all whistleblower complaints and investigations involving the UK Civil Service Commissioner are not reported in the public domain.

5.4 Conclusion

5.5.1 Application to the Theoretical Model

The purpose of this chapter has been to focus upon comparative mechanisms to the United Kingdom. This chapter also provided consideration the employment protection afforded to public servants working in those jurisdictions. It may be identified, that as with Crown servants in the UK jurisdiction, public servants in the jurisdictions discussed

[799] PDPSA section 38(2) The annual report must set out:
(a) the number of general inquiries relating to this Act;
(b) the number of disclosures received and complaints made in relation to reprisals, and the number of them that were acted on and those that were not acted on;
(c) the number of investigations commenced under this Act;
(d) the number of recommendations that the Commissioner has made and their status;
(d.1) in relation to complaints made in relation to reprisals, the number of settlements, applications to the Tribunal and decisions to dismiss them;
(e) whether there are any systemic problems that give rise to wrongdoings;
(f) any recommendations for improvement that the Commissioner considers appropriate; and
(g) any other matter that the Commissioner considers necessary.

[800] as per section 31(1) 8.

also encounter restrictions on their expression rights. Whilst the arguments from moral autonomy or to enhance the individual provide a justification for the raising of whistleblower concerns, the legal protections offered may not facilitate wider disclosures made to the public. Out of all of the legal protections identified, only the Canadian Public Servants Protection Act protects disclosures made directly to the public and moreover limits the protected categories of information to specified categories. Wider disclosures relating to gross mismanagement are not protected. This runs counter to the argument that freedom of speech may be justified to enhance the recipient audience and to facilitate participation in a democracy. Because it is very difficult for Canadian public servants to obtain legal protection for making whistleblowing disclosures to the public it is very likely that such communication will be inhibited. The unfortunate consequence is likely to be that public servants will choose to leak information rather than utilise the official mechanisms available. This discussion will now progress to consider the legal model.

5.5.2 Application to the Legal Model

Jurisdiction	Internal Mechanism	External Mechanism	Employment Protection	Restriction on Speech
UK	Line Management. Nominated Officer. Offence Inquiry Point. Minister of department. Departmental hotlines.	Civil Service Commissioners S.43C (2) Public Interest Disclosure Act 1998 Prescribed Regulators S.43F PIDA such as to National Audit Office. Disclosure to the Police S.43G PIDA.	Public Interest Disclosure Act 1998.	Civil Service Code Para 8. Misconduct In Public Office. Official Secrets Act 1989.
NZ	Internal procedures required by law. Head of organisation or Minister of department in certain circumstances.	Appropriate Authority as proscribed by S.3 (B) Protected Disclosures Act 2000. Includes: NZ Ombudsman, the Controller and Auditor Genera, the Director of the Serious Fraud Office, and the Commissioner of Police.	Protected Disclosures Act 2000.	S.78 Crimes Act 1961. Immunity from Civil or Criminal procedures provided that protected disclosure has been made S.18 Protected Disclosures Act 2000.
AUS	Agency head or nominated person S.2 (b) Public Service Regulations	Public Service Commissioner. Merit Protection Commissioner.	S.16 Public Service Act 1999.	S.13 Public Service Act 1999. APS Code of Conduct Paras 6 and 10. S.70 and S. 79 Crimes Act 1914.
US	Line Management.	Office of Special Council OSC Complaints Examining Unit. OSC Disclosure Unit.	Civil Service Reform Act 1978. Whistleblower Protection Act 1989.	Code of Ethics for U.S. Government Service Para 8. No Official Secrets Act. Some provision in Espionage Act 1917
CAN	Line management. Designated Person.	Public Sector Integrity Canada	Public Servants Disclosure Protection Act 2005.	Requirement to follow internal procedures and PSIC/ exception in S.16 PSDA 2005. Values and Ethics Code for Public Service Chapter 2 (d). Security of Information Act 2001/ public interest defence contained in S.15 (2)

The framework provided by the European Court of Human Rights in Strasbourg identifies the importance of effective whistleblowing procedures. The above table provides a summary of the comparative approaches. It can be observed that whilst the Public Interest Disclosure Act 1998 allows an employee to sue an employer before an Employment Tribunal for damages, it does not establish procedures for dealing with any concerns raised via authorised mechanisms. An advantage of sector specific legislation is that it allows for a two pronged approach. The first stage is to deal with the information reported and the second stage is to support the whistleblower and protect them from detriment for making the disclosure.

It may be observed that the New Zealand legislation is similar to the Public Interest Disclosure Act 1998, in that it allows for the protection of disclosures made about acts which may cause a serious risk to health and safety or damage to the environment. The NZ legislation goes further than PIDA by protecting sector specific concerns such as the unlawful, corrupt or irregular use of funds or resources in a public sector organisation, grossly negligent management or gross mismanagement. Whilst some of the above matters may be covered by s.43 B PIDA as a breach of a legal obligation, it may be identified that the NZ provides protection for 'protest whistleblowing' about gross mismanagement, matters which would not be covered by PIDA.

However, the New Zealand legislation requires public servants to first utilise the internal or external mechanisms in order to receive employment protection. Thus protest whistleblowing of this nature would only be acceptable via the prescribed channels. This method of protection places the importance on the effectiveness of those available channels. If those procedures are not effective there is no scope for last resort disclosure. As a consequence this is inconsistent with the *Guja v Moldova* framework.

The procedurally rigid approach has caused difficulties in other jurisdictions where the link between employment protection and concerns raised via official channels is evident in the legislation. This chapter has identified that the Australian mechanism which links both stages together does not work well at present. The United States mechanism is both overly complicated and disjointed. However, in the midst of various accountability bodies the inspectors general stand out as apolitical investigators to which whistleblowers can approach. Despite the obvious constitutional differences to the UK jurisdiction the US jurisdiction, the inspectors general identify that need for the UK to strengthen its own

accountability mechanisms and for Crown Servants to have access to report concerns to those respective bodies.

In comparison with the strong employment protection offered by the UK Public Interest Disclosure Act, the US protection appears weak. The National Whistleblowers Center (NWC) argue that currently a public servant who suffers detrimental treatment (i.e. is sacked or demoted) as a result of raising a concern will have 'a less than one percent chance of fighting and winning their case.'[801] The NWC found that the Merit Systems Protection Board are 'under pressure to process as many cases as possible' and that cases are decided by Administrative Judges under political pressure.[802] Moreover it found that since 1994 public servants have won 'only 3 out of 213 cases filed in the Federal Appeal Circuit Court of Appeal.'[803] The new proposed Whistleblower Protection (Enhancement) Act 2009 aims to legislate to strengthen available protections for public servants but such enhancements can only achieved by strengthening the Office of Special Counsel and the Merit Systems Protection Board - institutional changes which are difficult, if not impossible to legislate for.

The Canadian Public Servants Disclosure Protection Act is very similar to the New Zealand definition of wrongdoing. In addition to including information regarding public safety and harm to the environment, section 8 PSDPA allows for concerns regarding 'gross mismanagement' in the public sector. Gross mismanagement is not defined further and is clearly open to subjective interpretation by the would-be whistleblower. Protest whistleblowing is likely to be protected if disclosures are raised internally to the

[801] See further: http://www.whistleblowers.org/storage/whistleblowers/documents/3.%20whistleblower%20reform%20q&a.pdf (accessed 21/04/2010).
[802] *Ibid.*
[803] *Ibid.*

prescribed channels.

The Canadian legislation goes further than the New Zealand protection by allowing employment protection for 'last resort' disclosures direct to the public. However, if the matter concerns a risk to health and safety or the environment, the employee must identify an 'imminent risk.' Section 43 G PIDA (UK) does not require proof of an imminent risk. The Canadian legislation does not provide protection for concerns raised about gross mismanagement if they are raised to the public. It should be identified that no protection for reprisals may be obtained without the assistance of the Public Sector Integrity Commissioner. The Commissioner may conduct reprisal investigations and may further refer complaints to an independent tribunal.

Whilst the Canadian system provides the most comprehensive scheme of protection available, it also places complete emphasis on the PSIC to work effectively. However, this analysis has identified that the scheme has not worked effectively, meaning that a public servant's only way of obtaining access to the tribunal by taking a judicial review claim against the Commissioner. The Canadian system does however provide an example of a way in which the Civil Service Commission could be further involved in Civil service whistleblowing. The Civil Service Commission could provide an independent mechanism to investigate reprisal complaints made by Civil Servants. This would be in addition to allowing access by civil servants to the Employment Tribunal, and could be used as an alternative to existing grievance procedures. It is submitted that this recommendation may improve Civil Service confidence in the official mechanisms available.

In comparison to other jurisdictions, the UK Public Interest Disclosure Act provides the least restrictive means for an employee to obtain employment protection for raising a public interest concern.[804] This chapter has identified that for a procedurally rigid structure to be effective, the agencies or authorities tasked with dealing with the concerns must also be effective. Structural rigidity places too great a burden on the agencies to work well, if they do not and the whistleblowing law does not provide alternative means to raise concerns the employee may be more inclined to bypass the available mechanisms and leak the information to the media. [805]

This thesis does not recommend that the Public Interest Disclosure Act 1998 be changed to reflect the more procedurally rigid approaches taken the other jurisdictions identified in this thesis. However, it is just as important in a jurisdiction where the whistleblowing law is not procedurally rigid that the agencies or individuals tasked with dealing with the concerns do so effectively.

If the employee feels unable to raise his concerns in this way it is important that an independent authority if accessible to deal with the concern. Unauthorised disclosures to the media should only be considered as a last resort, yet, where the established procedures are considered by the public servant are perceived to be ineffective he may obtain art.10 protection for raising concerns directly to the public. It therefore makes sense to provide for the official mechanisms to provide effective alternatives to unauthorised disclosures. The next chapter considers the position of employees in the

[804] For a comparison of the two approaches see further: A.Savage, *Legislative Flexibility versus Procedural Rigidity: a Comparison of the UK and Canadian Approaches to Public Service Whistleblowing Protection*, paper presented at 40th World Congress of the International Institute of Sociology, New Delhi, India 19th February 2012.

[805] This is arguably particularly true of the rigid approaches to whistleblowing identified in Australia the United States and Canada and the problems identified with those agencies.

security and intelligence services.

CHAPTER SIX

EMPLOYEES OF THE SECURITY AND INTELLIGENCE SERVICES

"Whistleblowing revelations, purporting to disclose something seriously wrong in an organisation, tend to reveal far more about the whistleblower than about the organisation which is having the whistle blown on it. These so-called 'revelations' have been, in my experience, invariably partial, one-sided and as such misleading accounts of what are usually much more complex than they present...The one question rarely asked is 'Did you try to do something about it before going public?"[806]

The requirement to combat global terrorism has placed national security at the forefront of our national agenda. Those given the task of protecting our national security, namely the Security Service (MI5), the Secret Intelligence Service (MI6) and Government Communications Headquarters (GCHQ) have received an increase in both workload and resources[807] but have increasingly been placed under the spotlight and not always for the right reasons. Most recently, accusations that members of the security and intelligence services have been complicit in the torture of terrorist suspects have not only prompted questions in the Commons, but for the first time has prompted the head of the Secret Intelligence Service to deny the allegations in an open media forum.[808] The torture allegations are most relevant to this chapter because they appeared to come from

[806] Stella Rimmington, the former Director General of the Security Service writing in her autobiography, which received criticism for discussing matters thought best kept secret, S. Rimmington, *Open Secret* (Random House) 187.

[807] In the 2005 Pre-Budget Report, the Chancellor of the Exchequer announced an additional £85 million would be made available over three years to aid the expansion of the agencies. The ISC has indicated that the planned resources for 2007/08 would total £1.381.8 million in the SIA, the Single Intelligence Account, which is allocated to the agencies. It is notable that many of the figures were blanked out. See Further Intelligence and Security Committee, *Annual Report*, 2005-2006, Cm 6864.

[808] *A century in the Shadows*, 10 August 2009, see further http://www.bbc.co.uk/programmes/b00ls8ll (accessed 01/09/09). It should be noted that the Security Service has denied allegations put forward by former intelligence officer David Shayler.

'whistleblowers' in the know.[809] It should be noted that at the time of writing the head of MI6 has called in the Metropolitan Police to investigate an employee of MI6 who was allegedly complicit in the torture of a terrorist suspect.

It can be observed that the work of the Security and Intelligence Services have become increasingly noticeable in the public domain in recent years but the question remains as to whether the services have become any more publicly accountable for their actions. Born and Leigh highlight that effective external control of the security and intelligence services must rest with the Executive and therefore it is essential that these services are under democratic control by elected politicians, who are the 'viable custodians of public office in a democracy.'[810] However, as we have already observed in previous sections of this thesis, the Executive accountability mechanisms contain inherent weaknesses. One may therefore consider that a strong, affective and accountable national security provision requires a strong, effective and accountable Executive. The fact that the majority of high profile instances of unauthorised whistleblowing have involved unauthorised disclosures of information pertinent to national security, suggests a need to revaluate the accountability mechanisms of the Security and Intelligence Services.

The purpose of this chapter is to consider the current safeguards in order to improve understanding as to why unauthorised disclosures of national security information take place and whether such safeguards can be improved in order to reduce unauthorised disclosures of national security material. Consideration will first be given to the current

[809] David Davis, *Hansard* HC Deb, 7 July 2009, col 940: "As the House will realise, the account I am about to relay comes from several sources. I cannot properly give my sources, given the vindictive attitude of this Government, particularly the Foreign Office, to whistleblowers. Indeed, in this case of Rangzieb Ahmed, the authorities were so paranoid that they threatened to arrest a journalist for reporting facts stated in open court."

[810] H. Born and I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Publishing House of the Parliament of Norway, Oslo. 1995) 55.

complaint reporting mechanism available to employees of the Security Service and the Secret Intelligence Service and whether Crown employees exempt from PIDA on national security grounds should have the same protections as Crown Servants not involved in national security matters.

6.1 Authorised mechanisms to raise concerns

One of the key aspects of the House of Lords Judgement in *R v Shayler* was the lengthy consideration to the fact that Shayler had failed to utilise a number mechanisms available to him which were authorised by virtue of the Official Secrets Act 1989.[811] Lord Bingham identified that concerns relating to the work of the service could be reported to the independent staff counsellor. Concerns about the legality of what the service had done could be disclosed to the Attorney General, the Director of Public Prosecutions or the Commissioner of the Metropolitan Police. Lord Bingham emphasised that all three officers were 'subject to a clear duty, in the public interest, to uphold the law, investigate alleged infractions and prosecute where offences appear to have been committed, irrespective of any party affiliation or service loyalty.'[812]

The Attorney General and the Commissioner of the Metropolitan Police are both expressly mentioned as authorised persons to receive disclosures in the Official Secrets Act 1989.[813] It also makes sense to include the Attorney General on the list because his consent is required for prosecutions under the OSA 1989.[814] Concerns about misbehaviour, irregularity, maladministration, waste of resources or incompetence could

[811] See also chapter three of this thesis.
[812] *R v Shayler* [2002] UKHL 11, *para* 27.
[813] Section 7 Official Secrets Act, Official Secrets Act (Prescription Order) 1990.
[814] Section 9 Official Secrets Act 1989.

be referred to the Home Secretary, the Foreign Secretary, the Secretaries of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet or the Joint Intelligence Committee, staff of the comptroller and Auditor General, the National Audit Office and the Parliamentary Commissioner for Administration.[815]

Lord Bingham refers to the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200 which authorises disclosures to the aforementioned persons. What is most unclear is whether or not any of the above persons would have dealt with Shayler's concerns if he had approached them and whether they would be prepared to deal with whistleblower complaints in general.

The Parliamentary Commissioner for Administration, or ombudsman as she is better known, has an extensive remit to investigate government departments but one which expressly excludes investigations relating to national security matters.[816] With regard to the Joint Intelligence Committee, several members of the security and intelligence services raised concerns as to the intelligence dossier used to justify invasion into Iraq, yet these concerns were not dealt with.[817] Reporting concerns to the Prime Minister, the Home Secretary or the Foreign Secretary may also be seen as problematic, because of the political affiliations or possible involvement of the persons concerned.

6.1.1 The Staff Counsellor

The role of an independent staff counsellor was established in 1987, he is a high ranking former member of the security and intelligence services to whom a member of those

[815] *Ibid* at 36.
[816] Schedule 3, Parliamentary Commissioner for Administration Act 1967.
[817] Brian Jones later testified to the Hutton Inquiry.

services could go to in order to raise concerns. Then Prime Minister Margaret Thatcher described the role to the Commons, in a passage later repeated by the Court of Appeal judgment in *Shayler*:

> "He will be available to be consulted by any member of the security and intelligence services who has anxieties relating to the work of his or her service which it has not been possible to allay through the ordinary processes of management-staff relations. He will have access to all relevant documents and to any level of management in each service. He will be able to make recommendations to the head of the service concerned. He will also have access to the Secretary of the Cabinet if he wishes and will have the right to make recommendations to him. He will report as appropriate to the heads of the services and will report not less frequently than once a year to me and to my Right Hon friends the Foreign and Commonwealth Secretary and the Home Secretary as appropriate on his activities and on the working of the system."[818]

Historically there have been difficulties in assessing the precise role of the Staff Counsellor. The staff counsellor was originally introduced following the case of Michael Bettaney a former MI5 operative who was arrested whilst attempting to offer secrets to Russian agents. Bettaney had been reportedly suffering from a drinking problem which was known to his superiors. The Independent reported that operatives of the Security and Intelligence Services who were found to be spying for the other side often suffered from emotional problems.[819]

The resulting appointee as Counsellor, Sir Philip Woodfield was described by some newspapers an 'agony uncle'[820] and by others as an 'ombudsman.'[821] Indeed it soon became clear that the role and jurisdiction of the staff counsellor had extended beyond the remit outlined by Thatcher.[822] In the first few months of Sir Philip Woodfield's new role he was asked by a former MI6 Officer Anthony Cavendish, to appeal on his behalf,

[818] Hansard, HC Debs, 2 November 1987, written answers, col *512*.
[819] *Report of the Security Commission on the Case of Michael John Bettaney*, Cmnd 9514, May 1985.
[820] See: Sir Philip Woodfield, *Obituary*, The Times, 19th October 2000.
[821] J.Craig, *Spies Set to Reveal Own Secrets to Ombudsman,* Sunday Times, 1st November 1987.

after the Secret Intelligence Service blocked the publication of his memoirs, Sir Philip refused.[823] In 1991 the Staff Counsellor was asked to conduct a review into the detention of 91 Iraqi and Palestinian nationals during the Gulf War and after exonerating the involvement of MI5 received criticism as a result.[824] In 2002 the Staff Counsellor, then Sir John Chilcot, was asked to conduct a review into the theft information relating to the identities and home addresses of police officers and informants from a Northern Ireland police station. The appointment of Sir John to review the matter was criticised by the Deputy Chairman of the Northern Ireland Policing Board who questioned his independence.[825]

In the book, *Spies Lies and Whistleblowers,* Annie Machon former MI5 officer and then girlfriend of David Shayler justified why Shayler did not raise his concerns with the independent staff councillor:

> "A staff councillor existed, but he was seen as a joke amongst MI5 staff, and officers who consulted him were labelled at best 'unreliable' or at worst 'mad.' The staff counsellor also had no remit to investigate allegations of criminal activity. Our line management had also made it clear to us that there was no independent body with the power to investigate our concerns… if there had been an independent route with a guarantee that the crimes reported would be investigated David would have used it."[826]

Without further information as to the work carried out by the Staff Counsellor it is impossible to carry out a thorough analysis of the role. However, one can identify when considering the mechanism against the Official Secrets Act 1989 that even if the Staff Counsellor did not have the remit to investigate allegations of criminal activity, Shayler could still have made an authorised disclosure to the Commissioner of the Metropolitan

[823] B.Penrose, *How 'Uncle' Refused to Help Cavendish*, Sunday Times, 3rd January 1988.
[824] N.Cohen, *MI5 Cleared Over Innocent Gulf War Detainees*, 16th December 1991.
[825] Unknown, *Cameras Fail to Catch Raiders*, The People, 24th March 2002. Sir John Chilcot had experience as former Permanent Secretary to Northern Ireland yet it was his role as staff counsellor which meant that he was considered 'too close to MI5.'
[826] A. Machon, *Spies Lies and Whistleblowers* (The Book Guild, Lewis, 2005) 109.

Police and as it was explained in the aforementioned section reporting of criminal offences, the police are the most appropriate body to receive reports of alleged criminal activity. Machon further questions the independence of the Staff Counsellor, yet even with the little information given as to the role of the Staff Counsellor one can identify that the role stands separately from the management chain. Furthermore, the Staff Counsellor is available to all three services, the Security Service, the Secret Intelligence Service and Government Communications Headquarters. It is clear however that what the reporting system does lack is external oversight, which is considered below in an analysis of the Intelligence and Security Committee.

During the Shayler case another former employee of the Security Service chose to speak out. Jestyn Thirkell-White[827] was reported to have backed many of Shayler's allegations and expressed that he had no confidence in the staff counsellor because he was 'required to inform the personnel department' if he had seen the counsellor and had 'little trust in the role.' Former GCHQ employee Katherine Gun stated that she chose not to approach the staff counsellor before leaking documents to the Guardian because she felt that the matter was 'so urgent it needed direct action' and that she believed that the person would:

> "…probably say 'well, we appreciate your concerns, we'll take it into consideration and perhaps we should meet in a week or so' was not going to be adequate."[828]

Since the case of Shayler it should be noted that the Security Service has established an 'Ethical Counsellor.' The first mention of the new role was in the Intelligence and

[827] M.Hollingsworth, *Opening the floodgates: When Jestyn Thirkell-White broke cover, he ruined MI5's strategy for dealing with David Shayler*,The Guardian, 25th July 2000.
[828] Author unknown, *GCHQ: It was full of people like me*, Gloucester Echo, 27th October 2004.

Security Committee's Annual Report 2007-2008.[829] The report explains that the post was established in 2006 to 'provide staff with an internal avenue to raise any ethical concerns they may have about the Service's work with someone who is outside their management line.' The report details that around 12 individuals have approached the Ethical Counsellor since the post was established. The report included information regarding the types of concerns raised:

> "Whether the Service had adequate mechanisms to evaluate the mental and physical health risks to ICT agents; whether the Service should be involved in PREVENT work given the pressure it faces to tackle the terrorist threat directly; whether it was ethical for the Government to seek to alter the ideological views of its citizens (as part of its counter-radicalisation strategy); and whether there were sufficient controls for sharing information with countries that do not comply with international standards for the treatment of those in detention and whether guidance for staff on these matters was sufficiently accessible and understood."[830]

The ISC welcomed the establishment of the post and also stated that in absence of an equivalent post within SIS or GCHQ staff could approach the Staff Counsellor available to employees of all three services. Whilst the establishment of the ethical counsellor is a positive step, it is currently unclear as to where the new Ethical Counsellor and the existing Staff Counsellor sit in relation to each other.

No information is given as to whether the new Ethical Counsellor replaces the provision for employees of the Security Service to raise concerns or whether employees still can approach the Staff Counsellor. It is too soon to tell whether the ISC will be supplied with such information as to the types of concerns mentioned but just as important is the question of how the concerns were dealt with by the ISC. It should be noted that since the establishment of the ISC, the Committee has provided no mention of the Staff Counsellor or his work in their annual Committee reports. It is submitted, that the ISC

[829] *Intelligence and Security Committee Annual Report* 07-08 Cm 7542, see in particular para 56.

[830] *Ibid*, at para 56.

should be supplied with the information as to how many cases were dealt with, the nature of the concerns raised and whether or not the concerns were dealt with. It would then be open to the ISC to decide whether or not to probe further into the concerns detailed in the information supplied. The next section provides an analysis of the role of the ISC.

6.2 Restricted Information, Restricted Oversight?

Oversight of the Agencies is carried out by the Intelligence and Security Committee, The Interception of Communications Commissioner, the Intelligence Services Commissioner and the Investigatory Powers Tribunal. The Intelligence and Security Act 1994 created the Intelligence and Security Committee (ISC).[831] It was created by John Major's government, who in the same year introduced the Committee for Standards in Public Life. The committee is tasked with the examination of policy, administration and expenditure of the main three intelligence gathering bodies: the Security Service, the Secret Intelligence Service and Government Communications Headquarters. The committee comprises of nine parliamentarians drawn from both houses of Parliament. The members are chosen by the Prime Minister with the agreement of the leaders of the two main opposition parties. It is notable that as an extension of their remit, and with Government agreement, the ISC also examines the work of the Joint Intelligence Committee, and the Intelligence and Security Secretariat. It also takes evidence from the Defence Intelligence Staff, part of the Ministry of Defence.[832] The ISC appointed an investigator, John Morrison, in 1999 in order to bring the ISC more in line with oversight mechanisms in other countries which have established an Inspector General. The investigator completed 14 reports before his contract was terminated in 2004 after he

[831] Section 10(1) Intelligence and Security Act 1994.
[832] For a general description of the Committee's remit see further http://www.cabinetoffice.gov.uk/intelligence/ (accessed 05/09/08).

appeared on the BBC Panorama programme and criticised the 'misuse of intelligence' in the run up to the Iraq war. The agencies reportedly wrote to Sir David Omand, the Cabinet Office Security and Intelligence Coordinator stating that they had 'lost trust' in Morrison and could 'no longer work with him.'[833] At the time of writing the ISC is yet to appoint a replacement.

The Committee's web page indicates that the Committee is subject to s.1 (b) of the Official Secrets Act 1989 meaning that they have access to 'highly classified material when carrying out their duties.'[834] However, in reality the practice is a little less straight forward. Schedule 3, para 3(1) affords the heads of the agencies with the discretionary power to either release information to the ISC or to withhold it because the information is 'sensitive' or because the Secretary of State has determined that it should not be disclosed. The definition of 'sensitive information' is contained in para 4 and is worth quoting in its entirety:

> "(a) information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the Security Service, the Intelligence Service or GCHQ;
>
> (b) information about particular operations which have been, are being or are proposed to be undertaken in pursuance of any of the functions of those bodies; and
>
> (c) information provided by, or by an agency of, the Government of a territory outside the United Kingdom where that Government does not consent to the disclosure of the information."

At first consideration the lengthy definition above contains legitimate safeguards for protection of members of the services and their methods. It also provides an indication for the reasons behind the committee's lack of investigation into the allegations by David Shayler, formerly of MI5 and Richard Tomlinson formerly of MI6. Shayler's

[833] See *No Regrets for Spy Expert*: http://news.bbc.co.uk/1/hi/uk_politics/3965775.stm (accessed 06/01/10), see also A. Glees, P. Davis and J.Morrison, *The Open Side of Secrecy* (Social Affairs Unit, 2006) 45.
[834] *Ibid.*

unauthorised disclosures to the Mail on Sunday, had detailed alleged wrongdoing in operations, and with it had identified operational details and the persons concerned. The House of Lords judgment in *Shayler* further argued that he could have disclosed information to the Intelligence and Security Committee:

> "This would be the situation where it was suggested that statutory controls were being overridden…this committee has a secretariat of civil servants to whom disclosure is authorised; if the relevant material was not passed on to the committee, judicial review would be available."[835]

The aforementioned reasoning is not wholly correct. The guide on Intelligence Oversight produced by the Intelligence and Security Committee in 2002 does mention that the ISC is staffed by a small Civil Service Secretariat however no information is provided that the Secretariat will receive complaints from members of the Security and Intelligence Services.[836] Furthermore, the Official Secrets Act 1989 (Prescription) Order 1990 which included the JIC, Parliamentary Ombudsman and the Comptroller or Auditor General was not amended following the Intelligence Services Act 1994 to include the ISC as a means of authorised disclosure. The most recent Statutory Instrument, the Official Secrets Act 1989 (Prescription) Amendment Order 2007, adds the Nuclear Decommissioning Authority and the Independent Police Complaints Authority but does not add the ISC. It is submitted that this is indicative of a Committee which relies upon co-operation of the Security and Intelligence Services for information.

Crucially, in all of the Statutory Instruments and explanatory material, there is no provision for authorised disclosures to be made to either the Secretariat or the Committee. It may also be argued that if a member of the Security and Intelligence

[835] *Ibid* at 39.
[836] Ref: 253353/0702/D16, 12. Accessible via: http://www.cabinetoffice.gov.uk/intelligence/ (accessed 10/09/08).

Services made a disclosure to the Secretariat, members of the Secretariat would potentially be in breach of their own obligations under Section 5 of the Official Secrets Act 1989, which covers any individuals who receive information from making a further disclosure of that information. The fact that both members of the Secretariat and the Committee have their own obligations under the 1989 Act is also immaterial to the authorisation of disclosures made by a member of the Security or Intelligence Services.

Whilst Lord Hope's suggestion that an employee of the Security and Intelligence Services could report concerns to the Intelligence and Security Committee appears misguided, it does, however, raise important considerations for future reform. In cases of serious malpractice the ability for an employee to approach the Committee may enhance Parliamentary accountability of the work of the services. In the United States, members of the Central Intelligence Agency may report concerns to the Senate Intelligence Committee, albeit with the authorisation of their agency chief.[837] Whilst the need to obtain approval from the Agency head may in itself be seen as problematic, employees of the CIA may be seen as at an advantage to their UK counterparts and it should also be noted that prior to the requirement to seek authorisation, members of the Senate committee were willing to meet CIA employees to voice their concerns 'off the record.'

This should be contrasted to the UK perspective whereby the ISC failed to acknowledge or investigate the accusations made by both David Shayler and Katherine Gun and backed away from calling for reform of the Official Secrets Act after it was informed that the Shayler case had dealt with the question of necessity of circumstance. In a recent report the ISC met the announcement that the Security Service had appointed an Ethics

[837] Intelligence Community Whistleblower Protection Act 1998.

Counsellor was met with a positive response, however, no comment was made as to whether the ISC would be interested in investigating any concerns that had been raised by the Ethics Counsellor, or any future involvement in the new post.[838] With close public interest into whether members of the Security and Intelligence Services have been complicit in torture, one must ask whether the ISC could take a more active role as a mechanism to receive concerns from employees.

The fact that information regarding allegations of torture has been reported the opposition MP David Davis, allegedly by employees 'in the know,' and then repeated in the House of Commons begs the question of whether it would be more appropriate if employees could report concerns to the ISC. At least such disclosures, if appropriate safeguards were in place, would be controlled. Unauthorised disclosures, be it to an opposition MP or the media harm both the reputation of the Security and Intelligence Services and place the Crown Servant involved under grave risk of prosecution.

In order to facilitate a route for employees to approach the ISC a new Statutory Instrument would be required to authorise disclosures to the ISC. In principle this legislative change could be done with relative ease. Furthermore, considering the organisations currently authorised such as the Parliamentary Ombudsman (whom, it should be reminded cannot even accept complaints directly from the public, let alone investigate matters pertaining to national security) and the Independent Police Complaints Commission, there is considerable justification for adding the ISC to the list

[838] *ISC Annual Report*, 2007-2008, para 66 C, www.independent.gov.uk/isc/files/2007-2008_ISC_AR.pdf?attachauth=ANoY7cpxwS79_cGsxE4amhwGlgSx_zGhsaRDxqK8YVU0ZI-5GCeMQrFUdFzUlS_R18P57fgMHRsH5xHptlQWuqX-OakFNTZtGwQ05IZbZkXSMbMoXzO9aUnCiOgF84_Vd2OqVLRE0wKYbGprbYPsv4uwtRQ62QNyetVdhlrue16UfeWVZ-gWabzgnAUXXJEE2rO1D7wph-S-CWKxJ4mH0gXUrSPe9FoJWR6MomYBXMGTNVa2qdAswvg%3D&attredirects=0 (accessed 19/04/11).

of those authorised under the OSA.

It is perhaps most worrying that the Joint Intelligence Committee is authorised under the OSA whereas the ISC is not, despite the Intelligence and Security Committee having oversight of the JIC. Unfortunately, the very nature in which the ISC receives intelligence information may be a difficult hurdle to overcome. Schedule 3 of the Intelligence Services Act 1994 creates a procedural system whereby the ISC is reliant upon the head of the relevant service to provide them with the information that they require. It may therefore be the case that to have the ISC authorised under the Official Secrets Act would be an unrealistic proposition under the current framework.

6.3 National Security Employees and PIDA

It has been suggested that the reluctance of the 'Convention organs' to intervene in cases involving whistleblowers has less of a consequence in the UK as it does in other European states because of the Public Interest Disclosure Act 1998 (PIDA).[839] However, employees of the security and intelligence services and Civil Servants involved in national security matters are unprotected both if they raise concerns internally or externally as a journalistic source.[840]

Section 193 Employment Rights Act 1996 states that employees of the Security Service,

[839] A.Nichol, G.Millar & A.Sharland, *Media Law & Human Rights* (Blackstone Press, London, 2001). More generally, McColgan has also highlighted the 'halfhearted application' of Article 10 and other Convention provisions in the employment sphere. See: A McColgan in *Human Rights At Work* (The Institute of Employment Rights, London, 2000) Ed. K D Ewing, 73. An employee involved in national security matters has little protection in either domestic law (by way of S.10 Contempt of Court Act 1981 and the Human Rights Act 1998) or under the European Convention.

the Secret Intelligence Service and Government Communications Headquarters do not have employment protection under PIDA. Furthermore, the provisions under the Act do not have effect where there is a Ministerial Certificate in force which certifies that employment 'of a description specified in the certificate, or the employment of a particular person specified (or at a time specified in the certificate, was) required to be excepted from those provisions for the purpose of safeguarding national security.' Effectively this provision covers persons who may not work in the security and intelligence services but who are still involved in national security matters.

It should also be noted that in any event the Public Interest Disclosure Act is rooted in employment law. It provides no protection against prosecution for unauthorised disclosures such as under the Official Secrets Act 1989 or the common law offence of Misconduct in Public Office. Moreover, if the employee commits a criminal offence in disclosing the information, the disclosure will not qualify for protection under the Act.[841] Therefore any prosecution for unauthorised disclosure brought under the Official Secrets Act 1989 would deny the Crown Servant protection under PIDA and in any case it would be most likely that he would not have protection under PIDA because of the exemptions under section 11 PIDA and s.193 ERA.[842]

With regards to the offence of Misconduct in Public Office, the provision of s.43B (3) PIDA would preclude the Crown Servant from protection under PIDA if he leaked information and was prosecuted under the common law offence. This situation is indicative of the particularly draconian nature of the offence. It is likely that a

[841] Section 43B (3) ERA.

[842] It should be noted here that if such a prosecution were unsuccessful the Crown Servant would then be able to bring a PIDA claim provided that he was not subject to the exemptions listed in S.193 ERA. Derek Pasquill is one such example. He was found not guilty of an offence under the Official Secrets Act and is currently pursuing a claim under PIDA.

prosecution for misconduct in public office would be brought where the information leaked did not fall within the remit of the Official Secrets Act 1989. This means that any Crown Servant not involved in national security matters (and thus not already exempted from PIDA protection) could still be prosecuted and would lose any protections under PIDA despite the public benefit of any such disclosure.

If a prosecution is brought for an offence committed under the Official Secrets Act 1989 or misconduct in public office the Employment Tribunal would postpone the proceedings until the outcome of the trial. If the person is acquitted of the criminal charge tribunal proceedings could then begin. If no proceedings have taken place the Employment Tribunal may wish to consider whether the employee's conduct in making the disclosure amounted to a criminal offence. The Employment Tribunal should then assess the conduct against the same standard of proof as that used in criminal cases. This is again deeply problematic because of the 'catch all' nature of the misconduct offence.[843]

In the aforementioned section on PIDA, it was stated that national security employees have no access to PIDA protection. Employees in the Security and Intelligence Services were given the right to have employment disputes decided by an Employment Tribunal in 2001.[844] Despite this change the exemption from PIDA remained.

[843] According to the view of Lord Nolan, Hansard HL 5 June 1998, col. 614:

"If he has been prosecuted in a criminal court, questions of proof will proceed on ordinary lines. If the question arises in, say, an industrial tribunal, I believe the law to be that the offence would still have to be proved according to the standard appropriate for crime. That was certainly the view expressed by my noble and learned friend Lord Lane when he was Lord Chief Justice, and on a number of occasions by my noble and learned friend Lord Denning. It would be a rare and rash judge who would take a different view."

[844] Sections 191 and 193 Employment Rights Act 1996 as amended.

There is an argument that employees involved in national security matters should be afforded a degree of protection under PIDA if they raise concerns. In order to maintain the requirements for the protection of national security it is submitted that employees of the Security and Intelligence Services should receive PIDA protection for instances whereby they make controlled internal disclosures to either a person in the line management chain, the Ethical Counsellor (for MI5) or the Staff Counsellor.

Currently, the tribunal procedures for national security employees are contained in Rule 54, Schedule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. Rule 54 provides for a system of closed hearings whereby special advocates are used for parts of the hearing where evidence pertinent to national security is considered. Special Advocates are chosen from a pool of advocates cleared for national security matters and have been most often used in proceedings of the Special Immigration Appeals Commission. Because the Employment Tribunal register is not readily accessible to the public there is little information as to how many times employment disputes regarding the Security and Intelligence Services have gone to the Employment Tribunal.

The most readily accessible information on the relevant procedures comes from the Employment Appeals Tribunal judgment of *Mr A Farooq v Commissioner of Police of the Metropolis*.[845] The case concerned a claim under the Race Relations Act 1976. The Applicant was a police officer who was involved in diplomatic protection of the Prime Minister. The Applicant failed security vetting and as he was therefore not authorised to

[845] (2007) WL 4368105, Appeal No. UKEAT/0542/07/DM.

carry a firearm he was required transfer to other duties. The case was the first of its kind to involve the use of the new Rule 54 provisions.

It should be noted that the use of special advocates has received criticism. Mr Justice Burton in Farooq drew attention to cases which involved the use of special advocates in SIAC appeals and focussed in particular on the comments of the House of Lords in *Secretary of State for the Home Department v MB*.[846] Mr. Justice Burton sought to distinguish the position of Employment Tribunals using the special advocate system by stating that he was not 'wholly persuaded' that the SIAC procedures 'must be imposed' on Employment Tribunal Proceedings.

Following the case of *Secretary of State for the Home Department v MB*, the European Court of Human Rights made a determination of the use of closed material procedures with particular reference to art.5 (4) ECHR which identifies:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Strasbourg court identified that the protection afforded to national security had to be counterbalanced with the right to procedural fairness contained in art.5 (4). The ECtHR held that it was essential that 'as much information about the allegations and evidence of each applicant' be disclosed as possible 'without compromising national security or the safety of others.'[847] Where full disclosure was not possible, art.5 (4) required that the difficulties caused by the lack of disclosure must be counterbalanced in a way which

[846] [2007] UKHL 46.
[847] *A v United Kingdom* 49 EHRR 695, para 217.

allowed each applicant to still have the possibility to effectively challenge the allegations against him.[848]

Ultimately, the Court held that a special advocate could perform an important role in counterbalancing the lack of full disclosure by 'testing the evidence on behalf of the detainee during the closed hearing.' The court held that this function could not be performed in a useful way unless 'the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'[849] The Court identified that procedural fairness must be determined on a case-by-case basis. Where the evidence was 'to a large extent disclosed' meaning that the open material 'played the predominant role in the determination' this would be sufficient to identify that the applicant had had the opportunity to challenge allegations made against him.[850] Where the information was not fully disclosed but the allegations contained in the open material provided were sufficiently specific, it should be possible for the applicant to provide the special advocate with information with which to refute them without having to know the evidence which formed the basis of the allegations. Here, general assertions on the topic area would not be sufficient, the applicant should be provided with the 'gist' of the information.[851]

In the subsequent domestic decision of Secretary of State for the *Home Department v AF*[852] (No 3) the House of Lords sought to establish whether the aforementioned reasoning could apply to judicial review proceedings concerning non-derogating control

[848] *Ibid*, 218.
[849] *Above*, n 847, para 220.
[850] *Above*, n 847, para 220.
[851] Above, n 847, para 220.
[852] [2009] UKHL 28.

orders. The government argued that the reasoning in *A v United Kingdom* could not be applied to non-derogating control orders; on the basis that the nature of such orders meant that they did not involve the depravation of liberty. Lord Phillips identified that whilst there was a difference between art.5 (4) and its application in criminal proceedings and art.6 and its application in civil proceedings he did not believe that Strasbourg would draw a distinction when dealing with the minimum disclosure necessary for a fair trial.[853]

In *Home Office v Tariq*, the UK Supreme Court sought to identify whether the 'minimum disclosure' principle should be applied to Employment Tribunal proceedings.[854] The claimant worked for the Home office as an immigration office, but following the arrest of his brother and cousin for alleged involvement in a suspected terrorist plot, he lost his security clearance. The claimant brought a claim for racial and religious discrimination before the Employment Tribunal and sought to challenge the direction of the Tribunal that the Home Office could rely upon evidence that would not be shown to either himself or his legal representative but could be shown to a special advocate appointed on his behalf.

Lord Hope distinguished the reasoning in Secretary of State for the *Home Department v AF*, stating that it was an 'entirely different case.' In *AF* the individual's fundamental rights were being restricted, the rule of law therefore required that the individual 'be given sufficient material to enable him to answer the case that is made against him by the state.' The significant difference in *Tariq* was, according to Lord Hope, that the claimant

[853] *Ibid*, para 57.
[854] [2011] UKSC 35.

was not 'faced with criminal proceedings against him or with severe restrictions on his personal liberty.'[855] *Tariq* was a civil claim where the question was whether the claimant was entitled to damages. Lord Hope stated that whilst the claimant was 'entitled to a fair hearing before an independent and impartial tribunal' the Home office had stated that it could not defend the claim in open proceedings because it could not reveal how the security vetting procedures were carried out. Lord Hope held that this situation was 'unavoidable' because of the nature of the work Mr. Tariq was employed to do.

Lord Hope questioned how the balance should be struck in the instant case. He suggested that if the closed procedure were not to be adopted, the Home Office would be placed at a 'greater disadvantage' because it could not defend itself in open court and would have to concede the claim.[856] 82 In terms of the disadvantage caused to the claimant by a closed procedure, Lord Hope identified that the 'general nature' of the Home Office's case had been provided to him, he would be provided with the services of a special advocate, his claim will be determined by an independent and impartial tribunal. Ultimately, Lord Hope suggested that if 'inferences have to be drawn' because of the quality of the evidence provided by the Home Office, they will be drawn 'for the claimant and not against him.'[857] Lord Hope held that the requirements of disclosure will depend on the individual circumstances of the case. Given the nature of the case in question, the procedural safeguards were sufficient to achieve fairness in the instant case.

Whilst critics would argue that use of special advocates is not procedurally fair for the Applicants in SIAC proceedings, one can argue that the Rule 54 procedures can be

[855] *Ibid*, para 81.
[856] *Ibid*, para 82.
[857] *Ibid*.

distinguished. Rule 54 allows members of the Security and Intelligence Services the opportunity to have employment disputes dealt with by an Employment Tribunal and this advancement in the protection of rights for national security employees should be considered a welcome improvement on those employees not having any form of access to the Employment Tribunal at all.

At a practical level those employees who chose to undertake employment with the Security and Intelligence services must appreciate that the nature of their work requires careful handling if discussed at tribunal because Employment Tribunal judgments most often provide lengthy analysis of both working relationships and practices. The tension for a tribunal in deciding what the closed procedures in the hearing will entail is that the very nature of an employee's work in the security and intelligence services is likely to result in the discussion of matters concerning national security. Chapter one of this thesis identified that employees of the security and intelligence services agree to a voluntary restriction of their article 10 rights in order to enter employment with those services. It is submitted that the provision of employment rights for those employees may require a form of agreed limitation of rights by consent. In providing analysis of the *Tariq* decision, Chamberlin correctly identifies that art.6 rights may be waived provided that the 'waiver is voluntary, informed and unequivocal.' Thus, Chamberlin argues that by voluntarily agreeing to a security vetting procedure he should have waived his right to sufficient disclosure in any proceedings to challenge the outcome of the process. He suggests that this would have preserved the integrity of 'both the security clearance system and the right to a fair trial.'

It should be indentified that the both the House of Lords in *AF* and the Supreme Court in

Tariq placed considerable emphasis of the requirement for the court to look at the closed procedure process as a whole in order to determine whether a procedure has been used which involves a significant injustice to the claimant.[858] A tribunal, as per the obligations required by s.6 HRA must ensure that the procedures of the court are conducted fairly; this should provide a high degree of protection to the claimant in proceedings where he may not be privy to the information disclosed. If the judge fails to adopt the standard required, the claimant has the opportunity to appeal any decision before the Employment Appeals Tribunal and then, if necessary to the Court of Appeal and Supreme Court.

It is submitted that to allow those employees special rights under PIDA would be a positive advancement. It would also distinguish between matters whereby an employee suffers detriment as a result of raising a public interest concern and where a person's other rights are affected.[859] Upon entering employment with the security and intelligence services, it is submitted that a clause could be written into the contract of employment which identifies that any employment law procedures entered into may be subject to the special advocate procedure.

6.2 Part II National Security Concern Reporting and Oversight Mechanisms: An International Comparison

6.2.1 New Zealand

With regards to public service employees involved in national security matters, the Protected Disclosures Act (NZ) takes a very different approach to PIDA. Whereas PIDA

[858] *Ibid*, para 28.
[859] PIDA aims to distinguish between public interest disclosures and private employment disputes normally dealt with firstly by grievance procedures.

offers no protection, the PDA does authorise protected disclosures for members of the intelligence and security services, albeit through strictly prescribed channels. Section 12 PDA identifies the channel under the clearly identifiable heading of 'special rules on procedures of intelligence and security agency.' Section 12 requires the internal procedures of the intelligence and security agencies concerned to:

> "(a) provide that the persons to whom a disclosure may be made must be persons holding an appropriate security clearance and be authorised to have access to the information; and
> (b) state that the only appropriate authority to whom information may be disclosed is the Inspector-General of Intelligence and Security;
> (c) invite any employee who has disclosed, or is considering the disclosure of, information under this Act to seek information and guidance from the Inspector-General of Intelligence and Security, and not from and Ombudsman; and
> (d) state that no disclosure may be made to an Ombudsman, or to a Minister of the Crown other than-
> (i) the Minister responsible for the relevant intelligence and security agency; or
> (ii) the Prime Minister"

It can be observed that the Act allows for disclosure to security cleared persons only. The number of prescribed avenues of disclosure is greater than the available UK internal mechanism which allows for a concern to be raised no further than the 'independent staff counsellor.' It is particularly interesting to note that the Protected Disclosures Act allows the employee to seek advice from the Inspector-General of Intelligence and Security, even before the disclosure has been made. In contrast, in the United Kingdom, the Intelligence and Security Committee does not allow for approaches from members of the security and intelligence services. Furthermore, when unauthorised disclosures have been made by members or former members of those services, it has failed to acknowledge them.[860]

[860] The most notable examples are David Shayler, former MI5 officer and Richard Tomlinson, former MI6 officer, both made allegations about the work of their respective services and received convictions under the OSA 1989. See further: I.Leigh in Born, Johnson and Leigh, *Who's Watching the Spies?: Establishing Intelligence Service Accountability* (Potomac Books, 2005) 92.

The New Zealand Inspector-General of Intelligence and Security was established in 1996 and the position is appointed by the Prime Minister upon consultation with the leader of the opposition.[861] The office is independent and the person appointed with the role is required to be a retired High Court judge, as per the Inspector-General of Intelligence and Security Act 1996. His role is to assist ministers responsible for the intelligence and security agencies (which comprise of the New Zealand Security Intelligence Service and the Government Communications Security Bureau) in oversight and review. The Inspector-General has a right of access to service staff, records and premises.

The active role of the Inspector-General has particular advantages. A compelling justification for the unauthorised disclosure of information to the media is that whistleblowers feel isolated and rather helpless in their own organisation. A lack of advice or information on internal procedures or a lack of recognition of the importance of whistleblowers in the workplace is often seen as the cause for the disclosure. The role of the NZ IGIS is clearly defined and most importantly, protection afforded to employees who complain to the NZ IGIS is further recognised in s.18 Inspector General of Intelligence and Security Act 1996 which predates the Protected Disclosures Act.[862]

The proactive approach given by the Protected Disclosures Act and the special provisions available for employees involved in national security matters are an acknowledgement that whistleblowers exist and can be beneficial to the oversight of

[861] This section does not consider the role of the NZ Intelligence and Security Committee which examines policy, receives and considers the services' annual reports and to consider matters referred by the prime minster which have national security implications but which do not relate directly to the activities of the services). The NZ ISC are excluded from looking into matters within the NZ IGIS' remit.

[862] "Where any employee of an intelligence and security agency brings any matter to the attention of the Inspector-General, that employee shall not be subjected by the intelligence and security agency to any penalty or discriminatory treatment of any kind in relation to his or her employment by reason only of having brought that matter to the attention of the InspectorGeneral unless the Inspector-General determines that in so doing the employee acted otherwise than in good faith."

those services. It also provides a recognition that it is inevitable that there may be times when an employee may feel compelled to make a disclosure, regardless of the merits behind making the disclosure. By providing secure channels with which to disclose the information and by providing assistance and advice, the structure keeps the information 'in house' and thus limits the temptation to make unauthorised disclosures to the public domain. It also separates genuine whistleblowers from those who wish to make vexatious disclosures to the media, for the purpose of revenge or personal gain.

Currently, an equivalent to the UK Official Secrets Act exists in the form of s.78 Crimes Act 1961. Section78 provides for an offence of espionage whereas s.78A provides for an offence of wrongful communication, retention or copying of information likely to prejudice the security or defence of New Zealand. Section 18 Protected Disclosures Act affords immunity for civil and criminal proceedings for an employee who makes a protected disclosure. Therefore immunity is provided against prosecutions under s.78A but this is strictly limited as a result of s.12 PDA to the Inspector General for Intelligence and Security, to the minister responsible for intelligence and security and the Prime Minister. Immunity from civil proceedings would protect employees from actions such as for breach of confidence actions or libel. The most notable departure from the comparable UK Public Interest Disclosure Act is that s.18 PDA provides immunity for disciplinary proceedings resulting from the disclosure.

The UK Public Interest Disclosure Act is used to sue an employer when an employee suffers a detriment as a result of raising a concern. Referring to the Act as 'employment protection' is somewhat of a misnomer, because protection starts post detriment. In the UK an employee facing disciplinary action would be advised to wait for the outcome of

the proceedings before deciding whether to sue. In contrast, s.18 PDA provides immunity from disciplinary action and therefore the protection effectively starts pre detriment.

The next section considers the situation in Australia, where official information is still protected by legislation modelled on the old UK s.2 Official Secrets Act 1911 provision and whilst there is a clear route to raise concerns.

6.3 Australia

Whereas in the United Kingdom the Official Secrets Act 1989 affects a relatively small number of Crown Servants and the majority of Crown Servants are subject to a relatively short provision in the civil service code which states that servants must not disclose official information without authority,[863] in Australia all Commonwealth employees (including APS and the Federal Police) are subject to the Public Service Regulations and will be consequentially liable for prosecution under the Crimes Act 1914.[864]

The wording of section 70 is particularly widely framed and despite the amendment of the above regulations, exists to provide an absolute restriction on freedom of speech for Commonwealth employees. Further restrictions are contained in section 79 and concern the unauthorised disclosure of 'official secrets' without lawful excuse of information obtained by virtue of the employee's official position. Section 79 is again widely framed and covers the act of unauthorised disclosure from the original discloser to the actions of

[863] Civil Service Code: Standards of behaviour: Integrity, para 6.
[864] Section 70 Crimes Act.

persons in receipt of the information which imposes a further duty not to disclose (acting in a similar way to s. 5 OSA, which is aimed at preventing journalists from printing the information, there is yet to be a successful prosecution for a s.5 offence, although it has been used as a tool to threaten newspaper editors with prosecution if they publish the material).

The penalties are severe, both the disclosure and receipt of an 'official secret' constitute an indictable offence. The sentence for unlawful disclosure is seven years, however if a person knowingly receives information in contravention with the Act he too will be subject to seven years imprisonment.

6.3.2 'Emerging Threats': to National Security and Open Government

It has been suggested that the result of the sections 'virtually makes it a criminal offence for public sector workers to tell us who occupies the room next to them.'[865] However, despite the breadth of the above provisions, the effectiveness of both sections 70 and 79 has been labelled 'doubtful.'[866] In contrast to the UK Official Secrets Act which specifically mentions the disclosure of security and intelligence information (per s. 1 OSA 1989), section 79 does not extend the definition of 'official secrets' any further

[865] P.Finn, Evidence to the Senate Select Committee on Public Interest Whistleblowing, 29th November 1993, Canberra,61. See also, W. De Maria, *Whistleblowers and Secrecy: Ethical Emissaries from the Public Sector*, paper presented to Freedom of the Press Conference, Bond University, 11 November 1995 http://www.bmartin.cc/dissent/documents/DeMaria_wbs.html (accessed 05/06/10).
[866] G.Rose & D.Nestorovska, Terrorism and National Security Intelligence Laws: Assessing Australian Reforms, Faculty of Law Research Paper, University of Wollongong, 2005.

than the title. However it does appear that both the restriction of information under the Crimes Act and the comparable UK Official Secrets Act has been subject to very similar criticisms. De Maria has highlighted in particular that s.70 'fails to distinguish between information that could harm the public interest and information that would assist it' and that 'no defence is available that the officer believed that they had a disclosure duty, or that the disclosure would not cause any detriment to the public interest…'[867] Furthermore, in relation to the protection sensitive information and the release of information under Australian Freedom of Information Act. Tsaknis states that there is now an unsavoury position whereby:

> "public sector officers as members of the public are entitled to access information…but… as officials, they may not disclose that information to the public."[868]

Further restrictions to the unauthorised disclosure of 'operational information' of intelligence matters or information relating to a warrant have been specifically implemented to prevent intelligence leaks.[869] The ASIO (Australian Security Intelligence Organisation) Legislation Amendment Act 2003 is part of a raft of legislation which has been introduced to counteract the emerging terrorist threat post September 11th 2001.[870]

The requirement to balance the protection of national security alongside the promotion of open and accountable government and Executive agencies has proved an increasing

[867] *Above*, n 865.
[868] L.Tsaknis, *The Commonwealth Secrecy Provisions: Time for Reform?*, CLJ [1994] 18

[869] Section 34 VAA ASIO Legislation Amendment Act 2003 (which amends the Australian Security Intelligence Organisation Act 1979). It should also be noted that S.78 of the Crimes Act exists to protect Australia against espionage activities. *R v Lappas* [2003] ACTA 21 was the first successful prosecution for the passing of top secret documents by an intelligence analyst to a prostitute who intended to sell them on to a foreign power. S.78 is comparable to the UK S1 Official Secrets Act 1911.

[870] See further Australian Government website, the list is extensive: http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument (accessed 10/08/09).

challenge for western democratic states, particularly those involved participant in the Iraq war. The position of a person wishing to blow the whistle on malpractice or maladministration does not fit well within this sphere.

The most pertinent example of this occurrence in Australia is the unauthorised disclosure of information made to *the Australian* newspaper by the Custom's Officer Allan Kessing. Kessing had anonymously leaked a report that he had written which detailed a range of 'serious breaches in security' at Sidney Airport in 2005. Kessing's report which detailed instances of 'theft, drug smuggling, criminals screening damage' and 'serious terrorist risks' was ignored by the Customs Department and he chose to leak the information rather than complain internally. He was convicted of a section 70 (2) offence and given a suspended sentence of 9 months imprisonment. The information disclosed prompted a swift investigation into all major Australian airports by former British Police chief Sir John Wheeler, who published the findings three months later which endorsed Kessing's conclusions and led the then Prime Minister John Howard to pledge $200 million to vastly overhaul security.[871]

Despite providing a clear and comprehensive whistleblowing procedure, the lack of a public interest defence means that disclosures of information of public concern, which may actually enhance and benefit the national security provision in the country, will continue to be both highly controversial and forthcoming as the national security interest remains on the agenda. The national security agencies of the Australian Security

[871] See further: J.Albrechtsen, *Blowing the Whistle on Hypocrisy*, The Australian, 13 April 2007.

Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) shall now be considered. The agencies provide a direct comparison to the work of the United Kingdom Security Service (MI5) and the Secret Intelligence Service (MI6 or SIS) respectively.

6.3.2.i The Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

The Australian Security Intelligence Organisation deals with domestic security and counterintelligence issues, primarily defined as 'activities prejudicial to security' 'acts of foreign interference' and 'attacks on Australia's defence system.'[872] Whereas APS employees are governed by contract under the Public Service Act, ASIO officers are employed under the ASIO Act 1979 by written contract with the Director-General of Security and are exempted from the Public Service Act by virtue of s.86. This exemption thus prevents access to the protections afforded to section 16 PSA. However, despite the introduction of the Public Service Act in 1999, which introduced the whistleblowing procedures for APS employees, no comparable mechanism has been introduced to rectify the apparent lack of whistleblowing protections for ASIO employees.[873]

The Australian Secret Intelligence Service deals primarily with foreign intelligence and counterintelligence matters, ASIS staff are employed under the Intelligence Services Act

[872] Australian Security Intelligence Organisation Act 1979, Part I S.4.
[873] This was identified in a detailed report by the Australian Law Reform Commission, See further: *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98, 2004, 3.44.

2001 and by written contract with the Director-General of ASIS.[874] However, whilst this indicates a similarity to their ASIO counterparts in that ASIS employees are exempted from the whistleblower protections afforded under the Public Service Act, in contrast section 35 Intelligence Services Act requires that although ASIS employees are not subject to the Public Services Act, the Director General must adopt the principles of the Act 'to the extent to which the Director-General considers they are consistent with the effective performance of ASIS.'

Whilst section 35 does provide a degree of protection for ASIS employees wishing to blow the whistle, as the Australian Law Reform Commission has highlighted, this does not mean that ASIS employees are 'directly covered' under s.16 PSA.[875] By providing the Director-General with the authority to decide at what level internal protections should be set, the potential for abuse of the aforementioned provision becomes a distinct possibility. However, despite this ASIS employees enjoy a degree of whistleblower protection whereas ASIO employees do not. There appears to be no identifiable justification as to why ASIO employees are at a disadvantage to their ASIS counterparts, indeed both agencies deal with information highly sensitive to national security. It appears more likely therefore to be due to the fact that the legislation which governs ASIS is considerably more up to date.

Employees of the defence and intelligence agencies do have access to the Inspector-General of Intelligence and Security (IGIS). IGIS is an independent accountability

[874] For a comprehensive guide to this Act see: *Criminal Law and Procedure, The Intelligence Services Act* 2001[2002] Commw. L. Bull. 28, 13.
[875] *Ibid* 3.46.

mechanism with the aim of providing 'independent assurance to the Australian government, the Parliament and the people.' Most interestingly, s.33 Inspector-General of Intelligence and Security Act 1986 does provide complainants with a degree of protection from civil actions. It states that a person will not liable to an action or other proceeding for damages, whereby a person has made a complaint and information, documents or other evidence have been produced. One must question the usefulness of such a protection in the context of the subject matter for which IGIS deals with. IGIS's primary function is to be involved in national security information, which is expressly protected by criminal legislation mostly in the form of the Crimes Act 1970. In the subsequent paragraph to the protection against civil action, the Inspector-General and his staff are themselves liable for criminal sanction, if they make unauthorised disclosures, rigidly enforced by a $5000 fine or two years imprisonment.[876] The protection against a civil action in the absence of protection from possible criminal prosecution appears to be of little use and can therefore be seen as actively discouraging employees of ASIO and ASIS from contacting the IGIS.

When the proposed changes to the Public Service Act and Regulations, which incorporated whistleblower protections for APS employees were discussed in 1997 it was agreed that IGIS had the primary responsibility for grievances for the Defence Signals Directorate (DSD) Defence Intelligence Organisation (DIO) and the Office of National Assessments (DSD).[877] It is unclear as to why both ASIO and ASIS were excluded from the agreement, particularly when both agencies form the backbone of the Australian intelligence machinery. Considering that operational activities form the basis

[876] However this would not prevent the Inspector General from raising concerns with ministers in an unpublished form.
[877] IGIS Annual Report 1997-1998, para 33.

of those agencies' work, the accountability and oversight of such actions should be particularly necessary to provide effective oversight. In the year preceding the agreement the IGIS Annual Report itself conceded that 'virtually all of the complaints' received during the year related to ASIO and that this reflected the fact that ASIO has a 'much closer working relationship with Australian citizens' whereas ASIS and DSD are concerned with foreign intelligence collection and were therefore 'much less exposed to members of the Australian public.[878]

With such a considerable emphasis on complaints regarding ASIO it is difficult to ascertain why ASIO employees are not protected for making complaints to IGIS. As one of IGIS' key objectives is to 'provide assurance to the people,' one may surmise that the agency whose work has the greatest affect on the Australian public requires a strong accountability mechanism which protects ASIO employees who complain to IGIS, or at the very least one as strong as their counterparts in ASIS. It has been suggested that ASIO has a 'historical lack of accountability' which has 'existed since its origins' and that there is a 'distinct danger' that under the 'counter-terrorism legislation ASIO will effectively operate as a law unto itself, armed with greater powers than ever before in Australian history.'[879]

With this in mind, it appears that with the extensive current focus on legislative reform to enhance national security, the climate is ripe to allow improvements to the whistleblower protections for members of the national security and defence agencies. The Australian

[878] IGIS Annual Report 1995-1996, para 55.
[879] M.Hand, *ASIO, Secrecy and Lack of Accountability* 11 4 Murdoch University Electronic Journal of Law [2004], paras 22 and 83.

Law Reform Commission has made a series of detailed recommendations with an emphasis on providing an environment that provides legislative protection for the aggrieved employee and appropriate handling of 'classified and security sensitive material.'[880] All of these reforms are yet to be implemented and therefore the current relationship between the employees of the aforementioned agencies and IGIS remains undefined.

Similar instances of disclosure such as the leak by Allan Kessing have occurred in other Jurisdictions. The unauthorised disclosures of information detailing security concerns at Airports, and other installations vulnerable to terrorist attack has occurred in the United States and has prompted the redrafting of the notoriously weak provisions contained in the Whistleblowers Protection Act

6.4 United States of America

The chapter will now progress to consider federal employees not covered by the Civil Service Reform Act and Whistleblower Protection Act, namely those involved in national security matters. The aim of this section is primarily to consider any available whistleblower protections available to the agencies exempted from the Acts. We shall start with consideration of the Federal Bureau of Investigation, which has been the subject of a number of unauthorised disclosures, particularly in the period post September 11th 2001.

[880880] See further ALRC discussion paper, final report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC DP 98 2004, para 3.35 http://www.austlii.edu.au/au/other/alrc/publications/reports/98/Ch_03.html#Heading99 (accessed 08/09/08)

6.4.1 The Federal Bureau of Investigation: A unique whistleblower protection?

Whilst the FBI is excluded from the general protections afforded to federal employees via the Merit Systems Protection Board, a separate scheme is provided to protect employees of the FBI from whistleblower reprisals. The FBI is an agency under the umbrella of the Department of Justice for which the Attorney General is the head of department. The FBI has a wide jurisdiction to investigate national security and criminal matters from counter intelligence to white-collar crime.

The role of the FBI in the investigation and protection of national security matters has dramatically increased post September 11th 2001 and has led to the formation of the National Security Branch with the specific aim of counter-terrorism. It has also been highlighted by the Federation of American Scientists that the FBI has developed a new role in foreign intelligence with a particular emphasis on informants or human intelligence (HUMINT).[881]

Currently the FBI whistleblower protection scheme provides three designated routes: the Office of Professional Responsibility and the Office of Inspector General, which are both attached to the Department of Justice, and the FBI's own Office of Professional Responsibility. All three routes are designated recipients of protected disclosures and offer protection against whistleblower reprisals. The Federal Employee also has an additional protection, which effectively provides a failsafe and takes the form of the Office of Attorney Recruitment and Management; however there are limitations to this

[881]The FBI as a Foreign Intelligence Organization, Federation of American Scientists, *News*. Accessible via : http://www.fas.org/blog/secrecy/2008/03/the_fbi_as_a_foreign_intellige.html (accessed 09/09/09).

as will be illustrated below.

6.4.2 The Procedure

In the first instance, the aggrieved Federal employee may choose between the Office of Professional Responsibility and the Department of Justice Inspector General. The body that receives the complaint will then conduct the investigation and then make any necessary recommendations.

Most interestingly, the 'roles and functions' of the FBI scheme are deemed 'analogous' with those of the OSC and MSPB,[882] but with the principle motivation that appeals 'would not be to the outside but to the Attorney General.'[883] It was also mandated in Congress that the FBI whistleblower provisions be 'consistent with the applicable provisions of' the Whistleblower Protection Act.[884] Whilst the benefits of an internal scheme which effectively keeps national security and operational information 'in house' are clearly advantageous, the effectiveness of the scheme has been called into question, further highlighting the exemption afforded to other federal employees under the WPA.

The Case of Michael German[885] is one of a number of examples where the system has failed to provide adequate protection for FBI employees. German became aware of serious failings in a counterterrorism investigation. It had primarily involved a tape of a

[882] Department of Justice, *Whistleblower Protection for Federal Bureau of Investigation Employees*, Federal Register, November 1, 1999 (Volume 64, Number 210) Rules and Regulations, Page 58783
[883] Statement of Representative Udall 124 Cong. Rec. 28770 (1978) see also *Ibid.*
[884] Title 5 U.S. Code Section 2303, Prohibited Personnel Practices in the Federal Bureau of Investigation, See also: Project on Government Oversight, *Homeland and National Security Whistleblower Protections: the Unfinished Agenda*, April 2005, 18.
[885] A detailed study of this can be found in: M. Goodman, C. Crump, S. Corris, *Disavowed: The Government's Unchecked Retaliation against National Security Whistleblowers*, American Civil Liberties Union, 2007, 6.

meeting between a domestic and a foreign terrorist organisation, which had detailed an attempt to secure ownership for the foreign organisation. Poor handling of the case would have resulted in the exclusion of evidence from any future prosecution. Upon informing his superiors of the failings, a cover-up ensued, which included the hiding of the aforementioned tape and the falsification of a number of official documents. German took evidence of the original meeting to the Department of Justice Inspector General and the FBI Office of Professional Responsibility. The FBI officials were immediately informed and were allowed to amend their reports. They did so but omitted any mention of terrorism from the meeting transcript. German suffered retaliation for two years and eventually went public by reporting the information to Congress and subsequently resigning his post. During the alleged retaliation, the Inspector General failed to act in order to protect German, furthermore it was not until over a year after German has resigned that he published a report acknowledging the failings and the subsequent retaliation. However the report was weak in substance and failed to recommend that the officials involved be held to account.

6.4.3 The Inspectors General.

The role of an Inspector General (IG) is common place in US Public Service departments; there are now a total of 64 statutory Inspector Generals. However, their role as an adequate mechanism for Federal employees to voice their grievances is questionable. At this juncture it is necessary to identify that the Inspector General has three specific if non-distinct functions. The first is to maintain oversight of the respective agency, to investigate its actions and any allegations of wrongdoing. The second is its role as a designated recipient of whistleblower complaints for the purpose of possible

investigation and protection against retaliation. The third role is as a recipient of whistleblower complaints under the Intelligence Community Whistleblower Protection Act 1998, whereby the complainant wishes to report an 'urgent report' to Congress (discussed below).

The case of Michael German brings the Inspector General's role as an 'independent set of eyes and ears'[886] into question. In a publication designed to advise potential whistleblowers on whether they would receive protection or not, the American Civil Liberties Union (ACLU) is particularly scathing in its criticisms of the inspector general system in general by questioning the role's independence and by suggesting that if the IG 'upset the Administration's applecart' he or she could be 'instantly removed.'[887]

The ACLU's criticisms are in stark contrast to a submission made by the OIGDOJ to a House Committee on Government Reform in 2006, which explained that in a five year period, the OIG had initiated more than 25 investigations into allegations made by FBI employees. He stated that the OIG had devoted 'significant resources to investigations over the years and that they often involve a large number of interviews polygraph and forensic examinations,' ultimately the OIG stated that they do not 'generally publicise findings' given the 'FBI whistleblower requirements and the privacy interests of subjects, complainants and witnesses.'

It is possible to ascertain from the OIG's submission that within the limitations detailed

[886] G. Friedman, B. Snyder, Impact of the Inspector General Concept & the Federal Inspector General Community Presentation, September 2006. Accessible via the Federal Inspector General's website: http://www.ignet.gov/igs1.html (accessed 09/09/09).

[887] *The Art of Anonymous Activism*, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002, 20. Quoted in: Testimony of N. Schwellenbach, Investigator Project On Government Oversight, House Oversight and Government Reform Committee, *Examining the Executive Branch Reform Act of 2007 and the Whistleblower Protection Enhancement Act 2007*, February 13, 2007.

by the ACLU, a considerable effort is made to investigate whistleblower complaints. However, the success of the OIGDOJ is dependent upon the Inspector General agreeing to investigate the complaint in the first instance. Furthermore, the Michael German case details significant failings with regard to the reporting of findings. The time in which the complaint is investigated and reported upon is of particular importance, a significant period of time had lapsed before the final report had been made. When the report was made it failed to adequately hold the necessary people within the FBI to account. Therefore the devotion of significant resources to what appear to be detailed and thorough investigations is an irrelevance if the Inspector General system fails to protect the complainant and to, where necessary hold the persons responsible to account.

One may also consider that the DOJIG's constitutional status has deterred potential complainants from approaching the IG in favour of the FBI-OPR. It has been conceded by the IG in the past that the FBI-OPR "currently investigates most, if not all, complaints raised by and against FBI employees" and that if an approach is made to the IG, he will normally refer the case directly to the FBI Office of Professional Responsibility or seek the Deputy Attorney General's permission for the OIG to conduct the investigation. In doing so, any suggestion of independence from the administration is lost, and the potential to make politicised judgements becomes a real possibility.

The method of reporting also exposes an inherent weakness. From the outset the Inspectors General were required to keep Congress 'Fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.'[888]

[888] 92 Stat 1101 at Ss 2(3).

However, the current reality identifies frustration by members of Congress to receive information on instances of wrongdoing in federal departments. Moreover, it has been suggested in general that Congress has 'had to throw a fit' in order to make the intelligence agencies respond to requests for information.[889] One can determine, therefore, that it would be even less likely for intelligence agencies to provide evidence of wrongdoing or assist the respective inspector general in such matters.

As a whole the system of reporting to Congress lacks sufficient teeth. In a similar way to the UK Parliamentary Ombudsman, the IG can only make recommendations, and his findings are neither binding nor enforceable. The Project on Government Oversight has stated:

> "Time and again attorneys and advocates have found that verifying a whistleblower's allegations is not enough: Managers who retaliate against whistleblowers may continue to do so unless ordered to stop."[890]

The IG has neither the power to put an end to such retaliation, nor does the system allow for the IG to offer adequate protection to the complainant whilst investigations are taking place. The role of the Inspector General and the effectiveness of the Intelligence Community Whistleblowers Protection Act 1998 (ICWPA) shall now be considered.

[889] See L. Johnson, *Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States* in Born, Johnson and Leigh, *Who's Watching the Spies?: Establishing Intelligence Service Accountability* (Potomac Books, Dulles Virginia, 2005) 71.
[890] Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, 2005, 7.

6.4.4 The Intelligence Community Whistleblower Protection Act 1998: a tool for the enhancement of Congressional Oversight?

The President and the Intelligence agencies are statutorily obliged to keep the 'Congressional intelligence committee fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.'[891] However, the reality is that Congress has had particular difficulty in obtaining information and cooperation from the intelligence community.[892]The purpose of the ICWPA is to allow members of the intelligence community, that is members of the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation and certain parts of the Department of Defense to report an 'urgent concern' to Congress. An urgent concern is defined as any of the following criterion by statute:

> "(1) a serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinion concerning public policy matters; (2) "A false statement to Congress, or a wilful withholding from Congress, or an issue of material fact relating to the funding, administration or operation of an intelligence activity or (3) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) in response to an employee's reporting an urgent concern in accordance with this paragraph."[893]

The ICWPA does not, however, allow employees direct access to Congress. Instead, the employee must report the complaint to the Inspector General of their respective agency and give notification that they intend to report the matter of urgent concern to Congress.

[891] 50 USCS Ss 413(a)(1) (2007).
[892] Johnson identifies, with reference to the CIA that: "On some matters the CIA has politely refused to cooperate…on other matters the Agency has, in essence, looked the other way, apparently hoping the Committee would forget or lose interest in the subject; if the committee persisted, the Agency would finally respond…In still other situations the CIA has sought refuge in a cloud of imprecise language." L.Johnson, The US Congress and the CIA: Monitoring the Dark Side of Government [1980] LEGIS STUD QUART V 4, 494.
[893] 112 Stat 2413-14 SS 701 (1998).

Upon receiving the complaint the IG has 14 days to decide whether or not the complaint appears credible. If he decides it is, the IG is then required to inform the Director of the respective agency, who then has seven days to forward the matter to the Congressional Intelligence Committees.

If the complainant is dissatisfied that the information has not been given correctly to the Committees, he may then approach one of the Committees directly. Considerable emphasis is given in the statute to the limitations on direct contact between the employee and the committees. In particular he is required not only to contact the IG[894] but also to obtain and follow from the agency head, direction on how to contact the intelligence committees in accordance with "appropriate security practices."[895] Any disclosure which is therefore made under the mechanism effectively controlled by the agency head from the moment that the Inspector General notifies him.

One could consider the need to control the disclosure of security sensitive information as a necessary requirement to safeguard national security, much in the same way that the New Zealand scheme allows for protected disclosures of national security information to take place, albeit thorough strictly prescribed channels. However, the New Zealand scheme does not require the involvement of the agency head in the process; instead disclosure through the prescribed, security cleared channels is sufficient. One must therefore ask why the involvement of the Agency head is necessary in the process. If the employee is aware of the existence of the Inspector General and is aware of the security cleared intelligence committees, it is difficult to ascertain why such a route should suffice.

[894] *Ibid* (d) (2) (A).
[895] *Ibid* (d) (2) (B).

The answer may be found in the objections given to the Intelligence Community Whistleblowers Protection Bill by the respective agency heads and the Office of Legal Counsel, which represented the interests of the administration. The OLC argued that the President as Commander in Chief has 'ultimate and unimpeded authority' over the 'collection, retention and dissemination of national security information and that any act by Congress to remove this power would be 'unconstitutional.' [896]The Administration stated that the Director of Central Intelligence and other heads of agency within the Intelligence Community had the right to examine, and in 'certain extraordinary circumstances' prevent the allegations of whistleblowers before they 'reached the ears of Congress.'[897]

In his submission to the Committee, Dr Louis Fisher rejected the notion that the President has autonomous control over national security information, and any statute proclaiming otherwise was unconstitutional. He suggested that there was no express 'constitutional language' regarding national security information as it pertains to the President and that his authority to regulate the information was an 'implied authority' flowing from his responsibilities as Commander in Chief and Chief Executive.[898] This submission is further supported by an analysis of Congressional oversight by Kitrosser,[899] in which she argues that whilst Presidential secrecy is expected there is a 'balanced constitutional design' whereby it 'remains on a leash of political

[896] See further, Statement of Randolf Moss, Deputy Assistant Attorney General, Office of Legal Counsel, DOJ.S.Rep.No. 105-165 at 4 (1998) House Permanent Select Committee on Intelligence 105th Congress, Record of Proceedings, pp7-31 and T. Newcomb, *In From the Cold:The Intelligence Community Whistleblower Protection Act of 1998* 53 [2001] Admin. L. Rev. 1243.
[897] See Charles F.C. Ruff, Counsel to the President, Letter to Chairman Goss, 9April 1998, Record of Proceedings, *ibid* n61 pp229-230, and T Newcomb *op cit* n 61.
[898] Statement of Dr. Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, S.Rep.No. 105-165, at 4-5.
[899] H. Kitroser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, Cardozo L.Rev. (2007).

accountability.'

The Intelligence Community Whistleblower Protection Act clearly sought to redress the balance. However, what appears to have occurred is a compromise between the two strands of governance, which reaffirms the constitutional position of either power but in doing so, places the requirement of Congress to make checks on Executive power below the right of the President, and thus the agency heads, to have virtual autonomy over national security information.

The objectives of Congress were clearly identifiable in the wording of the statute which highlighted that national security 'is a shared responsibility' requiring 'joint efforts and mutual respect by Congress and the President' and that Congress is empowered by the constitution to serve as a check on the executive branch and has a 'need to know allegations of wrongdoing in the intelligence community.'[900]Unfortunately, the reality is that the ICWPA does not put Congress on a co-equal footing with the Executive. Instead the Act allows the Agency heads to control the information given to Congress. If the sole constitutional objective of the Executive were to maintain the control of national security and intelligence information in order to protect it, then one can argue that the disclosure of information to defined, security cleared channels is sufficient. By requiring the Agency head to be informed of the prospective disclosure, it gives the opportunity for any persons alleged in the 'urgent concerns' to be notified in advance and to cover tracks. In doing so this may further prevent Congress from investigating the issue further, by allowing any potential future submissions by the intelligence agency to be doctored to put the position of the agency in a favourable light.

[900] Pub. L. No. 105-272 (1998) Intelligence Community Whistleblower Protection Act 1998 Sec 701 (b)(1).

It is submitted that the Intelligence Community Whistleblower Protection Act aims to satisfy the needs of constitutional science rather than allow for uninhibited disclosure of information to Congress and the protection of federal employees who make such disclosures. There are several evidential issues which support this assertion. Firstly, the ICWPA allows a prescribed avenue to disclosure Congress via the agency heads and the respective Inspector General. As Newcomb identifies, prior to 1996 there was an 'implicit accommodation' of the unauthorised disclosure of information by employees of the intelligence community. Managers may have discouraged such disclosures, but did not punish those who did so. It was in 1996 that the OLC issued a memorandum which reaffirmed the President's autonomy over national security information, at the expense of Congressional oversight and the revocation of security clearances began for members who disclosed information to Congress.[901]

Secondly, the ICWPA cannot be said to protect employees from recrimination or 'prohibited personnel practices.' From the wording of the statute, the layman might ascertain that the Intelligence Community Whistleblower Protection Act is the intelligence community's equivalent to the Whistleblower Protection Act. In reality the ICWPA is more procedurally rigid. Under the ICWPA, if the employee complains of a 'prohibited personnel practice' he must contact the IG identifying his desire to approach Congress on the matter, the IG must then decide if the complaint is valid and notify the agency head.

If one were to consider a general federal employee who approached the IG with a

[901] Newcomb, H.R. Rep. No 105-747, 10 (1998) and Record of Proceedings *Op Cit* n 61, 55 Statement of Robert M. McNamara.

complaint regarding a prohibited personnel practice, he should in theory, receive protection by the IG and in the same way the agency head is notified. Indeed, with regard to the intelligence community, the creation of a statutory Inspector General for the CIA provided a whistleblowing provision and protection against prohibited personnel practices; this is a separate and distinct function to the IG's responsibilities under the ICWPA. With regards to the CIA therefore, an employee can approach the IG with a whistleblowing complaint and in theory receive protection from prohibited personnel practices. However, if he approached the IG with an 'urgent concern' with which he intends to report to Congress and wishes to further report information of a prohibited personnel practice to Congress with the aim of receiving protection, he would not receive the protection from the IG but from congress. In the mean time he is open to the possibility of further retaliation. The same instance could also occur under the unique system provided by the Federal Bureau of Investigation whistleblower mechanism.

If the situation prior to the ICWPA allowed for members of the intelligence community to approach members of Congress with concerns and did not suffer retaliation from managers, and the Inspectors General have had a continuing duty to receive whistleblower complaints and provide protection against PPPs the ICWPA indicates Congress' assertion of power in a bid to rebalance the constitutional settlement, rather than a statute to adequately provide protection of whistleblowers in the intelligence community. In essence, Congress had attempted to reverse the findings of the OSC memorandum but as a result it ended up in a worse position than prior to the memorandum.

Thirdly, the DOJIG's submission of evidence to the Committee during the passage of the

Bill indicates the necessity of such a provision:

"During my four years as Inspector General I have not been made aware of any cases involving FBI employees who have raised allegations of wrongdoing on a matter that would be implicated by this legislation. This may in part be attributable to the fact that the FBI has its own internal investigations entity FBI Office of Professional Responsibility… To date, we simply have not seen these types of cases in the Department of Justice OIG"[902]

From the above submission, one can ascertain that Congress may have better obtained their objectives in another way. It can be argued that if the 'urgent concern' reported was so serious it may well involve the agency head or senior members of the agency and thus any desire to keep congress better informed of possible agency wrongdoing is diminished. The ICWPA is a symbolic piece of legislation, which in reality does not protect whistleblowers within the intelligence community.

6.4.5 Preparing for the demands of the future: the availability of US whistleblower protection post September 11th 2001.

In 2002 Coleen Rowley, an FBI special agent wrote a letter to FBI Director Robert Mueller detailing significant failings by personnel in FBI headquarters in Washington DC in the mishandling of information provided by the Minneapolis Field Office concerning an investigation into a suspected terrorist, Zacarias Moussaoui, who was suspected to be involved in preparations for a suicide-hijacking. It was these failures which, Rowley alleged, had left the United States vulnerable to such terrorist attacks. Rowley later testified before the Senate and the 9/11 Commission, which led to an overhaul of the organisational structure of the agency. The 9/11 Commission embraced the need for whistleblowers stating that 'democracy's best oversight mechanism is public

[902] Statement of Michael R.Bromwich, Inspector General, *U.S. Department of Justice concerning H.R.3829: The Intelligence Community Whistleblower Protection Act of 1998*, 10th June 1998.

interest disclosure.'[903]

The year of 2002 also heralded Rowley as one of three whistleblowers to make Time magazine's person(s) of the year 2002.[904] However, whilst on the surface the public recognised the courageous efforts the employees, who brought information of serious failings to the public arena and prompted wide-ranging institutional change, Coleen Rowley did not receive any protection under the ICWPA and instead chose to make direct approaches to Congress. The instance of Coleen Rowley is indicative of a need to substantially reform the whistleblowing provisions available to those involved in national security matters. It has become necessary and proportionate to make considerable reforms to the whistleblower reporting and protection mechanism afforded to all US federal employees.

The proposed Whistleblower Protection Enhancement Act (WPEA) aims to extend the current Whistleblower Protection Act to include members of the intelligence community.[905] Section 10 includes protections for employees of the Federal Bureau of Investigation, the Central Intelligence Agency, The Defense Intelligence Agency, the National Reconnaissance Office and any other Executive agency, or element or unit thereof, determined by the President to have at its principal function the conduct of foreign intelligence or counterintelligence activities.

The WPEA would present a significant breakthrough for intelligence community

[903] See The 911 Commission Panel Report, July 2004, 103.
[904] A. Ripley and M. Sieger**,** *Time Persons of the Year 2002: The Special Agent*, Time Magazine, 22nd December 2002 see also: *Coleen Rowley's Memo to FBI Director Robert Mueller*, Time Magazine, 21st May, 2002 and R. Ratnesar & M. Wiesskopf, *How The FBI Blew The Case*, Time Magazine, 26th May 2002.
[905] At the time of writing the proposed legislation is currently before congress.

whistleblowers, and if successful would arguably the most important advancement of whistleblower legislation in twenty years. However, one must proceed with a great deal of caution. A 2007 WPEA had received unanimous approval in Congress but was vetoed by the then President. The Administration strongly opposed the WPEA. It stated that the Act 'could compromise national security,' was unconstitutional, and overly burdensome' and that 'rather than promote and protect genuine disclosures of matters of real public concern, it would likely increase the number of frivolous complaints and waste resources.'[906]

It is unclear how the disclosure of security sensitive material through existing prescribed channels could compromise national security. Indeed, in the case of Coleen Rowley, it appears that her submission to the 9/11 Commission contributed to the enhancement of national security. Furthermore, the argument relating to the Act being unconstitutional mirrors the arguments put forth during the Intelligence Community Whistleblower Protection Bill. It is still unclear as to whether or not the WPEA will succeed.

If the WPEA did succeed one must ask if this would provide an increased level of protection to national security whistleblowers. In this chapter, a number of procedural shortcomings have been identified in the mechanisms which conduct the investigation of wrongdoing and prohibited personnel practices. The Office of Special Counsel, in particular, has a number of identifiable failings to the detriment of general federal employees who currently have access to the system.

It is submitted that without significant changes to the OSC and MSPB systems, including

[906] Statement of Administration Policy, Executive Office of the President, 13 March 2007.

the simplification of over complicated procedures, federal employees in the intelligence community do not stand to benefit substantially from access to the WPA mechanisms. In effect, the employees will receive access to two more potential avenues for disclosure, as the current system already allows for direct access to the Inspectors General. The employees would therefore face the same uncertainty both in the general federal whistleblowing process as it stands and the difficulties associated with the WPA. It may therefore be suggested that the Administration was right in its assertion that the WPEA may harm national security; however this would be because faced with a weak and uncertain whistleblowing mechanism it is more likely that members of the intelligence community would choose to make unauthorised disclosures to the media.

6.5 Canada

In Canada the advancement of whistleblowing provisions for the National Security and Law Enforcement agencies was prompted after a number of damaging instances of corruption. The Royal Canadian Mounted Police (RCMP) is the national police service of Canada. The service is unique in that it has a responsibility at national, federal, provincial and municipal level.[907] Prior to 1984, the Royal Canadian Mounted Police Security Service dealt with matters relating to national security and intelligence, with counter intelligence matters being handled by the RCMP's Special Branch.[908] However, after a number of allegations surfaced in the 1970s, the McDonald Commission[909] was established. Upon reporting in 1981 the Commission identified a number of instances of serious wrongdoing by the service in its attempts to deal with Quebec seperatives. This

[907] For further information of the role see: About the RCMP, Royal Canadian Mounted Police Website: http://www.rcmp-grc.gc.ca/about/index_e.htm (accessed 19/03/08).
[908] For a potted history of the RCMP see RCMP:A Brief History, June 22nd 2005, CBC News Website: http://www.cbc.ca/news/background/rcmp/ (accessed 19/03/08).
[909] The Royal Commission of Inquiry into Certain Activities of the RCMP, Established 1977.

included breaking in to the offices of Parti Québécois (a party which campaigns for national sovereignty for Quebec), theft of a membership list, conducting illegal bugging activities, opening mail, forging documents and burning a barn where the Black Panther Party (a far left movement which campaigned for African-American civil rights) and a Marxist terrorist group called Front de Libération du Québec were intending to meet.

The McDonald report recommended that the RCMP be detached of national security responsibilities and that a civilian agency should be formed to deal with matters of intelligence and national security. The Canadian Security Intelligence Act came into force in 1984 and established the Canadian Security Intelligence Service.[910]

In the present day, the RCMP has resumed a degree of responsibilities relating to national security matters. In the post 9/11 era, the RCMP has continued investigate counter-terrorism matters under the guise of 'National Security Criminal Investigations' (NSCI). The RCMP asserts that the statutory mandate for this is governed by S6 (1) Security Offences Act 1985, although the statutory power is by no means comprehensive and does not identify specific operational duties.[911] Instead section 6 requires the RCMP to perform duties in relation to an offence in section two which states:

> "(a) the alleged offence arises out of conduct constituting a threat to the security of Canada within the meaning of the Canadian Security Intelligence Service Act…"

From the above section it is clear that despite the desire of the RCMP to no longer be involved in national security activities, it has been doing so since 1985. This change of stance is no doubt a response to the bombing of an Air India flight which had flown from

[910] *Ibid* Second Report Volume Two,754 and S.Farson, *Canada's Long Road from model Lawe to Effective Political Oversight of Security Intelligence*, in H.Born, L.Johnson, and I.Leigh, *Who's Watching the Spies? Establishing Intelligence Service Accountability* (Potomatic Books, Dulles Virginia, 2005) 99.

[911] Section 6, " (1) Members of the Royal Canadian Mounted Police who are peace officers have the primary responsibility to perform the duties that are assigned to peace officers in relation to any offence referred to in section 2 or the apprehension of the commission of such an offence."

Montreal Airport on 23rd June 1985. In the continuing inquiry it has been widely alleged that the security failings at Montreal Airport in 1985 were a result of a lack of cooperation between CSIS and the RCMP.[912]

The current working relationship between the two agencies appears to be far more cooperative. The RCMP is reliant on CSIS for the 'significant portion' of national security information and intelligence that it receives and acts upon. Consequentially, the fact that CSIS exists as a civilian agency, means that it needs the arrest powers of the RCMP to work effectively. This is a similar situation to the UK relationship between MI5 and the Metropolitan Police's Special Branch. The cooperation is further bolstered by a secondment programme. However, Collins suggests that CSIS has suffered criticism 'since its inception' and that most recently this criticism stems from an 'inability to cope' with the threat of terrorism.[913]

6.5.1 Internal Accountability of RCMP: A failure to adequately investigate.

There have been a number of instances of corruption and failings which have involved the leaking of information or whistleblowing within the RCMP. The most notable case involved the RCMP pension scheme. Denise Revine, a Human Resources director for the RCMP discovered that managers were using the RCMP's pension plan to cipher off millions of Canadian dollars to not only pay for 'operational expenses' such as laptop computers but for overpriced contracts that were awarded to families and friends of the

[912] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 see website: http://www.majorcomm.ca/en/index.asp (accessed 12/01/10).
[913] D.Collins, *Spies Like Them: The Canadian Security Intelligence Service and Its Place in World Intelligence*, [2002] 24 Sydney L. Rev. 505.

individuals concerned.[914] Revine then reported the information to the then head of the RCMP Giuliano Zaccardelli who promised an investigation. In the mean time, unconnected to Revine, Staff Sergeant John Lewis made several complaints about a person who it later emerged had significant involvement with the scandal Lewis reported his concerns to Zaccardelli but these were ignored.

Zaccardelli instigated a criminal investigation into the pension scandal; however he later decided to drop the investigation in favour of an internal audit. The Auditor-General also conducted a probe and the Ottawa Police also investigated. However, whilst evidence of wrongdoing was found, involving a number of high ranking officials within RCMP, there were no formal punishments or sanctions of any kind. An independent investigation was later instigated by the public accounts committee. The report of the investigation which was published in July 2007 found significant failings in the RCMP's internal whistleblowing provisions.[915] The new RCMP Commissioner, William Elliot has stated that he intends to change the institutional culture of the service to encourage whistleblowers and that this would mean opening up communications for people to come forward.[916] The Commissioner has designated a task force to investigate this, however at the time of writing no significant findings or changes to the structure have been reported.

6.5.2 External Accountability and whistleblowing: RCMP and CSIS

It should be noted that the former RCMP Commissioner, Giuliano Zaccardelli resigned

[914]K May, *Pensions Crisis Strikes at RCMP Core, Vancouver Sun,* Saturday, April 14, 2007.
[915] See: A Matter of Trust: *Report of the Independent Investigator.*
into Matters Relating to RCMP Pension and Insurance Plans, available via:
http://www.publicsafety.gc.ca/rcmppension-retraitegrc/_fl/report-en.pdf See also Caslon Analytics Guide: http://www.caslon.com.au/whistlecasesnote5.htm (accessed 10/09/09).

[916]See further: *New RCMP Commissioner to encourage Whistleblowers*, Ottawa Press, September 7th 2007.

his post before having to give evidence before a Commission investigating the circumstances behind the detention and torture of Meher Arar. Meher Arar, a Canadian Citizen formerly of Syria, had been wrongly identified by the RCMP as an Al Qaeda suspect. In 2002, upon returning from a family holiday, Arar made a stopover in New York. He was detained by the United States Immigration and Naturalisation Service (INS), after receiving information from the RCMP. Despite being in ownership of a Canadian passport, Canadian officials informed the INS that Arar was no longer a citizen of Canada. Arar was deported to his native country of Syria where he was tortured whilst questioned as to his alleged involvement in terrorist activities. Upon being allowed to return to Canada, Arar mounted a legal challenge against the Canadian and United States governments. After an RCMP internal investigation and an external Inquiry instigated by the Canadian Government the RCMP was forced to apologise, yet failed to hold the officers responsible to account.

The Arar inquiry report detailed significant failings in the external accountability of the RCMP's national security activities.[917] The Commissioner of the Inquiry stated that the need for an external review mechanism to review the RCMP's involvement in national security matters had become 'overwhelming.' He recommended that a new mechanism called the Independent Complaints and National Security Review Agency for the RCMP (ICRA) be formed; however despite Parliamentary discussion no significant changes to the external accountability of RCMP have been made.

6.5.3 CSIS: Accountability and Oversight

[917] *Commission of Inquiry into the actions of Canadian Officials in Relation to Meher Arar*, 2006. See further http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf (accessed 01/10/2010).

With regards to the accountability of the Canadian Security and Intelligence Services two mechanisms are provided. The first is an internal mechanism provided by the Inspector General. Under S.30 CSIS Act, the Inspector General has the function to monitor the compliance by the Service of its operational policies, and to review the operational activities of the Service. Under S.31 CSIS Act, the Inspector General is entitled to any information which is required for the purpose of his investigation and may compel members of CSIS to provide him with information if needed.

The Inspector General has a further function in relation to periodical CSIS reports. The Director of CSIS is required to submit periodical reports to the relevant minister detailing the operational activites of the Service.[918] The Inspector General will then receive a copy of the report and will issue a certificate indicating whether he is satisfied with the report of if he is of the opinion that an act detailed in the report is not authorised by the Act or that it involves 'an unreasonable or unnecessary exercise by the Service of any of its powers.[919]

The Inspector General is effectively an internal auditor of CSIS[920] and consequentially the Inspector General's certificate is not released in the public domain. However, upon producing the certificate, he is required 'as soon as is practicable' to pass a copy of both the certificate and the report to an external review mechanism, the Security and Intelligence Review Committee (SIRC).[921] SIRC can also instruct the Inspector General to conduct investigations where necessary. The Committee's mandate is to review past operations of CSIS and also to receive complaints by members of the public.

[918] See S.30 CSIS Act.
[919] S.33(2) CSIS Act.
[920] For information on the role of the Inspector General, CSIS, see further Public Safety Canada website: http://ww2.ps-sp.gc.ca/igcsis/index_e.asp (accessed 07/09/09).
[921] As per S. 33(3) CSIS Act.

6.5.4 SIRC: The Canadian Security Intelligence Review Committee

The Security and Intelligence Review Committee was established in 1984 under s.34 of the CSIS Act. Its objectives are to provide an independent and external review mechanism which provides oversight of the work of CSIS. Furthermore, it investigates complaints from citizens and receives complaints from individuals who have been denied security clearance or whose security clearance has been revoked.[922] The results of the Committee's work are published in an annual report to Parliament. The report is first security vetted before reaching the public domain and consequentially some information contained in the report will remain secret.[923]

The ability for CSIS employees to make direct complaints to SIRC is not clear and requires careful analysis. In Canada national security information is protected by the Security of Information Act 2001, which unlike the United Kingdom Official Secrets Act 1989 contains a public interest defence. Section 15(2) carefully balances the public interest in disclosure against the public interest of non-disclosure:

"(a) the person acts for the purpose of disclosing an offence under an Act of Parliament that he or she reasonably believes has been, is being or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada; and
(b) the public interest in the disclosure outweighs the public interest in non-disclosure."

In assessing the balance it is necessary for the court to consider a number of factors such as whether the person had reasonable grounds to believe that the disclosure was in the

[922] See further Canadian Security Intelligence Service Act 1984, in particular S.38 (a) and S.42 (3) for a review of the work of CSIS and general background information see: SIRC, *Reflections: Twenty Years of Independent External Review of Security Intelligence in Canada*, 2005. See also D. Collins *Op Cit* n.540 para 3.
[923] See further s.53 CSIS Act and D.Collins *Ibid.*

public interest (s.15 (4) (d)) the seriousness of the alleged offence (s.15 (4) (4)) and the extent of the risk of harm created by the disclosure (s.15 (4) (f). Most importantly there must be evidence of prior disclosure of the information under s.15 (5) to one of several prescribed channels including:

> "(i) the Security Intelligence Review Committee, if the person's concern relates to an alleged offence that has been, is being or is about to be committed by another person in the purported performance of that person's duties and functions of service for, or on behalf of, the Government of Canada, other than a person who is a member of the Communications Security Establishment, and he or she has not received a response from the Security Intelligence Review Committee within a reasonable time…"

The Security and Intelligence Review Committee is therefore, a prescribed avenue to receive a whistleblowing complaint from a member of CSIS. However under section 41(2) CSIS Act 1984:

> "(2) The Review Committee shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act or the Public Service Labour Relations Act."

The above passage indicates that SIRC cannot provide protection for employment grievances suffered by members of CSIS, yet SIRC identifies on its dedicated website that the conditions prescribed by section 41(2) do not prevent the Committee from 'investigating cases' and 'making findings and recommendations' where 'individuals feel that they have not had their complaints answered satisfactorily by CSIS.'[924]

The situation is therefore uncertain as to whether: firstly, SIRC will investigate complaints from members of CSIS and secondly, whether they will investigate instances of reprisal. It is clear that SIRC has the jurisdiction to investigate complaints relating to the revocation of security clearances, which often occurs when employees in the

[924] SIRC website accessible via: http://www.sirc-csars.gc.ca/cmpplt/index-eng.html (accessed 07/09/09).

intelligence community attempt to blow the whistle. However, it is important to stress that any investigations that take place by SIRC will result in recommendations made to the Director of CSIS, not corrective action.[925]

The SIRC 1988-1989 annual report identified that the CSIS Act 1984 does not provide CSIS employees with protection from whistleblower reprisal and recommended that the Act be amended to ensure that any complaints made to SIRC by employees are allowed to be made anonymously and that employment protection would be provided for employees who make such complaints.[926] The recommendations have not been implemented and the situation continues to remain unclear. Furthermore, the Public Service Labour Relations Act does provide protection for employment grievances but has no mention of whistleblowing or protection of complaints reporting. CSIS employees are therefore put at a significant disadvantage as any employment reprisal complaints they do make will not be dealt with by SIRC who not only have experience in intelligence and national security matters but unparalleled access to CSIS. There is also a clear jurisdictional problem here as any revocation of security clearances as a result of reprisals should fall under the very jurisdiction of the Committee prevented from investigating employment reprisals, SIRC.

6.6 Conclusion

6.6.1 Theoretical model

The requirements of employment in the Security and Intelligence services place an

[925] See further, the Supreme Court decision of *Thomson* [1992] 1 S.C.R. 385.
[926] See further, SIRC Annual Report 1988-1989, para 14.

inevitable limitation on the individual's right to moral autonomy. The effect of an individual choosing to disregard the restrictions imposed on him to exercise his own will outside of the 'closed circle' imposed by his employers could be detrimental to the public interest where the information concerned is harmful. A restriction on the individual's right to moral autonomy may be justified, according to J.S. Mill to prevent harm to others, to which Dworkin argues that the state must be able to identify 'a clear and substantial risk' of great damage to citizens or property. The restriction may also be justified in order to maintain loyalty in the service. As Bok argues, it may be disloyal to colleagues to raise concerns to the public first without trying to utilise internal mechanisms. Given the nature of employment, loyalty to colleagues and the service may be considered a prerequisite.

As Bok identifies, state secrecy creates an inevitable conflict between citizens and the state. Because the nature of state secrecy places so much power in the hands of the 'fact holders' there is great potential for abuse of such power. As Aftergood correctly identifies, government secrecy may be used to obtain political advantage. It may also be used to shield members of the public and those responsible for external oversight of the services from information relating to illegal conduct.[927] The exercise of moral autonomy may therefore be required for an individual to voice his concerns to his colleagues and superiors to state that he believes a particular course of action may be harmful or wrong. On this basis 'internal dissent' may be justified. This further provides a strong theoretical justification for 'protest whistleblowing' whereby the individual identifies that a policy decision taken is wrong. Whilst the policy decision may not contain information relating to illegality, there may be adverse ethical or public safety issues which may arise if the

[927] *Above*, n 227.

consequences of an intended policy are not fully explored.

Unauthorised disclosures to the public may be justified in order to prevent immediate harm to individuals. In providing a theoretical justification of necessity, Brudner holds that it cannot be used as a justification whereby the individual who breaks the law 'imposes grave risks on the health of persons.'[928] It is submitted that this reasoning is correct and is further supported by Howard Dennis who suggests that it should be for the legislature to regulate the ordering of harms with specific defences.[929] This provides a strong theoretical justification for the drafting of a necessity defence, which the author suggests should be based on the Canadian Security of Information Act 2001.

It is submitted that, as Howard Dennis suggests, the defence of necessity should be confined to circumstances whereby there is either an emergency situation or where there is a conflict of duty giving rise to a danger of death or serious injury. In the security and intelligence context, this may include where an employee raises a concern to the public about a policy relating to extraordinary rendition and torture. Anonymous unauthorised disclosures of this nature must only be justified in the narrowest of circumstances, where the whistleblower has genuine fears for his safety. This is because if the individual intends to rectify an immediate threat of harm to individuals, he must avail himself to the recipients of the messages he is trying to convey. A leak of a document may not have the desired effect. If the information is provided to a journalist the correct message may not be communicated. An anonymous note may not provide sufficient information.

[928] *Above*, n 74.
[929] *Above*, n 76.

The aforementioned analysis is also applicable to considering justifications for civil disobedience. This is most relevant where the Crown Servant chooses to breach the Official Secrets Act 1989. Whilst the threat may not be immediate, the servant may make an unauthorised disclosure of information because he believes a policy decision to be wrong. The justification for civil disobedience bears close similarities to protest whistleblowing. The information disclosed should be of a high value to the public interest. Anonymous acts of civil disobedience must be questioned. As Rawls correctly identifies the act of civil disobedience should be in public, not in secret.[930] In order for the act to be justified to society, the whistleblower should make himself known in order for the source's motives to be challenged. This discussion will now proceed to discuss the legal model.

7.6.1 Legal model

Before considering the legal model it is necessary to consider whether the *Guja v Moldova* framework may be applied to employees working in the Security and Intelligence Services. The leading Strasbourg decision on national security employment is *Hadjianastassiou v Greece*. In this decision the applicant was a Greek airforce officer who published an article in a journal detailing missile technology for a fee. The applicant was convicted for breaching official secrecy. In conducting the proportionality analysis to determine whether a breach of art.10 had occurred, the Strasbourg court did not consider the public interest value of the information disclosed. Instead, the court focussed upon the

[930] *Above*, n 82.

fact that the information disclosed identified technical details regarding a weapon which could cause 'serious damage to national security.' The court also focussed upon the duty of confidence owed by the applicant. The ECtHR held that the court had not overstepped the limits of the margin of appreciation which must be left to domestic courts regarding matters of national security.

It is submitted that the court in making its ruling failed conduct sufficient analysis of the information disclosed. Whilst the court correctly identified that domestic authorities are provided with a margin of appreciation with regards to national security matters, by failing to accurately assess the information the court could not determine whether the information was capable of being harmful to national security. In keeping with existing values determined in a number of decided cases, the court should have determined whether the public in the disclosure outweighed the public interest in non-disclosure. Hadjianastassiou may be further distinguished from *Guja v Moldova*. The Court in Hadjianastassiou had to rule on a situation whereby the applicant had published an article for profit. In contrast the Court in *Guja v Moldova* identified that the case had been the first time that the ECtHR was required to make a ruling on a situation regarding whistleblowing. Whilst it is recognised that the European Court of Human Rights is not required to follow precedent, it is submitted that in cases involving whistleblowing, the *Guja v Moldova* framework should be used. The framework most closely aligns with art.10 values by allowing for a determination of the public interest value in the information disclosed. It is only after making this determination that the court hold whether or not the domestic authority has overstepped its margin of appreciation.

In applying the *Guja v Moldova* framework, the Court will be required to make a determination as to whether alternative channels for raising the concerns were available

and whether those channels where effective. The ECtHR drew upon both materials from the United Nations and the Council of Europe in order to determine that the state of Moldova should have provided procedures and protection for whistleblowers. It is therefore submitted that the following recommendation by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism is relevant to this analysis:

> "Practice 18. There are internal procedures in place for members of intelligence services to report wrongdoing. These are complemented by an independent body that has a mandate and access to the necessary information to fully investigate and take action to address wrongdoing when internal procedures have proved inadequate. Members of intelligence services who, acting in good faith, report wrongdoing are legally protected from any form of reprisal. These protections extend to disclosures made to the media or the public at large if they are made as a last resort and pertain to matters of significant public concern."[931]

It is further identified that the Council of Europe Resolution 1729 requires that whistleblowing provisions should be comprehensive and should extend to the security and intelligence services.[932] It is submitted, as the aforementioned analysis has identified, that the available mechanisms appear to fall far short of the recommended best practice.

The operation of the concern reporting mechanism available to members of the UK Intelligence and Security Services is not well publicised. Whilst this may be for the legitimate aim of safeguarding national security, it is difficult to assess whether the role of staff counsellor is fit for purpose. In the absence of official information critical analysis can be found in media reports or by accounts of former officials who have

[931] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, 2010: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/134/10/PDF/G1013410.pdf?OpenElement (accessed 06/02/12).
[932] Accessible via: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm (accessed 06/02/12).

chosen to bypass the staff counsellor in favour of unauthorised disclosures. Information provided in the recent ISC annual report regarding the establishment of an 'Ethical Counsellor' for MI5 is a positive step in the right direction, however there is no information of the Counsellor's role in relation to the Staff Counsellor, or indeed whether the role of the Staff Counsellor has been replaced.

One of the key arguments against the inclusion of a public interest defence in the Official Secrets Act 1989 was that the Services had a staff counsellor in order to raise concerns, the role of the Staff Counsellor is therefore most important as he is meant to provide the clear alternative to making an unauthorised disclosure. The staff counsellor was meant to act as a conduit between the Servant and the respective agency head, or the Prime Minister, in deal with any alleged malpractice. It is most alarming therefore that the Staff Counsellor appears to have no input in the work of the Intelligence and Security Committee. If the Staff Counsellor is effective in his role, he could surely assist the ISC in holding the Security and Intelligence Services to account.

The following table (overleaf) displays the available statutory whistleblowing provisions from other jurisdictions. The table is not intended to be exhaustive of all mechanisms available but acts as a comparator the ISC.

Jurisdiction.	Mechanism.	Investigatory Capacity.	Employee Access.	Employment Protection.	Secrets legislation/ and protection.
United Kingdom	ISC	No/ Ad hoc	No	No access to PIDA	Official Secrets Act/ No public interest defence
New Zealand	IGIS	Yes	Yes	Access to PDA	S. 78 Crimes Act 1961/ Immunity from Civil or Criminal action for protected disclosures S.18 PDA but strictly Prescribed.
Australia	IGIS	Yes	Yes	S.35 Intelligence Services Act (up to DG to make internal provisions) no access to Public Service Act.	S.70 and S.79 Crimes Act 1914/ No Degree of protection from civil action S.33 Director General Intelligence and Security Act 1986
USA	Various Inspector Generals for each respective department and congressional intelligence committees	Yes	Yes	Intelligence Community Whistleblower Protection Act 1998	No OSA equivalent. Some provision in Espionage Act 18 USC 794 and Intelligence Identities Protection Act 50 USC 421
Canada	SIRC	Yes – may instruct inspector general	Yes, but uncertain whether SIRC will investigate complaint.	Public Service Labour Relations Act, but no express whistleblower protection.	Security of Information Act 2001/ Public Interest Contained in S.15(2)

It can be observed that the New Zealand IGIS has both the capacity to receive whistleblowing concerns and to independently investigate. The New Zealand model is the most useful comparator as the Protected Disclosures Act was modelled on the UK Public Interest Disclosure Act. The PDA (NZ) goes much further than PIDA (UK) by including employees of the NZ Security and Intelligence Services. The PDA is procedurally rigid by comparison to PIDA which does not require employees to exhaust internal mechanisms or follow strictly prescribed mechanisms to obtain protection. The consequence of this rigidity is that it is much easier to legislate for national security whistleblowing because in order to qualify as a protected disclosure the employee must exhaust the stages prescribed in the Act. Most importantly, the New Zealand Inspector General has both the capacity to receive and investigate the complaints. The UK

Intelligence and Security Committee does not have the jurisdiction to conduct either functions.

The Australian position is a little more uncertain as it is effectively up to the Director General of the respective agency to decide what internal provisions are implemented to mirror the protections available to public servants not involved in national security mechanisms. Like the NZ IGIS, the Australian IGIS can receive whistleblower complaints from employees.

Employees who report concerns to the IGIS have a degree of protection from civil action but unlike their New Zealand counterparts do not have any protection from criminal action. In a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs the current IGIS, Ian Carnell suggested that if new public interest disclosure provisions are implemented for Commonwealth employees, s.33 of the IGIS Act could be expanded allow for protection from criminal actions. Carnell said that he believed the IGIS is the correct external body to receive concerns but that he would support the setting up of an internal agency for employees to go to with an obligation for the agency to report concerns to the IGIS.[933] Carnell also said that the IGIS and his staff speak regularly at induction courses and at seminars for the intelligence services and would be willing to conduct training on public interest disclosures.[934]

The submission of the Australian IGIS identifies the level of access that he and his staff

[933] http://www.aph.gov.au/house/committee/laca/whistleblowing/subs/sub003.pdf at 9 (accessed 04/05/10)
[934] *Ibid* at 12. Note that the Committee has recommended that a new Commonwealth Public Interest Disclosure Bill includes a provision for protected disclosures to be made by employees of the Security and Intelligence services to either the IGIS or the Commonwealth Ombudsman, this would expand the current role of the Ombudsman in intelligence matters as he may currently consult with the IGIS but cannot receive concerns from employees of the Australian Intelligence Community. Following the Committee report a draft Bill has been proposed but is yet to be published.

have to the Intelligence and Security Agencies. Carnell states that all of his staff at the IGIS have been vetted to Top Secret level thorough positive vetting. It is clear that the IGIS would not have had the same level of access to the agencies without such high clearance. In comparison the Intelligence and Security Committee, whilst notified under the Official Secrets Act 1989 are not subject to security vetting.[935] Parliamentary Committees are often not subject to security vetting because it is argued that to provide such vetting would remove the degree of independence.

Despite multiple mechanisms available to employees of the US intelligence community, critics have argued that there is a lack of protection for employees to speak up. US employees do however have access to the various Inspector Generals and may, with consent, approach the Congressional Intelligence Committees. The Canadian model whilst uncertain does provide scope for employees to raise concerns. Furthermore regardless of the provisions available employees have the benefit of a public interest defence, built into their official secrets legislation. It is recommended that the United Kingdom provide a public interest defence based upon this model.[936]

It is most apparent, that despite criticisms of the accountability mechanisms in other jurisdictions, a common feature is that employees have access to the independent mechanism. The ISC must therefore take more of an active role in the work of the staff counsellor and or the respective ethical counsellor.

One must ask why employees of the UK intelligence community have been exempted from PIDA. At the very least inclusion of a special provision in PIDA for employees

[935] See answer to question by Jacqui Smith MP, HC Debs 7 May 2009, Col 433.
[936] See further below.

who report concerns to the Staff Counsellor would be a positive first step.

The New Zealand mechanism illustrates that employment protection for whistleblowers can be provided and that the concern itself can be raised in controlled channels. The next stage would be to develop an effective parliamentary oversight mechanism. The ISC cannot function to its full potential without an inspector. It is submitted that this role should be enshrined in statute, not to restrict the function of the role of inspector or the ISC, which has to a certain extent evolved beyond its statutory remit since its inception, but to ensure that an inspector is permanently in place. An alternative recommendation would be to formalise the role of the Staff Counsellor, attach his position to the ISC and replace the inspector, thus providing both the investigatory capacity and link to the ISC.

Whilst it is understood that to give employees of the Security and Intelligence Services the employment protection and mechanisms to report concerns may be seen as a significant and perhaps unwelcome reform, one must address the recent situation whereby employees of the services have been leaking to opposition MP David Davis. The consequences of such leaks are not only bad for the reputation of the services and a potential risk to national security but are recognition of the failure of available mechanisms to adequately deal with whistleblower concerns and to hold the services to account.

CHAPTER SEVEN

FREEDOM OF SPEECH AND LAWFULL DISSENT IN THE ARMED FORCES

The purpose of this chapter is to consider the position of armed forces personnel as whistleblowers. The motivation for considering the position of members of the armed forces can be found in the fact that members of the armed forces are considered to be Crown servants by virtue of section 12 Official Secrets Act 1989. Furthermore, like their counterparts in the security and intelligence services, members of the armed forces are excluded from the whistleblowing protections provided by the Public Interest Disclosure Act 1998.[937]

This chapter shall provide an analysis, firstly of the nature and protection of freedom of speech in the armed forces. It shall then consider procedures with regards to available complaints mechanisms and with it the involvement of independent oversight bodies. The chapter will also provide a comparative analysis of complaints and oversight mechanisms in other jurisdictions, together with the consideration of freedom of speech and level of authorised dissent within those jurisdictions. It is suggested that the free speech of armed forces personnel is of a particular value, as servicemen offer a unique viewpoint and specialist knowledge of matters which are of vital national interest.

It will become apparent to the reader that the issue of discipline and adherence to authority are features which are fundamental to the structure, safety, security and

[937] Members of the armed forces are excluded from the employment rights afforded by PIDA by virtue of s.192 Employment Rights Act 1996. For a comprehensive overview of the position of armed forces personnel as Crown servants see: P. Rowe, *Military Servants*, in M.Sunkin and S.Payne, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, Oxford, 1999) 297.

everyday running of the armed forces. It should therefore be observed that whilst this chapter deals with a number of different issues arising from the question of freedom of speech in the armed forces, the consideration of discipline remains a constant, underlying feature.

It is necessary to identify that the rights of armed forces personnel can be observed in two forums: the first, in a wartime situation, and secondly, what may be referred to as 'back at the barracks.' The practical purpose of these distinctions shall become clear at several points during the analysis; however one must not consider the human rights protection or indeed the potential for abuse of those rights in isolation. In recent years the question of human rights and controversial allegations of abuse in the United Kingdom armed forces have crossed both forums.[938]

There is a notable distinction between the 'civilian' Crown servant and a member of the armed forces. The armed forces are reliant upon a hierarchical command structure to maintain efficiency. Based upon rank, the structure requires subordinates to obey the orders of a superior officer. The structure also allows for 'administrative action' or

[938] It has recently been identified that the Human Rights Act may have jurisdiction for serving armed forces personnel abroad, however this will depend on the particular circumstance of the case. In *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26 it was held that the Human Rights Act had extra-territorial jurisdiction in relation to the abuse of prisoners in a UK run prison in Iraq. In *R(Catherine Smith) v The Assistant Deputy Coroner for Oxfordshire* and *The Secretary of State for Defence v The Assistant Deputy Coroner for Oxfordshire* [2006] EWHC 694 (Admin) it was held that Article 2 ECHR, the right to life, applied to UK armed forces personnel serving abroad "wherever he or she may be," however particular emphasis was given throughout the judgement that the applicability of the Human Rights Act and Convention rights was dependent on the 'particular facts of the case' (see for example para 20 of the judgement). The Court of Appeal later upheld the decision of the lower court. However, the decision was overturned by the Supreme Court, the court ruling that the Human Rights Act only applies to servicemen abroad whilst on an army base, it does not extend to when they go off the base. See *R(on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another* [2010] UKSC 29.

For an inquiry into the abuse of prisoners see the Aitkin Report, available online: http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (accessed 06/10/09).

punishments to be considered by superior officers for matters relating to discipline.[939] Therefore, whereas a Civil Servant would be subject to obligations prescribed by the criminal law and by the Civil Service Code, the military justice system is structured to deal with both matters of criminal law and discipline, by way of court martial or by 'administrative action.'[940]

Chapter one of this thesis identified that it may be acceptable to restrict freedom of expression for the following reasons: firstly, where the information pertains to national security or operational information and the disclosure of such information may cause grave harm to individuals and property.[941]Secondly, because of the nature of work in the armed forces, restriction may be considered necessary to prevent insubordinate or overtly political expression.[942]

It will be observed that there are a number of mechanisms available in the United Kingdom jurisdiction to enforce restrictions which take a number of different approaches and which utilise the aforementioned military justice system to full effect.

7.1 Part One: Disclosures made in the Public Domain

7.1.1 National Security and Protection of Operational Information.

[939]For discussion of this in relation to the human rights of armed forces personnel see: P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, Cambridge, 2006) 7.

[941] Theoretical justifications may be identified in the work of Dworkin argues that such limitations may be justified if the state demonstrates 'a clear and substantial risk to the person or property of others. *Above*, n 31, 204.

[942] This may be identified as a voluntary restriction of art.10 rights, for further discussion see below.

The Queen's Regulations for the Army state that:

"Every officer is responsible for ensuring that all persons under his command are acquainted with the provisions of the Official Secrets Act 1911-1989, and with the need for strict compliance with those provisions. All personnel are to be reminded annually of their responsibilities under the Acts. On joining and leaving the Regular Services all personnel will sign declarations regarding the Official Secrets Act on Ministry of Defence Forms 134 and 135 respectively."[943]

Section 42 Armed Forces Act 2006 reaffirms this position by expressly incorporating the Official Secrets Acts by extending all acts 'punishable by the law of England and Wales' into the jurisdiction of the armed forces.[944]

It can be identified that the Official Secrets Acts impose extensive restrictions on the communication of information obtained in an official capacity. Section 1 Official Secrets Act 1911, gives a broad definition of the act of spying which includes the communication of information which is intended to be 'directly or indirectly useful to the enemy.'[945]

The Official Secrets Act 1989 contains specific provisions relating to the work of the armed forces. Section 2 provides that a disclosure is damaging if it:

"(a) It damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or
(b) ...it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad."

Section 3 OSA 1989 identifies an implied obligation for armed forces personnel with regard to foreign relations. In particular s.3 (2) (a) states that a disclosure is damaging if:

[943] See further: The Queen's Regulations for the Army, Official Information and Public Relations, Chapter 12, J12.001.

[944] Section 42 Armed Forces Act 2006, see in particular S.42(1).
[945] Section 1 Armed Forces Act 2006 also contains a separate provision with regard to 'assisting an enemy.'

"It endangers the interests of the United Kingdom abroad, seriously disrupts the promotion or protection by the United Kingdom or endangers the safety of British citizens abroad."

With regard to joint operations, for example those conducted by NATO section 6 OSA protects information entrusted in confidence to other States or international organisations.

Despite wide-ranging statutory restrictions, the government has, on occasion failed to prosecute or prevent the unlawful disclosure of official information. One unsuccessful attempt to proceed in a prosecution for breaching the Official Secrets Act concerns an Army whistleblower. Using the pseudonym Martin Ingram, the soldier contributed to a series of articles in the Sunday Times which detailed the activities of the Force Research Unit, a covert army intelligence unit, during the late 1980s and early 1990s.[946] Ingram's allegations prompted a police investigation into the claims, headed by the then Commissioner of the Metropolitan Police, Sir John Stevens which focused upon the alleged collusion between members of army intelligence and loyalist paramilitaries in the murder of a Belfast solicitor, Pat Finucane.[947]

The most common problem posed for successive governments, has been the publication of memoirs of former servicemen for commercial purposes. The first case worthy of note concerns the controversy surrounding the sinking of the General Belgrano by the submarine HMS Conqueror during the Falklands Conflict in 1982.[948] Following the sinking, Lieutenant Sethia a junior officer on board the submarine released a diary

[946] See, N. Hopkins and R. Norton-Taylor, *Army Whistleblower will not be Prosecuted*, Guardian, 30th November, 2000.

[947] Despite drawing reference to the information, the Stevens Enquiry (sic) did not interview Ingram and did not discuss the incidents arising from the disclosure of information. See further The Stevens Enquiry (sic) Report, 17th April 2003.

[948] *Sethia v Stern*, The Times, 4th November, 1987.

detailing his experiences during the conflict. Sethia passed the diary to Simon O'Keefe, a fellow officer on the Conqueror whose father was in publishing. O'Keefe then passed the diary on to Tam Dalyell MP. The contents of the diary were deemed particularly valuable as it had been announced in Parliament in 1984 by the then Defence Secretary Michael Heseltine that the submarine's naval log had gone missing. After extracts from the diary were published in The Observer, Sethia issued proceedings for liable and breach of copyright against the newspaper. Sethia then issued liable proceedings against the Mail on Sunday and the Sun newspapers after it was alleged that the stolen navel log had been recovered from Mr Sethia's possession.

During the case, the defendants had the intention to rely upon the diary for the defence of justification. It was then that a Public Interest Immunity Certificate was issued by the Treasury Solicitor on Behalf of the Defence Secretary, George Younger. He argued that disclosure of the information would cause 'unquantifiable damage' to the 'operational capability' of nuclear submarines. Despite acknowledging that the extracts had already been published by the newspapers Younger argued that it would be 'contrary to the national interest on the grounds of national security' to compare the authenticity of the passages. The parties agreed to the certificate and Sethia was awarded £260,000, a then record amount of damages.[949]

The circumstances surrounding the case are particularly interesting. During the proceedings Patrick Milmo QC, counsel for Mr Sethia identified a number of sources whereby the detail in the diary had been readily accessible to the public domain, including articles in newspapers, books and television programmes. Michael Hill QC

[949] See further: *260,000 pound damages for Belgrano man*, The Times, 14 November 1987 (author unknown).

argued that there was 'no difference' between Mr Sethia taking the naval log and 'his receiving information from the log to put in his diary.' By agreeing to the consent order Mr Sethia did not pursue the disclosure of the information subject to the Public Interest Immunity Certificate but instead sought to clarify that agreement to the certificate did not mean that the parties agreed to the contents of the certificate or that the matters in the certificate were true.[950]

From the information given, it may be arguable that due to the loss of the naval log, the diary contained details which could have assisted the opposition MPs or indeed members of the public in ascertaining the correct facts surrounding the Belgrano sinking in order to hold the government to account. This position is reflected in a point of order raised by George Foulkes MP with the Speaker of the House of Commons.[951] The effects of the Belgrano diary case raises the question of whether certain information can be shielded from the public domain, regardless of the fact that the information is readily accessible to those able to purchase a newspaper.

Following the 1991 Gulf War, some former members of the Special Air Services (SAS) chose to publish their own accounts of a failed mission whilst acting as a patrol with the call sign 'Bravo Two Zero.' In 1993, a former soldier using the pseudonym Andy McNabb published a book entitled Bravo Two Zero which later resulted in a television film. In 1995, another soldier using the pseudonym Chris Ryan published his version of the events in a book entitled The One that Got Away which was also made into a film made for television. Both accounts appeared to differ somewhat from each other. It was

[950] See S.Herbert, *Law Report: Diary Details not the Issue*, The Guardian, 2nd November 1987.
[951] This position is reflected in a point of order raised by George Foulkes MP with the Speaker of the House of Commons Hansard, HC Debs, 27 November 1984, vol. 68, col 782-3.

at this point that some members of the SAS who believed that the writers had not told the correct facts and that some of the events detailed were entirely fictitious urged the Ministry of Defence to correct the errors in the public domain.[952] The Ministry of Defence failed to provide the corrections and to suppress the disclosure of the information.

The controversial actions of McNabb and Ryan prompted the SAS Regimental Association to conduct a poll of its members as to whether binding contracts preventing unauthorised disclosure should be introduced. 96.8% of the respondents favoured the contracts and in 1996, the Ministry of Defence introduced them.[953] Failure to agree to sign the contracts would result in the soldier being 'returned to unit' meaning that he would become an ordinary soldier in the position he was in before joining the Special Forces regiment, thus returning to a lower rate of pay, and loosing the prestige associated with the position.

Most notably, information of the exact content of the aforementioned confidentiality contract would not have been published in the public domain had it not been for the case of 'Mike Coburn.'[954] Coburn was a serving SAS soldier from New Zealand who was also present on the Bravo Two Zero patrol. After signing the contract during active service, Coburn decided to leave the SAS and then write his own book entitled Soldier Five: The Real Truth about the Bravo Two Zero Mission.

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[952] For a detailed account of this see: *R v Her Majesty's Attorney-General for England and Wales Respondent from the Court of Appeal of New Zealand,* Privy Council, Appeal No 61/2002 delivered 17th March 2003.

[953] *Ibid*

[954] A pseudonym.

After the UK publisher Holder & Stoughton sent a copy of the manuscript to the Ministry of Defence for approval, the Attorney-General issued proceedings in the High Court of New Zealand for Breach of Confidence to restrain publication, to obtain damages and any available profits.[955] Coburn then pleaded that he had signed the contract under military orders and this had amounted to duress or undue influence.

The High Court (NZ) agreed with Coburn. Most interestingly, Salmon J identified that the relationship between the soldier and his superior officers gave rise to the presumption of undue influence, which means that a contract should not be allowed to stand if consent has been obtained through unacceptable means. This was further propounded by the fact that he was not given the opportunity to seek legal advice and was prevented from having a copy of the contract.

The Court of Appeal (NZ) disagreed with the decision that the signing of the contract was a 'military order.' It was considered that the soldier had the choice between either signing the contract or being returned to his unit. Whilst this put considerable pressure on him, this pressure was not unlawful. Coburn appealed to the Privy Council whereby the Court of Appeal decision was upheld. It was considered that the MOD was 'reasonably entitled' to regard anyone 'unwilling to sign the contract' as 'unsuitable for the 'SAS.'[956] The Privy Council's reasoning reflects jurisprudence both of the European Court of Human Rights and U.S. Supreme Court which identifies that if a person chooses to be employed in a specific role, he must accept the limitations on his freedom of expression which arise from it.

[955] *Ibid*

[956] *Ibid* para 18.

In upholding the Court of Appeal's (NZ) decision, the Privy Council refused the injunction, instead awarding the MOD with all proceeds from the sale of the book.[957] This had the effect of allowing the publication of the material in the public domain, whilst recognising the importance and validity of the contract in question by not allowing 'Coburn' to profit the disclosures. The Privy Council drew reference to Tipping J's comments in the Court of Appeal (NZ) judgment which identified that 'the particular and unusual circumstances' justified a decision not to allow the injunction. It can therefore be observed that there was a clear public interest in allowing the general public to hear an alternative and conflicting account of the events surrounding the 'Bravo Two Zero' mission but that the court also recognised the importance of the confidentiality contracts in preventing former members of the SAS from profiting from their experiences.

The judgment does however identify that use of the confidentiality contracts as a means to protect operational information is far from certain. The contracts provide the Ministry of Defence with a civil mechanism with which to apply to suppress the information and seek damages yet it is up to the court to decide, on the individual circumstances of the case whether or not the information will be suppressed. This mechanism can be contrasted with the criminal law protection of the Official Secrets Act 1989.

With regard to the national security or operational information protected by the Act,

[957] A useful comparison of this is the US case of *Snepp v United States* (1980) 444 U.S. 507. The case concerned a former CIA employee who had written a book about the agency's activities in Vietnam and failed to seek approval before publication, contrary to the confidentiality contract he had signed. The court denied Snepp with the royalties from the book for not seeking prior approval. It was held that this did not amount to a breach of First Amendment rights due to the fact that Snepp had breached the constructive trust between himself and the government which had jeopardised the safety of CIA operatives.

there is no such degree of latitude or judicial discretion. The content of the information concerned is irrelevant, the mere fact that a person has disclosed the information is sufficient to bring a prosecution under the Act. Therefore in terms of a mechanism to protect against the unauthorised disclosure of national security and operational information, the Official Secrets Act 1989 at least in codified form, provides an enhanced degree of certainty in comparison to the use of confidentiality contracts.

In the Privy Council judgment, Lord Scott of Foscote dissented. He focussed directly upon the nature of the command structure and the constitutional position of armed forces personnel as servants of the Crown. He argued that:

> "The appellant was not…an unworldly man in a secluded religious order. He was a soldier in a highly trained and efficient fighting unit. The essence of efficiency in a military unit is obedience to orders. The armed forces operate on a hierarchical basis. Each rank looks to the rank above for direction and, having received that direction is expected to comply with it. It is…entirely artificial to draw sharp distinctions between orders from senior officers… breach of which will be an offence under military law… and 'orders' couched as requests or recommendations…It is to be born in mind that members of Her Majesty's Armed Services do not, unlike ordinary employees, enter into contract with their employers… and can be dismissed by the Royal Prerogative. It is their agreement to serve, not any contract, that subjects them to… discipline and military law."[958]

Lord Scott's understanding of the relationship between the superior and subordinate ranks needs careful consideration. There is an established command structure in place in the UK Armed Forces, the basis of which armed forces personnel are employed at the pleasure of the royal prerogative. Whilst this factor distinguishes armed forces personnel from their counterparts in other sectors of Crown service, there are significant examples from decided case law which suggest that Crown servants do have a contract of employment, or may have a contract of employment depending upon the context of the situation. In relation to breach of confidence proceedings and national security the

[958] *Ibid*, paras 44-45.

Spycatcher judgements are particularly relevant.[959] It was held that despite the existence of a contract of employment with the Crown, a duty of confidence existed, arising from the nature of the employment (as a member of the Security Service MI5) and the duty to protect national security information.

The question of whether or not a contract of employment exists between the Crown and her servants has been debated in a number of decided cases. The issue has continually arisen in judicial review proceedings whereby successive governments have identified the existence of a contractual relationship in order to prevent the Crown servant from obtaining access to judicial review. However, successive governments have also capitalised on the uncertainty surrounding the status of Crown employees by denying the existence of a contractual relationship to provide a favourable outcome in civil actions against the Crown. Whilst one cannot predict the exact course of action the Crown would take in future breach of confidence proceedings against a member of the Special Forces, it is submitted as highly likely that the Crown would advocate the existence of a contractual relationship between the parties and evidence of a significant number of judgements suggests that the courts would recognise the existence of such a relationship.[960]

The *Coburn* judgment illustrates an unsuccessful attempt to restrict the unauthorised disclosure of official information. With regards to the use of confidentiality contracts as a deterrent from future unauthorised disclosures, the contracts have failed to prevent a

[959] see in particular: *Attorney-General v Guardian Newspapers Ltd* [1991] All ER 398 (No 2) at 769, *per* Lord Griffiths.
[960] See e.g., *R v Lord Chancellor's Department ex parte Nangle* [1992] 1 All ER 879 whereby the court held that there was a contract with the Crown, contrast with *McClaren v Home Office* [1990] IRLR 338 whereby the Crown asserted that Civil Servants did not have valid contracts. For discussion on the constitutional status of armed forces personnel see: P. Rowe in *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, Oxford, 2003), Eds M. Sunkin & S. Payne, 267

number of servicemen from going 'on the record' about their time in the Special Forces.[961] However a recent judgment suggests that the use of confidentiality contracts by the UK Special Forces is having an impact on the control of operational and national security information, at least in recognising the importance of seeking prior authorisation before disclosing the information in the public domain.

In *Ministry of Defence v Griffin*[962] the Ministry of Defence commenced breach of confidence proceedings against a former serving soldier in the UK Special Forces after several unauthorised disclosures had been made. The MOD sought a permanent injunction to prevent further disclosures from taking place. The main consideration for the court was whether or not it was acceptable for an individual serviceman to decide whether or not the information concerned would constitute a breach of confidence, or if the serviceman must, in all circumstances seek prior authorisation in a process referred to as obtaining 'express prior authority in writing' (EPAW). The court identified that serving members and former members of the UK Special Forces were reluctant to approach the MOD for prior authority.[963] This was exemplified in the *Griffin* judgment. Griffin had allegations of wrongdoing involving the actions of American soldiers in Iraq and that he did not trust the MOD procedure. He believed that the MOD would allow for only a very narrow 'scope of permitted disclosure' and that if he reported the wrongdoing to the authorities, the allegations would either not be investigated properly or would be out of the authorities' jurisdiction.[964]

[961] In January 2005 the High Court issued a writ to sue four former SAS Soldiers, John MacAleese, Eddie Stone and two unnamed others despite the fact that the BBC television programme that they had contributed to, S*AS Survival Secrets*, had been screened a year before and had been repeated several times without complaint from the MOD. It was reported that the men in question went into hiding. See further: C. Leake, *Gagged...the SAS embassy siege hero who gave survival tips on the BBC*, Mail on Sunday, 16th January 2005.
[962] [2008] EWHC 1542 (QB)
[963] *Ibid* para 20.
[964] *Ibid* para 14.

Mr Justice Eady held that the injunction would continue to be in force and that if Griffin had any further disclosures to make he must first seek approval by way of EPAW.[965] If he was dissatisfied with the response from the MOD he could then consider making an application for judicial review. This proposition, whilst undoubtedly giving the applicant a further avenue with which to seek recourse, blurs the distinction between a soldier serving under the royal prerogative and an individual fulfilling his contractual obligations which was identified in the dissenting judgment in *Coburn*.

The *Griffin* judgment is particularly worthy of note as Mr Justice Eady considered the public interest argument made by Griffin's Counsel of disclosing allegations of wrongdoing. He identified that members of the armed forces are exempt from the whistleblower protections provided by the Public Interest Disclosure Act 1998. He stated that to allow such an argument would nullify the exemption in the Act.[966] Most interestingly, Mr Justice Eady drew reference to *R v Shayler* and the statutory obligation of confidence provided in the criminal law by the Official Secrets Act 1989. He suggested that clauses (1) and (2) in the confidentiality contract 'echo' section 1 Official Secrets Act 1989 and that the use of confidentiality contracts are 'clearly intended' to achieve the same 'policy objectives' that is in the interests of national security but with the distinction that a breach of obligation will be enforced, through 'remedies available in civil litigation rather than by way of criminal sanctions.[967]

One must ask why successive UK governments have failed to bring prosecutions for breaches of the Official Secrets Acts against former servicemen who make unauthorised

[965] *Ibid* para 35.
[966] *Ibid* para 29.
[967] *Ibid* para 16.

disclosures. One can argue that the Official Secrets Acts existed as a type of 'contract' which imposes criminal sanctions and a lifelong ban on disclosure of official information long before the drafting of the confidentiality contracts took place.

A distinct comparison between the effects of the above mechanisms can be given when considering the intelligence community and former Secret Intelligence Service MI6 officer Richard Tomlinson, ironically a former soldier serving in the Territorial SAS. After Tomlinson gave a synopsis of a proposed book detailing his career in the Secret Intelligence Service to an Australian publisher, he was arrested for breaching the Official Secrets Act 1989. Tomlinson pleaded guilty and was given a twelve month custodial sentence.[968] The events happened around a similar time implementation of the confidentiality contracts.

With regard to control of national security and operational information, there is a notable advantage of using confidentiality contracts. Such contracts give the government the jurisdiction to sue for Breach of Confidence, and to apply for an injunction to block publication of the unauthorised material. Being a criminal offence, the Official Secrets Acts do not provide for such proceedings and to sue for contract damages. Whilst the attraction of receiving financial remuneration would not be the principle motivation for the Crown's proceedings, the imposition of damages to leave the defendant 'out of pocket' and the potential to be a deterrent to those considering an unauthorised disclosure is a welcome dividend.

Section 5 Official Secrets Act 1989 does provide for the prosecution of newspapers or

[968] Tomlinson was released after six months for good behaviour.

journalists who publish unauthorised information obtained from a Crown servant; however the provision is used as a threat to inhibit publication rather than a legal certainty.[969]With regard to the civil remedies made available as a result of the use of confidentiality contracts there is the potential for the prospective publisher, newspaper editor or journalist to incur tortious liability for inducing the member of the UK Special Forces to breach the contract with the Crown.

The tort of inducement originates from the case of *Lumley v Gye*.[970] The essential elements are that a third party will have the intention to make a direct procurement of a breach. In Lumley v Gye the defendant offered one of the parties to a contract a financial inducement in order to break the contract. This would directly relate to a scenario whereby a serving or former member of the UK Special Forces was offered the opportunity by a publisher or newspaper to sell his story. Furthermore, there does not have to be evidential proof of unlawful conduct to constitute a breach of the tort of inducement, the unauthorised disclosure of national security or operational information would provide evidence of unlawful conduct, under the Official Secrets Act 1989, thus far exceeding the evidential requirement to commit the Tort.

One may argue that taking action, either civil or criminal, against the media for publishing the unauthorised disclosures of a member of the armed forces, is unjust and detrimental to media freedom. There is little doubt that the action may dissuade servicemen from making unauthorised disclosures, or the media from prompting such action. However in a world where media access and coverage of the armed forces is extensive, such action may be considered as highly damaging to media relations. One

[970](1852) 2 C&B.

must therefore ask whether such suppression of official information is best undertaken by agreement with the media. The next section shall consider the issue of contact with the media, starting with an analysis of Defence Advisory notices.

7.2 Contact with the media

The Defence Advisory Notice may be used as a means of 'avoiding confrontation' between the government and the media.[971] The system provides a 'voluntary code' which offers guidance to the British media on the publication or broadcasting of national security information, to prevent the 'inadvertent public disclosure' of information that would compromise military and intelligence operations and methods, put at risk those who are involved in such operations or lead to attacks that would 'damage the critical national infrastructure' or 'endanger lives.'[972] Defence Advisory notices are issued by the 'Defence, Press & Broadcasting Advisory Committee' of which there are currently five standing DA Notices:

> "DA Notice 01: Military Operations, Plans and Capabilities, DA Notice 02: Nuclear & Non- Nuclear Weapons & Equipment, DA Notice 03: Ciphers & Secure Communications, DA Notice 04: Sensitive Installations & Home Addresses, DA Notice 05: United Kingdom Security and Intelligence Services and Special Services."[973]

If journalists wish to seek clarification as to whether or not the information they wish to publish falls within the aforementioned restricted they may contact the Secretary of the Committee directly by telephone. The aim is one of co-operation and the Committee

[971] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford 2006) 957, more generally see also: N.Wilkinson, *The Official History of the United Kingdom's D Notice System* (Routledge, Abingdon) 2009, P. Sadler, *National Security and the D-Notice System* (Ashgate, Aldershot) 2001, P. Sadler, *Still Keeping Secrets? The DA Notice System post 9/11* [2007] Comms.L. 12(6) 205, D.Fairley, *D Notices Official Secrets and the Law* [1990] O.J.L.S. 10(3) 430.
[972] See Defence Advisory Notice System website: www.dnotice.org.uk (accessed 07/08/08).
[973] *Ibid.*

meets with representatives of the media twice yearly to discuss the operation of the system and whether or not changes need to be made.

The Intelligence and Security Committee[974] states that the current DA-Notice system and the Agencies relationships with the media more generally are 'not working as effectively as they might' and that this is 'putting lives at risk.'[975] This appears to further support earlier claims made by the current DA Notice Secretary, Air Vice-Marshall Andrew Vallance, that the system is facing difficulty. He focussed upon the BBC's decision to show footage of four alleged members of British Intelligence retrieving data from a wireless data storage devise hidden in an artificial rock in a suburb of Moscow. Despite receiving advice, the BBC editors chose to air the footage.[976] When considering the giving of advice, Vallance reiterated the need for a balanced, independent approach stating that:

> "There is a tendency of Government to look upon the DA-Notice System as its own arm. But it is not. You have to be objective about it, as, if you step out of line, the editors, publishers and broadcasters just won't come to you again."[977]

If the aforementioned media personnel do not approach the Secretary, there is a considerable possibility that information that should be protected is instead released into the public domain to the detriment of national security interests. Without evidence of a clear working relationship, the DA Notice system is ineffective. It is submitted that the system fails to provide a watertight solution to the requirement to protect national security information. Furthermore this point is reiterated by the fact that the Official Secrets Acts provides for prosecution of persons for the unauthorised disclosure of

[974] Intelligence and Security Committee, *Annual Report 2006-2007,* Cm 7299.
[975] *Ibid* Para M, 40.
[976] *Internet Undermining DA-Notices, says DPBAC Secretary*, Press Gazette, 19th May 2006.
[977] *Ibid.*

national security and can prevent the person from making further unauthorised disclosures but it cannot protect the information itself.

Despite inherent difficulties associated with the DA Notice system, there has been a noticeable increase in media involvement in times of armed conflict. The introduction of 'embedded journalists' has allowed the media to provide unprecedented access to the work of the armed forces, it has also been a concept which has been reliant upon trust and cooperation between the Ministry of Defence, Armed Forces Personnel and the Media. A document entitled 'The Green Book' has been produced in consultation with editors, press and broadcasting organisations and details the process of embedded journalists.[978] Before journalists are allowed to shadow members of the armed forces, they must first be accredited in order to protect 'operational security.'[979]

In return for access, the embedded journalist is subject to wide-ranging controls on the release of information. The journalist may be required, albeit on occasion to submit the product of their reports, i.e. in the form of written material or video recordings etc for security checking before transmission. The emphasis however, is on a fair and 'even handed approach.'[980]

7.2.1 Media Access: A time of national interest.

On 15th March 2007, whilst on patrol off the coast in Iraq, fifteen Royal Naval and Royal Marine personnel were captured by Iranian forces for allegedly straying into Iranian waters. After spending twelve days in captivity the personnel were allowed to

[978] The Green Book, *MOD Working Arrangements with the Media*, Ministry of Defence.
[979] *Ibid* para 19.
[980] *Ibid* para 28.

return home and upon doing so were authorised by the Ministry of Defence to give interviews to the media and to receive payment for those interviews. The action received considerable criticism from several Members of Parliament and commentators and the controversy resulted in a thorough review of the policy regarding media access to military personnel.[981]

The report by Tony Hall suggested that there had been a significant increase in media access to the armed forces and military operations since the Falklands conflict and that the industry as a whole had become more competitive. Most importantly for the interests of this study Hall suggested that there is now a 'greater focus on individuals and individual rights thought society' and a 'lesser inclination to accept the requirements imposed by employers' meaning that the 'all of one company' ethos of the armed forces is 'more difficult to uphold.'[982]

In light of the above statement there is a clear possibility of harm being caused to the operational stability of the armed forces by individuals if interviews are given to the media or if material is disclosed without prior permission sought. However, one can also argue that by giving superior officers a forum with which to voice their own personal viewpoints can give rise to the prospect of discrimination on the basis of rank. The next section shall consider the media access of senior offices to aim to determine whether this discrimination is an acceptable consequence of the command structure.

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[981] The Foreign Affairs Select Committee were particularly critical of the decision to allow the Sailors to sell their stories to the press. See *Foreign Policy Aspects of the Detention of Naval Personnel by the Islamic Republic of Iran*, Sixth Report of 2006-2007 Cm 7211 at 61. See also comments by Dr. Liam Fox MP Hansard HC Debs 16 April 2007 Col 28.

[982] Report by Tony Hall on Review of Media Access to Personnel, 2007. It should be noted that the Foreign Affairs Select Committee was critical of the findings of the Hall Report. See Sixth Report *Ibid* at 56.

7.2.2 Media Access: Superior Officers

In 2006 General Sir Richard Dannatt, the then head of the British Army talked openly in an interview to the Daily Mail and made several comments which were in direct contrast to government policy.[983] General Sir Richard Dannatt has become increasingly outspoken during and after his time in office, by both voicing his own personal viewpoints as to the situation in Iraq and Afghanistan and by criticising the welfare of serving armed forces personnel to campaign for better equipment and living standards for servicemen.

Keith Sampson MP stated during a Commons debate, in relation to the increasing number of concerns voiced by senior officers that it was 'unusual' to not only have concerns raised from retired military personnel but 'from serving officers' and that it should be accepted that military personnel 'have a deep interest in politics' and 'will argue strongly not only about military matters but about matters that concern them as ordinary voters.'[984]

Dannatt's comments have caused controversy and criticism, but the views have also raised more important concerns in relation to the differences between the ranks. If military personnel do have a deep interest in politics, it appears that the opportunity to freely voice such political opinion is reserved for senior officers. General Sir Richard Dannatt and other commanding officers are provided with media access in order to conduct briefings.

[983] S .Sands, *Sir Richard Dannatt: A very honest General*, Daily Mail, 12 October 2006.
[984] Hansard, HC Debs, 12 Dec 2007, Col 353.

Given the controversy surrounding any criticisms of government policy and the need for cooperation between the government and commanding officers of the armed forces it is more likely that such events will go unpunished and subsequently the aftermath will become an exercise in political damage limitation. Again, the Dannatt episode is evidence of this. Following the scathing comments, the government sought to 'clarify' the Major General's assertions to bring them in line with government policy. In contrast, soldiers who are in the lower ranks are less likely to be provided with an open media forum and are likely to be punished for their dissent.

7.3 Access to a public forum? The Subordinate Ranks

In the lower ranks, members of armed forces are more likely to get their message across through the median of technology. The Hall Report indicated that the proliferation of technology had led to 'risks of operations' and individuals and that such a risk was increasing. It recommended that urgent consideration must be given to policies dealing with:

> "...the use of mobile phones, the video capacity of mobile phones, and the use of blogs, emails and social networking sites."[985]

He further indicated that:

> "Given the rise of the "citizen journalist", the implications need to be thought through as a responsibility."[986]

[985] The use of digital images of the abuse of Iraqi detainees in Abu Grahib prison was used by an American soldier to show evidence of the abuse on the American 60 Minutes programme, more detail of the incident will be given in the section considering comparative complaints mechanisms. Air Vice-Marshall Vallance, the DA-Notice Secretary has also voiced concerns with regard to the increase of technology, describing the internet as a 'serious threat. See also P. Sadler, Still Keeping Secrets? *The DA-Notice System post 9/11* [2007] Comms. L. 12(6), 205.
[986] *Above,* n 982 at 67.

The Ministry of Defence has responded by issuing wide ranging military Regulations restricting servicemen from contact with the media and for communicating information in public. From the outset the regulations indicate that the purpose of the rules is to 'ensure that operational security is upheld and that standards of political impartiality and public accountability are met at all times.' Principally, all contact with the news media must first be approved by the Director-General, Media and Communication (DGMC) via the Director, News Press Office (D News). Ministers will be consulted when necessary.[987]

Section 3 (9) states that the restrictions also apply to the 'writing of letters to newspapers, contributing to online debates, or participating in radio or television programmes, including phone ins on any topic relating to official defence matters, contact with the media at conferences and seminars, and invitations to media representatives to speak to briefings, courses or other departmental events.' Under section 3 (11) it states that if approval is given, the range of topics which can be covered will be agreed at the time of authorisation and that no comment should extend beyond the prescribed topics.

Section 4 deals specifically with the 'communication in public' of defence or related matters and attempts to tackle the concerns identified by Tony Hall head on. It details a number examples including, the use of mobile devises, publishing information in a blog, books, academic material, speaking at conferences, taking part in external surveys or interviews with the media. Quite interestingly, the section also details the use of on-line social networking sites.

[987] Defence Instructions and Notices, *Contact with the Media and Communicating in Public*, 2007 DIN 03-06

There is a contrast between the publication of a blog, which takes the form of a 'personal website' and a social networking site, which tends to be for the use of communication between friends. A blog provides a method of imparting information into the public domain whereas a social networking site may be likened to sending an email or having a telephone conversation. Despite these differences, under the aforementioned regulations, the serviceman is still required to seek approval before discussing information even if the purpose of the communication is to vent non-specific information surrounding 'a bad day at work' for example.

Section 5 deals with the authorisation for contact with the news media and communicating in public. Personnel of a 1 star rank are required to seek approval from the DGMC in the same way that their subordinates are required to. Requests must be submitted 7 days in advance of the proposed media interview. In comparison military personnel of a 2 star rank and above are required to seek permission from the relevant minister.

There are several identifiable concerns arising from the new regulations. In relation to the requirement to seek approval directly from a minister, the section allows for the possibility of political interference, particularly if the subject matter of the proposed communication is of a nature which is critical of government policy. The political neutrality of members of the armed forces is considered as a fundamental requirement; to not only maintain discipline (a concept which will be explored in further detail below) but also to maintain the citizen in uniform approach.

The concept comes from the German military system and also acts as a suitable comparative to the UK mechanism. The approach was developed as part of the foundation of a new military system after the fall of the Nazi regime. The soldier is expected to develop a degree of personal autonomy in order to utilise his 'rights and responsibilities as a politically active citizen.'[988] This purposive approach therefore aims to prevent acts which allow the armed forces be used as an overtly political tool by a dictatorial regime.

In the UK the aforementioned regulations also identify a common problem shared with civilian Crown servants. A servant of the Crown is expected to act and make decisions in a politically neutral way, yet for reasons of practicality is expected to serve the government of the day.

7.4 Do the regulations allow for an acceptable form of discrimination?

The regulations allow for the discrimination of different ranks of the armed forces. The European Court of Human Rights decision in *Engel* stated that the limitation of Article 10 rights for the subordinate ranks was necessary for the maintenance discipline and therefore constituted an accepted form of discrimination in relation to Article 14.[989] This can be observed by the way that the regulations treat the lower ranks in comparison to officers at command level. The consequences of failing to seek permission before disclosing information contrary to the restrictions may be a 'serious disciplinary or administrative matter' which could 'ultimately lead to dismissal.'[990] Traditionally, disciplinary matters are dealt with either by the chain of command structure, whereby the

[988] G.Nolte, European Military Law Systems (Walter de Gruyter, Berlin, 2003) 77.
[989] For further discussion see below.
[990] *Above*, n 987, para 2.

matter is considered by a senior officer, or by way of court-martial. As Born and Leigh identify, superior officers have 'a very high degree of control over the life of individual servicemen' and under 'extreme conditions of service' disciplinary matters may need to be dealt with where:

> "...Full procedural safeguards are not attainable and where there is an urgent and paramount need to restore discipline if the effectiveness of a mission is not to be compromised."[991]

This scenario is directly reflective of the concerns in the Hall Report which suggested that the proliferation of technology and increase in media participation in wartime operations had led to the compromise of those operations. The potential for disciplinary matters to be dealt with by superior officers in such situations is therefore high.

If one were to contrast the position of the lower ranks with the requirement for officers of a command level to seek authorisation from ministers before releasing such information or media comment as prescribed by the regulations, one must consider that there is limited potential for disciplinary action for acting contrary to the regulations. One may wish to consider the position of the head of the Army for example. If he fails to seek authorisation from the respective minister for making potentially adverse comments, critical of government policy, he could not be punished under the traditional command structure. Furthermore, it is highly unlikely that he or another person of a similar rank would face a court-martial. Again, this is in keeping with the justification of political neutrality which aims to maintain a level of discipline in the armed forces, at a command level the requirement to adhere to this level of discipline is diminished.

The German 'citizen in uniform' provides an alternative approach which acknowledges

[991] I.Leigh & H.Born, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (OSCE/ODIHR, 2008) 221.

that the armed forces are subject to the 'primacy of politics' which is defined in the following structure:

> "Primacy of politics means that the armed forces answer to politicians who are responsible to Parliament and that they are subject to special parliamentary control, a hierarchical order pervading all aspects of service and the principle of command and obedience."[992]

The 'primacy of politics' approach does not readily apply to the UK jurisdiction. If one were to consider armed forces personnel in comparison to a different form of Crown service, that of Civil Servants, it is evident that whilst the servant is under the control of a minister, the Civil Service Code and established convention places political impartiality at the forefront of working practice. Furthermore, the UK constitutional status of the armed forces means that personnel are deployed and controlled by ministers, in the name of the Monarch, using powers bestowed by the royal prerogative. This means that whilst Parliament may hold the government to account, through debate or committee, Parliament does not control the UK armed forces. The next section shall consider approaches taken by the European Court of Human Rights.

7.5 European Court of Human Rights: Approaches

Article 10 (2) of the European Convention on Human Rights allows a particularly wide restriction of the right to freedom of expression 'in the interests of national security.' A contrast can therefore be drawn between a Crown servant as a member of the armed forces and Crown servants involved in other areas of work. Unless servants are involved in work of a department which is involved in national security matters, such as the Ministry of Defence of the intelligence services, for example, they are much less likely

[992] Joint Service Regulation, Inner Fuhrung, ZDV 10/1, para 205 accessible via: http://www.kas-benin.de/mil/innere-fuehrung-eng.pdf (accessed 10/10/10).

to have their speech restricted. In comparison, the very nature of a position as a member of armed forces personnel can be deemed as 'in the interests of national security' and thus the restriction on the freedom of expression of servicemen will be far greater. This stance has been reflected in a number of decided cases heard by the European Court of Human Rights.

In *Hadjianastassiou v Greece*[993] the applicant, an officer in the Greek air force, failed to convince the court the information he disclosed did not risk national security. The Court rejected the claim on the basis that the state's interest in keeping information regarding the development of the missile secret was legitimate. The Court was influenced by the reasoning in *Engel and Others v the Netherlands*.[994]

In *Engel* the Court held that Article 10 applies to members of the armed forces just as it does to other persons 'within the jurisdiction of the Contracting States,' yet it identified that:

> "The proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings."[995]

The Court's determination may be identified as the "citizens in uniform" approach. Therefore, if a citizen joins the armed forces, he will still retain the right to freedom of expression, but will be subject to certain limitations imposed by the requirements of being a member of the armed forces. In essence this means that the limitations of certain Convention rights are therefore acceptable as the individual chose to surrender those rights as a condition of service.

[993] (1992) 16 ECHR 219.
[994] (1976)1 EHRR 647.
[995] *Ibid*, para 94 onwards.

A pertinent example of the voluntary surrender of the freedom of expression can be found in the 'signing' of the Official Secrets Acts. The act of signing the OSA is not a legal requirement but it is a symbolic formal recognition that the individual will conform to not releasing information pertaining to national security, thus voluntarily surrendering the right to freedom of expression in those circumstances.[996]

The approach taken in *Engel*, has continued to set the benchmark for subsequent Article 10 Challenges.[997] In *Engel* the Court also considered the question of Article 14 ECHR which advocates that the rights and freedoms contained in the Convention are to be secured without limitation. This would clearly apply to Article 10 rights. However in following its own interpretation of the 'Citizens in Uniform' approach it stated that:

> "The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the contracting states and are tolerated by international humanitarian law...In this respect; the European Convention allows for the competent national authorities a considerable margin of appreciation."[998]

The approach taken by the ECtHR reflects a practical application of the Citizens in Uniform approach, however by allowing member states a wide margin of appreciation one can argue that Strasbourg has failed to fully acknowledge the spirit of the doctrine. It can be observed from the *Engel* decision that the right to freedom of speech is

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[997] For example: *Le Cour Grandmaison and Fritz v France*, Appl. No. 11567/85, 53 DR 150 (1987) the Court found that the imprisonment of two conscripts who distributed information calling for the withdrawal of French troops from Germany did not violate Article 10. Similarly, in *E.S. v Germany* Appl. No. 23576/94 84 DR 58 (1995) the Court held that the dismissal of German military personnel for criticizing government policy on television was an acceptable limitation of rights under Article 10. The signing of confidentiality contracts by special forces personnel would also be an example of the voluntary restriction of Article 10 rights.

[998] (1976)1 EHRR 647 Para 72.

considerably more restricted in the lower ranks than it is in the high ranks of command level. This can be viewed as a necessary requirement of the chain of command in order to maintain an appropriate level of discipline, particularly in wartime. Political neutrality should be considered from two standpoints: the first concerns the degree of political independence from the government of which the member of armed forces personnel serves. The second concerns the extent to which servicemen need to remain independent in order to maintain practical functionality of the armed forces. The next section will focus upon internal dissent, namely freedom of speech in relation to unlawful orders and official complaints procedures.

7.6 Internal Dissent: Unlawful Orders and Official Complaints.

In the United Kingdom jurisdiction, armed forces personnel do not have a duty to obey an order if it is deemed unlawful; however in contrast there is no recognised obligation that servicemen have a duty to disobey unlawful orders either. One can consider however that there is an implied duty to disobey in the doctrine of individual accountability. Therefore, for any acts committed by a member of armed forces personnel, he will be in individually liable. This point has been reiterated by s.42 Armed Forces Act 2006 which has extended all acts 'punishable by the law of England and Wales' into the jurisdiction of the armed forces.[999] In contrast, the doctrine of command responsibility, applies to commanding officers. Under this doctrine, a commanding officer will not only be responsible for his own actions but for the actions of his subordinates. The United

[999]Section 42 Armed Forces Act 2006, see in particular Section 42(1) "A person is subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that-(a) is punishable by the law of England and Wales; or (b) if done in England or Wales, would be so punishable." See also Section 44 which deals with attempting criminal conduct, S.45 conspiring to commit criminal conduct, Section 46 inciting criminal conduct and S.47 Aiding, abetting, counselling or procuring criminal conduct.

Kingdom approach differs to Denmark, France and Italy, where soldiers in the respective jurisdictions have a duty to obey an 'obvious' illegal order.[1000]

In comparison, German military personnel conduct their duties in accordance with the concept of 'Inner Fuhrung.' Established alongside the 'citizen in uniform approach,' 'Inner Fuhrung' places its emphasis on "leadership and civic education." Moral and ethical considerations are therefore placed at the forefront of conduct in military life. It is stated specifically that the internal order of the armed forces should:

> "...diverge from society's standards of behaviour only where this is necessary to fulfil their military mission."[1001]

The method for implementing the doctrine resides in a responsibility for commanding officers to 'set an example' to their subordinates. This means that superiors are required to develop an environment of trust between themselves and their subordinates and be ready to talk to their servicemen. Individuals are given 'considerable latitude' in taking decisions and action and are able to actively develop their own opinions freely.[1002]

Nolte identifies that in the United Kingdom, servicemen take a risk by refusing to obey an order which they consider unlawful, when it is in fact lawful.[1003] The implied duty to disobey orders does not therefore account for the extent to which the individual serviceman has knowledge of the law. By incorporating all offences deemed criminal into the armed forces jurisdiction, the serving soldier may not be fully aware of the complexities of certain legal principles. The way in which a serviceman objects to the order is particularly important here. If he directly approaches the officer in question, he

[1000] *Above*, n 988, 93
[1001] Federal Ministry of Defense, Joint Service Regulation, Inner Fuhrung ZDV 10/1 updated 1993. Para 207.
[1002] *Ibid* para 302.
[1003] *Ibid*.

may be accused of using 'threatening or insubordinate language.'[1004] One way of legitimising the refusal to obey a command would therefore be to make an official complaint.

7.7 Official Complaints Procedures.

Until recently, the United Kingdom Armed Forces did not have a formal independent complaints procedure. Following the deaths of four army recruits at Deepcut Barracks in Surrey, an independent inquiry headed by Nicholas Blake QC investigated the circumstances surrounding the deaths and concluded that there were serious instances of bullying and harassment and that trainees who felt poorly treated were reluctant to complain against NCOs. Those who did complain were vulnerable to reprisals and received an 'ineffective response' by their 'immediate supervisors.'[1005] Ultimately, Blake identified that the system of military complaints cannot depend on the efficiency of an individual Commanding Officer or the perception 'he or she creates that the chain of command is approachable and caring.'[1006]He stated that the evidence had presented a 'substantial challenge to the present system,' identifying that other personnel had not brought instances of unacceptable conduct to the attention of the commanding officer. He further noted that, the confidentiality of complainants was an issue, the alleged abuser and other members of staff had been aware of visits made to the Army Welfare Service, this gave the potential for retaliation against the complainants.[1007]

The report recommended that a 'military ombudsman' be established with a remit to

[1004] Section 33 Army Act 1955 concerns insubordinate behaviour.
[1005] Nicholas Blake QC, The Deepcut Review, 2006.
[1006] *Ibid* para 12.83.
[1007] *Ibid.*

investigate complaints from servicemen or their families about 'specific allegations of conduct prejudicial to their welfare.'[1008] It was also suggested that the proposed ombudsman took a supervisory role in the investigation of complaints made to the authorities, for example the Royal Military Police. If the ombudsman was not satisfied with the way in which the complaint was handled he would be able to 'instigate legal proceedings to set aside legally flawed decisions not to prosecute.'[1009] The proposed ombudsman would have been in marked contrast to the equivalent civilian review bodies of the Civil Service Commissioners and the Parliamentary Commissioner for Administration in that neither have the power to instigate legal proceedings.

The government published a response to the review which acknowledged the need for an independent complaints commissioner but with significant limitations on the proposed powers. It argued that the proposed commissioner would undermine the chain of the command, would undermine the role of the prosecuting authorities and that the independent prosecuting authorities make their decisions under the general superintendence of the Attorney General.[1010]

It is submitted that the aforementioned response does not adequately consider the findings of the Blake Review. With regard to the command structure, Nicholas Blake QC identified at several points in the report that 'significant numbers' of trainee soldiers at Deepcut felt unwilling to approach their superiors.[1011] The success of the command structure system is largely dependent upon the persons within that system, whom may

[1008] *Ibid* para 12.101.
[1009] *Ibid.*
[1010] Response to Recommendation 26, *The Government's Response to the Deepcut Review*, June 2006 Cm 6851.

[1011] *Ibid* 12.82.

have a degree of personal involvement in the complaint, may be the subject of the complaint, or may be inclined to follow their own personal viewpoint to the detriment of the complainant. Moreover, there are difficulties associated with the role of the Attorney General in cases which may be of political importance. In considering whether or not a prosecution is in the public interest the Attorney General is expected to consult with ministers. Whilst the scope of this practice has now been limited informally by agreement between government and the Attorney General, the Shawcross exercise still extends to matters pertaining to national security of which the work of the armed forces would undoubtedly be included.

The Defence Select Committee agreed with the government's proposals to introduce a Service Complaints Commissioner, but voiced concerns as to the independence of the position.[1012] In response, the government argued that the commissioner would have 'significant powers.' it was stated that in order to 'introduce the greatest independence to the system' it would appoint someone independent of the armed forces and Civil Service, proclaiming that they hoped to 'open the field to as wide a variety of applicants as possible.'[1013]

One might assume that the best way of achieving the 'greatest independence' to the system would be to allow the position of commissioner to be entirely separate of the command structure. The Blake Review was established in response of allegations that

[1012] See *Armed Forces Bill: Proposal for a Services Complaints Commissioner*, 2006 HC1711, 8, recommendation 5: "We recommend that the House agree with the Lords Amendments establishing a Service Complaints Commissioner, but it should do so in the knowledge that there is concern that these amendments do not go far enough to ensure independence in the complaints process and that much of the detail remains to be established by secondary legislation."

[1013] *Armed Forces Bill Proposal for a Service Complaints Commissioner: Government Response to the Committee's Fourteenth Report of Session 2005-2006*, HC 180 Appendix 1. S.366 Armed Forces Act 2006 establishes the Commissioner.

there had been a 'cover up' of the events surrounding the soldiers' deaths. It is submitted therefore that an independent complaints mechanism is a fundamental necessity to indicate to the public and to Parliament that in the presence of an independent commissioner 'cover up' would be a highly unlikely occurrence.

On 1st January 2008 the first 'Services Complaints Commissioner' (SCC) was appointed as part of an independent complaint mechanism with substantial limitations, on the model proposed in the Deepcut Report. The Armed Forces Act 2006 affords both serving and former armed forces personnel the right to make a compliant if the serviceman believes that he has been wronged in any matter relating to his service.[1014] The process still utilises the command structure of which the Deepcut Report identified inherent difficulties.

The complaint is submitted in writing either by completion of a 'Service Complaint Form' or in the form of a letter in the first instance. There is a time limit which extends to three months from the time that the matter complained of occurred.[1015] This can be extended if the Commanding Officer (CO) decides that it would be "just and equitable to do so."[1016] Such examples given are if the serviceman is hospitalised or deployed on operations and thus is unable to have access to the materials necessary to make the complaint.[1017]

[1014] Section 334 Armed Forces Act provides that a person may complain: (1) If— (a) a person subject to service law thinks himself wronged in any matter relating to his service, or (b) a person who has ceased to be subject to service law thinks himself wronged in any such matter which occurred while he was so subject, he may make a complaint about the matter under this section (a "service complaint").
[1015] Section 334 (5), (6) Armed Forces Act 2006.
[1016] *Redress of Individual Grievances: Service Complaints*, Issue 1.0, Ministry of Defence, JSP 831 2007. para 5.
[1017] *Ibid.*

Complaints are excluded if they relate to pensions, discretionary awards, and discipline in relation to judgments made by court-martial and other criminal or disciplinary decisions, compensation and criminal injuries compensation, decisions relating to exemption from call out (applicable to reservists) and decisions made by the Security Vetting Appeals Panel.[1018] Interestingly, the recommendation by the Deepcut Report for family members and other concerned parties to complain has been included.

In making a complaint the serviceman has several options. He can seek informal resolution through the chain of command, lodge a service complaint directly with the Commanding Officer or submit an allegation with the Service Complaints Commissioner, if he is of an officer rank he may wish to petition the Crown.

From the outset, the guidelines appear to recommend the informal approach by stating that whilst a complaint 'must be taken seriously' many can be 'swiftly and satisfactorily resolved informally.'[1019]The emphasis on taking the informal approach would appear advantageous to servicemen who may fear that their complaint may result in either reprisal or that the complaint will not be dealt with in a serious and thorough manner.

7.7.1 Formal Complaints Structure

If the complaint is dealt with formally it may take the form of one of three levels. Level one concerns the 'prescribed officer' who will essentially be the Commanding Officer.[1020] If the Commanding Officer feels that he cannot deal with the complaint

[1018] There is a full list of exemptions contained in Schedule 1 The Armed Forces (Redress of Individual Grievances) Regulations 2007.
[1019] *Ibid* para 1.
[1020] *Ibid* para 15.

effectively, or that he lacks the 'authority to grant redress' he will submit it to Level two.[1021] Level two concerns the Senior Officer, who will be at least one rank above the Commanding Officer, again, the Senior Officer will consider whether or not it is appropriate for him to deal with the complaint, if he does not have the authority to grant redress he will refer the complaint to the next stage, level three. Level three concerns the most serious level and is headed by the Defence Council level which can form a 'Service Complaints Panel,'[1022] to be considered below.

7.7.2 Submitting a complaint directly to the Commanding Officer

If a Serviceman submits a complaint directly to the Commanding Officer, it may cause anxiety for servicemen wishing to make a complaint, again because of fears of reprisal. There is also the possibility that the Commanding Officer may be involved in the wrongdoing complained of. This factor has been considered and neatly dealt with by the appeals mechanism. If a CO is involved, his superior officer should be approached; if he too is implicated in the alleged wrongdoing then an officer of equal rank to the Superior Officer will be nominated by the lead headquarters for the respective service.[1023] The Commanding Officer who receives the complaint must also check to see whether or not he is implicated or is the subject of the complaint and if so, he is required to refer the matter to his immediate superior in the chain of command or if that officer is implicated in or the subject of the complaint and officer of equal or superior rank will be chosen by the lead head quarters of the respective service.[1024]

[1021] *Ibid.*
[1022] *Ibid.*
[1023] *Ibid*, para 2.
[1024] *Redress of Individual Service Complaints,* MOD, Issue 1.0 JSP 831.

Upon receiving a complaint the Commanding Officer will decide to either investigate the complaint, or to refer it to levels two and three. If the CO decides to investigate the complaint he will then make a decision as to whether the complaint is valid and whether or not he has the appropriate means of granting redress.[1025] If the Commanding Officer chooses to decide the complaint, the complainant has the option of having the matter referred to levels two and three if he is unhappy with the outcome. The Senior Officer at level two therefore acts as a further check on the actions of the Commanding Officer. If he chooses to investigate and decide upon the compliant he must consider whether to: uphold, reject, or refer the complaint. In doing so he must submit the outcome of his decision in writing to the complainant.

At level three the Defence Council has the option of making a decision on the complaint, of delegating the complaint to a Service Complaints Panel for consideration and a decision or delegating the complaint to the panel for consideration and a recommendation. The Defence Council will then make the decision based upon the recommendation of the panel.[1026]

The Service Complaints Panel is comprised of two serving military officers of a 1* rank.[1027] An independent member of the panel will be appointed in cases whereby the matter relates to instances of:

> "a. discrimination; b. harassment; c. bullying; d. dishonest, improper or biased behaviour; e. failure of the Ministry of Defence to provide medical, dental or nursing care where the Ministry of Defence was responsible for providing that care; f. negligence in the provision by Ministry of Defence healthcare professionals of medical, dental or nursing care; or g. concerning the exercise by a Service policeman of his statutory powers as a Service policeman."[1028]

[1025] See further Chapter Three Part 5 of the Regulations, *Ibid.*
[1026] *Ibid* Chapter Five Para 1.
[1027] Section 336 Armed Forces Act 2006.
[1028] Regulation 9 Armed Forces (Redress of Individual Grievances) Regulations 2007.

Section 336(7) gives the power for the Secretary of State to appoint an 'independent person' who must not be either a member of the Civil Service or a serving member of the armed forces.

One must ask if a person appointed by the Secretary of State can truly be regarded as independent. Whilst there are the clear exclusions under s.336 (7) to avoid a direct conflict of interest there are no defined exclusions which ensure that the 'independent' person is not associated with the Secretary of State in any way and that he or she does not have any other conflict of interest which may involve the armed forces in any way.

The use of the term 'independent' is misleading to the complainant and the layperson who may not either have the access or knowledge to fully research the Armed Forces Act or the related regulations. It is also quite apparent from consideration of the service complaints mechanism that the formal route is both procedurally complex and the appointment of an independent member of the panel by the Secretary of State adds to the formality. It may therefore be likely that an individual Serviceman may choose to have the complaint dealt with informally, to not proceed with the complaint at all, or if he or she is witness to serious malpractice, make an unauthorised disclosure to the media. The command structure may also dissuade servicemen, particularly in the lower ranks or of a young age (bearing in mind that a person can be enrolled in the armed forces at the age of 16) from making a complaint. The serviceman may either feel influenced my commanding officers, be nervous of the command structure, or fear reprisals for the result of the complaint. Most worryingly, at no stage does the structure allow for the complete confidentiality of the complainant. This fails to address the key concern of the

Blake Report which indicated that Servicemen did not have the protection of confidentiality.

7.1 The Role of the Service Complaints Commissioner

Speaking of her role, the newly appointed Service Complaints Commissioner (SCC) Dr Susan Atkins stated that:

> "The SCC is a very powerful 'somebody else,' people can right to me directly –as can family or friends on their behalf- and where I think it's serious enough I can put the complaint into the system at a higher level"[1029]

It is difficult to ascertain how the SSC can be deemed "very powerful." In comparison with the military ombudsman proposed by the Deepcut Report, the reality is that Commissioner has more of an advisory and oversight, audit type role. If an individual contacts the Commissioner, the serviceman will be advised on whether or not the complaint should be dealt with informally or formally by way of a 'service compliant.' If the matter is dealt with by a service complaint the SSC will then refer the matter to the Commanding Officer for investigation.

The Commissioner has no investigatory powers and in a similar way to the Parliamentary Ombudsman, will report yearly to Parliament. A father of one of the soldiers who died at the Deepcut Barracks has branded the role of the Commissioner as "pointless" and a "toothless tiger."[1030] The comments echo often lodged criticisms of the Parliamentary Ombudsman; however the main difference is that the Parliamentary Ombudsman does have the power to conduct investigations. The power to issue reports

[1029] Defence News, *First ever Service Personnel Complaints Commissioner appointed*, 7 Nov 07, Ministry of Defence website, accessible via: www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness (09/08/09).

[1030] Geoff Gray, father of Private Geoff Gray speaking on BBC News, Wednesday 7 November 2007

to Parliament has, as illustrated at previous points in this thesis, proved to be ineffective, as successive governments have chosen to ignore recommendations in the report.

One must ask what the benefits are to servicemen in approaching the Commissioner. In providing an advisory role, it can be suggested that the Commissioner is providing little more than a service which could be provided by the Citizens Advice Bureau or by personal research. In providing the referral role, by referring the complaint to the Commanding Officer, the Commissioner is effectively indicating that the complaint is of a serious nature. The SCC will be beneficial as she will undoubtedly have better access to the Commanding Officer than the respective complainant. However, by lacking the powers to personally investigate or if required to rule against the facts, the SCC's impact is minimal.

The government's justification that the implementation of the Deepcut Review's perceived ombudsman would be detrimental to the command structure requires closer analysis. The chain of command can be identified as a common feature of all armed forces. However, this has not prevented the implementation of Ombudsmen in other jurisdictions and this was made quite apparent in the Deepcut Review.[1031]

What is most concerning is the Commissioner's lack of involvement once the complaint is referred to the Commanding officer. This, in conjunction with the lack of a truly independent appointed member of the panel leaves significant gaps in the accountability mechanism.

[1031] http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf (accessed 04/08/09). para 12.94.

The author proposes that a solution to both of these difficulties could easily be obtained. The independent member of the panel should be replaced by the Service Complaints Commissioner. This would ensure that all cases that are heard by the panel are dealt with consistently and with the appropriate level of oversight. Most importantly such a reform would not need a significant change in the drafting of the legislation. The Service Complaints Commissioner already satisfies the criterion prescribed by s.336 (7) Armed Forces Act, which proscribes that the independent member of the panel should not be a member of the Civil Service or armed forces. Furthermore, the provision which regulates the appointment of the Service Complaints Commissioner, s.366 (3) Armed Forces Act effectively mirrors the provisions contained in s.336 (7). Therefore, there is nothing to prevent the Secretary of State from appointing the Service Complaints Commissioner as the independent person on the panel. If the Secretary of State chose to codify the adapted role of the Commissioner, there is legislative scope to do so by virtue of s.336 (4) which requires the Secretary of State to provide regulations for the complaints mechanism.

A pertinent argument is that the proposal would increase the Commissioner's workload. However, the Commissioner's oversight role suggests that she would already have a close interest in the complaints and would need to fully read and consider any reports made by the Defence Council. In being involved with the adjudication of the complaint, the Commissioner would have an intimate knowledge of the matters in question and would also save a considerable amount of time in having to report against any matters where she feels that the complaint was not handled properly. One may also argue that the Commissioner would be insufficiently qualified to be a member of the complaints panel. However there is nothing in the Armed Forces Act or the Regulations which state that the independent person should possess any specialist skills or attributes, merely that they

are independent of the armed forces or the Civil Service. This chapter shall now progress to consider how other jurisdictions deal with complaints by armed forces personnel and oversight of complaints mechanisms.

7.2 Comparative Complaints Mechanisms.

In the Republic of Ireland, the Irish Ombudsman for the Defence Forces provides a close comparison to the UK Services Complaints Commissioner.[1032] The position was established in 2005 and is independent of the Irish Defence Force and the command structure. The Ombudsman is statutorily defined by virtue of the Defence Forces Act 2004 (Eire) and is appointed by the President of the Republic of Ireland on recommendation of the government. The complainant is required to exhaust all internal procedures before making a complaint to the Ombudsman. If the Ombudsman investigates the complaint she can make recommendations to the Minister of Defence which offers proposals for corrective action. If she is unsatisfied with the response she may voice her concerns by publishing a special report.

The Ombudsman for the Defence Forces (Eire) offers a compromise which respects the traditional command structure of the armed forces and which provides oversight where necessary. However, the Ombudsman is excluded from investigating concerns raised about security or operational matters.[1033] This imposes a substantial limitation on the investigatory remit of the office, suggesting that the Ombudsman is best suited for investigating matters of person to person employment grievances (e.g. discrimination or allegations of personal malpractice, what is known as in the US Public Service

[1032] See website: http://www.odf.ie (accessed 09/09/08).
[1033] See further: Section 5 Ombudsman (Defence Forces) Act 2004.

jurisdiction as 'prohibited personnel practices') rather than major allegations of malpractice involving servicemen on operations.

In Australia, the Commonwealth Ombudsman has the jurisdiction to investigate complaints under the title of 'Defence Force Ombudsman.' The Ombudsman has a dedicated 'Defence Team' and can receive complaints from serving or former members of the Australian Defence Force. In direct contrast to the United Kingdom Services complaints mechanism, the Defence Ombudsman (AUS) has the power to investigate complaints about matters of discharge, pay and allowances, pensions and internal complaint handling with the ADF.

The Defence Ombudsman regularly cooperates with agencies which have an 'overlapping function' within the Department of Defence. The Complaints Resolution Agency deals with internal grievance complaints whereas the Inspector-General of the Australian Defence Force (IGADF) has the jurisdiction to investigate complaints of unacceptable behaviour. The IGADF is independent of the chain of command and offers direct access for ADF personnel and also any other person who wishes to make a complaint. The IGAF's investigatory remit is as follows:

> "abuse of authority/process, denial of procedural fairness, cover-up or failure to act; unlawful punishments and, victimisation, harassment, threats, intimidation, bullying and bastardisation(corruption)."[1034]

The most recent Defence Report to consider the scheme appeared to identify that the IGAF system is in good shape. It stated that focus group discussions with ADF units, representing 20% of the ADF's total personnel identified that ADF personnel 'would not hesitate to use avenues of complaint when required to do so,' that they were satisfied that

[1034] Part 11A Ombudsman Act 1976.

the disciplinary process was fair and that there were 'few instances of bullying and harassment.'[1035]

The Australian Department of Defence (Defence) operates a 'Defence Whistleblower Scheme.' The scheme extends to both civilian defence employees, members of the Australian Defence Force and contractors or other persons supplying goods or services to Defence.[1036] Servicemen are expected to report concerns through the chain of command. However, if the serviceman perceives the chain of command to be 'tainted or ineffective' or he believes that he will be 'victimised, discriminated against or disadvantaged' he may raise the concern by using the whistleblower scheme. The types of concern misconduct which may give rise to a whistleblower report have been defined to include:

> "(a) fraud or any other activity that may breach commonwealth legislation (b) misconduct under the Public Service Act 1999 (C) unethical behaviour (d) misuse or mismanagement of departmental resources (e) harassment or unlawful discrimination (f) breaches of security (g) behaviour that could jeopardise the good reputation of Defence and that of its members; and (h) practices that compromise occupational health and safety."

The scheme operates a 24 hour whistleblower hotline, and concerns may also be raised in person, by arranging a meeting with the director of investigation and recovery, or in writing. The Inspector General will then decide, in consultation with the serviceman the best way to investigate the complaint, the complaint may be investigated by the Inspector General or the matter may be referred to the chain of command, Service Police, Defence Security Authority or the Defence Safety Management Agency. In exceptional circumstances the matter may be referred to an external agency to Defence.

Servicemen are protected from detrimental treatment for raising a concern through either the chain of command or by using the Defence Whistleblower Scheme by virtue of s.16

[1035] See Department of Defence, *Annual Report*, 2006-2007, 157.
[1036] Defence Instructions (General), *Defence Whistleblower Scheme*, PERS 45-5, 1st July 2002.

Public Service Act 1999. Whilst the criticisms of s.16 Public Service Act 1999 identified in Chapter five of this thesis still apply, the position of servicemen in ADF is further bolstered by the fact that instances of detrimental action may be referred to Service Police if it constitutes a disciplinary offence under the Defence Force Discipline Act 1982.[1037] The scheme provides assurances for whistleblowers whose identity may be known or guessed as a result of the concern being raised, stating that specific measures will be undertaken to protect the serviceman from detrimental treatment or discrimination if necessary.[1038]

The Australian independent internal review mechanism would be deemed unworkable in the United Kingdom jurisdiction. One must why this is the case as the principles of the Australian Armed Forces have been obtained historically by the United Kingdom Armed Forces. The UK Government's justification for disallowing one independent review mechanism investigatory powers does not appear valid when the Australian Defence Force has two.

In Canada, the Canadian Army operates an ethics programme and has a 'Lamplighter Protocol.'[1039] The protocol supports a legal obligation for servicemen to report malpractice by allowing for designated officers, namely Unit Ethics Coordinators, Area Ethics Coordinators the Army Ethics Officer, to act as a conduit to report concerns to the 'proper authority' to investigate.[1040] The Ethics Officer operates an Ethical Helpline which offers guidance and allows servicemen to report concerns. The aforementioned officers do not have the power to investigate but can track the concerns raised to them.

[1037] http://www.defence.gov.au/defencemagazine/editions/200608/groups/ig.htm (accessed 05/04/10).
[1038] http://www.defence.gov.au/ig/gir.htm (accessed 05/04/10).
[1039] LFCO 21-18: http://www.army.forces.gc.ca/land-terre/aep-peat/lfco-ocft/annexc-eng.asp (accessed 10/05/10).
[1040] *Ibid*

The protocol identifies that members of the Canadian armed forces do not have legislated protection for raising concerns. A 'degree of anonymity' is provided but confidentiality cannot be guaranteed. Despite the noticeable lack of protection offered from reprisal the protocol aims to create a culture 'indirect encouragement' for servicemen to raise concerns.[1041]

The Canadian Armed Forces has the 'National Defence and Canadian Forces Ombudsman.' Like the Australian mechanism, he too has investigatory powers and offers direct access for servicemen, albeit with limitations.[1042] The Ombudsman was created after a public enquiry into Canadian military activities in Somalia.[1043]

The Ombudsman (CA) acts independently as a 'neutral third party' and reports directly to the Minister of National Defence. Since the office was established it has been approached more than 12,000 times by members of the defence community.[1044] The Ombudsman (CA) will not be allowed to investigate a complaint if the complainant has not 'availed himself' of one or more of the following mechanisms available to the complainant.

> "A. The CF (Canadian Forces) redress of grievance process; B. The public service grievance and complaints process; C. The Security Intelligence Review Committee; or D. The Complaint process under Part IV of the National Defence Act."[1045]

The Ombudsman (CA) must then consider if:

[1041] *Ibid*
[1042] To be considered below.
[1043] On 16 March 1993 the Canadian Airborne Regiment captured and severely beat a Somali teenager who later died in custody.

[1044]See: *About Us*, National Defence and Canadian Armed Forces Ombudsman Website, www.ombudsman.forces.gc.ca (accessed 02/03/09) for an analysis of the public service grievance process and the Security Intelligence Review Committee see chapter 5 of this thesis.
[1045] Ministerial Directives, para 13. See further 'Our Mandate' National Defence and Canadian Forces Ombudsman website: www.ombudsman.forces.gc.ca (accessed 02/03/09).

"A. Access to a complaint mechanism will cause undue hardship to a complainant; B. The Complaint raises systematic issues; or C. The complainant and the competent authority agree to refer the complaint to the Ombudsman."

A member of the Canadian Forces has the choice of several different avenues with which to make an official compliant. This reduces the chance of soldiers making unauthorised disclosures to the media. However, the consequence of this is that the serviceman would first need to attempt to use one of the available mechanisms before the Ombudsman can investigate. If the serviceman does not have confidence in the aforementioned mechanisms he may be dissuaded from raising the concern, meaning that the Ombudsman (CA) would not be provided with information of what may be a very serious public concern. Yet in contrast to the UK armed forces, Canadian soldiers are at a significant advantage over their UK counterparts. Again, the external complaint and accountability mechanisms are allowed to work alongside the internal complaints process provided for by the CF redress and grievance process.

Before leaving office the outgoing Ombudsman (CA) released a report in 2005 which was highly critical of the Canadian mechanism. He stated that the office had failed to obtain the full mandate it should have and that this was due to 'exaggerated fears' within the Canadian Defence Forces of 'outside interference' with 'military autonomy.'[1046] He stated that a 'fully effective ombudsman's office has to be credible, both to the members who rely upon it and to those who are subject to its oversight.'[1047]

The aforementioned comments provide considerations of best practice, to which the UK Service Complaints Commissioner should be based, most notably the wording focuses

[1046] *Overhauling Oversight, Ombudsman White Paper, A Compromised Mandate,* Para 3 the full, comprehensive report is accessible online via: http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/wp-lb/rep-rap-03-eng.asp#Compromised%20Mandate (accessed 10/09/09).
[1047] *Ibid* para 1.

upon independence but also on the key consideration of 'credibility.' Again, one must ask if the UK SCC can be regarded as credible, despite its lack of investigatory power.

In the United States, significant reforms have been made in relation to the armed forces complaints mechanism due to scandal surrounding the conduct of US soldiers at Abu Grahib prison. A reserve soldier, Joe Darby was leant a CD containing a number of photographs during his time serving in Iraq. The CD had photographs containing general shots around the region but also contained horrific images of the abuse of Iraqi prisoners by his colleagues. Darby chose to send the CD to the US Army Criminal Investigation Command. An investigation followed which led to several soldiers including, Private Lynndie England (who was featured posing in a number of the photographs) being convicted by an army court-martial. Derby had wished to remain anonymous. However, during a televised Senate hearing, the Secretary of Defense Donald Rumsfeld publically thanked him. As a consequence, Derby's home in Maryland has been vandalised, he has faced death threats and has been forced to live in protective military custody.[1048]

The events surrounding Joseph Derby had led to an overhaul of the complaints reporting mechanism. Armed forces personnel are able to make a complaint via the chain of command[1049] but also have direct and confidential access to either their respective service Inspector General (IG) or directly to the Department of Defence Inspector General by using the 'Defense Hotline.' The Service Inspector Generals act effectively as 'an extension of the commander,' working directly for him, the Inspector General has the power to conduct investigations but does not have the power to provide resolution, as this is dealt with by the commander. This means that there must be a close relationship

[1048] See further H. Rosin, *When Joseph Comes Marching Home*, Washington Post, 17 May 2004.
[1049] The communication to the chain of command will be regarded as a protected communication' under s.1034 (2) (b) Title 10 U.S.C.

between the commander and the Inspector General. It is stated that for the role to be effective the IG must be 'sufficiently independent' in order to continue to receive complaints from soldiers.[1050] Whilst one may question the independence of a Service Inspector General, there is a clear advantage in that the IG is a service officer within the respective service, and that the IG system is therefore in keeping with the traditional 'command structure' doctrine. The Department of Defense Inspector General is, in comparison, entirely separate of the command structure and instead reports directly to the Secretary of Defense and Congress.[1051]

The Defense Hotline allows for any person whether a serving member of the armed forces or a civilian to report instances of a violation of ethical standards or the law.[1052] It is staffed by professional investigators with knowledge of the relevant laws and regulations.[1053]Calls can be made anonymously or identities of callers will be kept confidential.

Under the Military Whistleblowers Protection Act, members of the US armed forces have direct access to members of Congress and like members of the intelligence community, are protected from reprisal for doing so. Under the reforms following the release of the identity of the Abu Grahib whistleblower, such communication is now a protected communication and is defined as:

> "A communication in which a member of the Armed Forces provides information that the member reasonably believes evidences a violation of law or regulation, including sexual harassment or unlawful discrimination, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and

[1050] See further, First Army Portal, Evolution of the IG: www.first.army.mil/ig/igevolut.htm (accessed 10/09/08).
[1051] For a discussion on the role of the Department of Defense IG see Chapter 5.
[1052] See DOD Website: www.dodig.mil/HOTLINE/index.html (accessed 10/09/08)
[1053] *Ibid.*

specific danger to public health or safety..."[1054]

Despite the improvements the Government Accountability Project (GAO) has called for a radical overhaul to bring the military in line with current reforms of the Whistleblower Protection Act.[1055] It is clear that the all of the comparative mechanisms detailed above provide both internal and external complaints reporting mechanisms. It therefore appears unacceptable that the United Kingdom is incapable of providing such a mechanism.

7.3 Conclusion

7.3.1 Theoretical model

It has been identified in the aforementioned analysis that Crown servants as members of the armed forces have an enhanced duty of loyalty compared to employees of the Civil Service. He is required to follow force discipline codes, must follow regulations regarding potential contact with the media, and furthermore is required to adhere to the Official Secrets Acts. The consequences of an individual exercising his right to freedom of expression on moral autonomy grounds may result in charges of insubordination and disciplinary action taken against him. It is submitted therefore that the nature of work in the armed forces is likely to have a detrimental impact the expression of value judgements.

This thesis identified that the service regulations discriminate between the superior and subordinate ranks. The subordinate ranks are faced with significant barriers to

[1054] Statute 1034 Title 10 U.S.C. Regulation: DOD Directive 7050.06. Note that the provision did not prevent the unauthorised disclosure of 91,731 documents to the wikileaks website. At the time of writing biggest leak of its kind is currently under investigation by US authorities.
[1055] A.Miles, *Military Whistleblowers Need Protections*, Buffalo News, 21 March, 2007.

communicating with the public. The regulations place restrictions on communication with the media and engagement with members of the public by writing publishable material, communicating on social networking sites, taking part in surveys and speaking at conferences without prior authorisation. The restrictions in place, therefore, make it very difficult for a serviceman in the subordinate ranks to engage in protest whistleblowing of any sort. In contrast, whilst senior military personnel require authorisation from a minister of the crown before being interviewed for the media, senior military figures have openly voiced their concerns about government policy they believe to be wrong or detrimental to the armed forces. This may be identified as protest whistleblowing.

One must question whether the regulations are fair. The regulations clearly discriminate between senior officers and those serving in the subordinate ranks; however, all of the theoretical justifications for freedom of expression identified in chapter two of this thesis do not discriminate between different categories of communicators. The justifications for restricting the right to freedom of expression are based around the prevention of speech which causes harm. Shauer provides the most appropriate analysis by identifying that communication to a group of people may cause harm to society by prompting those individuals to disobey the law.[1056] In the context of the armed forces, it is submitted that communication by armed forces personnel may be harmful in two ways. Firstly, that the speech contains details regarding operational information, such as the whereabouts of personnel in theatre. Second, where the communication in itself causes armed forces personnel to disobey orders or disregard the chain of command, causing a breakdown in discipline. The specific harm caused may be where the failure to obey an order results injury or capture of service personnel by enemy combatants.

[1056] *Above*, n 12, 10.

The second identifiable harm has close similarities to discussions associated with civil disobedience. In discussing moral objections for military activity and armed forces personnel, Coady conducts a theoretical analysis drawing reference to Hobbes' Leviathan. Where Hobbes identifies that a citizen may refuse to fight an enemy 'without injustice,'[1057] Coady suggests that this assessment must be made by an individual choosing whether or not to serve the state, identifying that the individual will need to determine how grave the risk is posed by the enemy to the state itself. It is submitted that this reasoning is significant as service personnel may be required to fight in war zones whereby no immediate threat is posed to the United Kingdom. If this analysis is correct, this would provide the scope for individual service personnel to engage in protest whistleblowing if they believed a decision to conduct military operations in another state was wrong. Here, it should be identified that longstanding judicial reasoning from the United States Supreme Court has suggested that speech which may affect military operations may be restricted if to allow it would result in 'imminent lawless action.'[1058]

It is necessary to further distinguish between the possible forms of civil disobedience. A serviceman who chooses to disobey an order by a superior will most likely be engaged in what Dworkin correctly refers to as a persuasive act.[1059] This is because the serviceman will be required to justifiy his actions or indeed inaction to his superiors and his fellow servicemen. In comparison the unauthorised disclosures of thousands of documents by an alleged serving member of the United States military would be a non-persuasive act. This is because the disclosures are designed to shock both the governments involved and

[1057] C.A.J., Coady, *Messy Morality and the Art of the Possible* (1990) *Proceedings of the Aristotelian Society*, 64.
[1058] *Brandenberg v Ohio* [1969] 395 US 44.
[1059] *Above*, n 88.

members of society into taking action. The defence of necessity may be more easily justified whereby an individual discloses information in order to prevent an imminent threat of harm. However, again it must be noted that necessity should not be justified where the disclosure of the information could be as equally or as more harmful as the act the serviceman is trying to prevent.[1060]

7.3.2 Legal model

Jurisdiction	Internal Mechanism	External Mechanism
UK	Level 1: Prescribed Officer (Commanding Officer. Level 2: Senior Officer. Level 3: Defence Council.	Services Complaints Commissioner.
EIRE	Commanding Officer, if not dealt with may complain to the Minister. Company Commander, may escalate concern to Adjutant General. (S.144 Defence Act 1954).	Ombudsman for the Defence Forces (No direct access must exhaust internal procedures first).
AUS	Commanding officer. Internal grievance procedure via the Complaints Resolution Agency. Defence Whistleblower Scheme	Defence Force Ombudsman. Inspector General of the Australian Defence Force.
CAN	Grievance submitted to Commanding Officer in line with the Canadian Forces redress of grievance process or the Public Service Grievance and Complaints Process Canadian Army Lamplighter Protocol	National Defence and Canadian Forces Ombudsman Must exhaust following procedures: A. The CF (Canadian Forces) redress of grievance process; B. The public service grievance and complaints process; C. The Security Intelligence Review Committee; or D. The Complaint process under Part IV of the National Defence Act.
U.S.	Chain of Command – May constitute a 'protected communication': Military Whistleblowers Protection Act s.1034 (2) (b) Title 10 U.S.C.	Service Inspector Generals. Department of Defense Inspector General (including Defense Hotline to report concerns). Direct Access to members of Congress – May constitute a 'protected Communication' - Military Whistleblowers Protection Act

From the above account of comparative mechanisms it is clear that there are many different options available, both for complaints handling and the provision of oversight. What is most apparent is that despite fears of interference with the command structure, an independent mechanism can exist alongside the existing internal structure. The

[1060] This reasoning is supported by Brudner's theoretical concept of necessity, see further *Above*, n 74, 365.

Australian approach is the most indicative of this and as the United Kingdom armed forces are institutionally similar one must ask if the Service Complaints Commissioner is the best possible oversight mechanism for armed forces personnel.

The Citizens in Uniform approach identified in *Engel* suggests that it will be necessary for both reasons of discipline and for the protection of national security that expression rights of service personnel may be justified as per Article 10 (2). It is necessary, however, to consider the different types of expression that this restriction may permit. There is a difference between the serviceman who makes an unauthorised disclosure in order to publish or article for a fee, the serviceman who chooses to openly question and rally support from his fellow troops to question a decision or policy that he does not agree with, and the serviceman who may be able to provide information that is of a high value to the public interest.

The European Court of Human Rights has repeatedly identified that 'freedom of expression constitutes one of the essential foundations of a democratic society and for each individual's self fulfilment.'[1061] In order to be consistent with these values it is submitted that a public interest defence is required in the Official Secrets Act for 'last resort disclosures.' The Council of Europe Resolution 1429 holds that whistleblower protection should extend to service personnel in the armed forces. Most importantly, a court must make a determination of the public interest value of the information. This reasoning is entirely consistent with the 'citizen in uniform approach' as citizens do not agree to relinquish their Convention rights, but instead agree to a proportionate restriction. Where the information is considered to be of a high value to the public

[1061] See for example: *Lingens v Austria* (1996) 8 EHRR 103, para 41.

interest this is likely to render any restriction and subsequent sanction imposed on the communicator as disproportionate. It is again reiterated that the *Guja v Moldova* framework should be applied. In conducting the proportionality analysis the court should therefore place emphasis on whether the applicant had alternative means for making the disclosure.

In the light of the wide ranging restrictions of speech imposed on United Kingdom Armed Forces Personnel, the requirement to provide a strong, consistent and trusted accountability mechanism for complaints has become of fundamental importance to the accountability of the UK armed forces. The absence of a strong, independent and clearly accountable mechanism make any restriction of speech less valid and the potential for armed forces personnel to make unauthorised disclosures a more likely possibility. Therefore a balance must be achieved between the restriction of speech and the right for members of the armed forces to report concerns through a defined and trusted reporting process.

With regards to mechanisms available to servicemen in comparable jurisdictions one can ascertain that the Ombudsman for the Defence Forces (Eire) requires servicemen to exhaust internal procedures before allowing complaints to be made to her office. This may act as a bar to concerns being raised because a serviceman who does not trust the chain of command, perhaps because the officer is involved in the concern or because he does not believe the matter will be dealt with appropriately may not want to take the risk in raising a concern this way.

The whistleblowing mechanism open to members of the Australian Defence Force

encourages servicemen to raise concerns through the chain of command but allows for a direct approach, through the Defence Whistleblower Scheme, to the Inspector General of the Australian Defence Force. The Defence Whistleblower Scheme is available to both servicemen of the ADF and Civilian members of defence. There are clear benefits of allowing both civilian workers and members of the armed forces the opportunity to raise concerns and obtain a degree of employment protection for doing so.

In the United Kingdom, the review by Charles Haddon-Cave QC into the crash of a Nimrod aircraft in Afghanistan which caused the death of 14 servicemen identified that safety concerns had been ignored.[1062] Furthermore, the report highlighted failings involving the Air Force, the Ministry of Defence and private contractors BAE Systems and Quintex. In a working environment which requires cross cooperation between servicemen and Civil Servants, it would make sense for employees of both the services and the Ministry of Defence to be able to raise concerns through the same channels and to receive protection where necessary. Civil Servants already receive PIDA protection. One must ask whether servicemen should have access an equivalent degree of protection in order to foster a culture whereby servicemen have the confidence to raise concerns to an independent mechanism when there is a block in the chain of command.

Servicemen of the armed forces are distinct from civilian employees, not only in that they do not qualify for PIDA protection but by the fact that the very nature of their work signifies a very different employment relationship and organisational culture. The Australian mechanism deals with the risk of reprisal to servicemen by making it a forces discipline issue, subject to forces regulations rather than an employment issue. This

[1062] http://www.official-documents.gov.uk/document/hc0809/hc10/1025/1025.pdf (accessed 04/04/10).

method effectively supports the protection of those who raise concerns whilst recognising the unique culture of the armed forces, which places the chain of command and discipline at the forefront.

Similar to the Australian mechanism, both the Canadian and United States mechanisms offer a dedicated whistleblowing hotline with investigations carried out by an Inspector General or Canadian Forces Ombudsman respectively. The US Military Whistleblowers Protection Act allows US servicemen to obtain protection for disclosures made directly to congressional committees. This may be seen as a better protection than that offered to members of the US Intelligence Community who must first seek authority from their respective agency head before approaching Congress. The Canadian Ombudsman is however limited in that concerns reported to his office must first be raised using one of the available grievance or complaint reporting procedures. This may have the consequence that the concern may become caught up in administrative processes or may not be raised at all if the Serviceman does trust the mechanisms, meaning that the Ombudsman (CA) will not be provided with the necessary information to investigate an important public concern.

The Canadian Army 'Lamplighter Protocol' acts in a similar way to the Services Complaints Commissioner in that it is used to record and pass on complaints to an officer to investigate. Whilst the protocol lacks the required teeth to be an effective whistleblower mechanism it sits alongside the existing National Defence and Canadian Forces Ombudsman and exists as part of a wider framework to promote a culture of ethics in the Canadian Army. The lamplighter protocol exists to enhance the internal mechanisms in place in the Canadian Army.

The Services Complaints Commissioner represents a missed opportunity to the detriment of the servicemen that the mechanism aims to protect. If one considers the findings of the Deepcut report in full, the government failed to adequately deal with the main concerns that internal complaints dealt with by the command structure were ineffective. A crucial failing of the SCC is that it has been set up to act as a type of lamplighter protocol – a means to pass on and record concerns to be investigated internally – rather than to act as an investigatory and oversight body in its own right. Unless the SCC receives the jurisdiction to investigate and report on concerns, Servicemen in the United Kingdom Armed Forces will not be provided with a robust mechanism to report concerns and a viable alternative to unauthorised disclosure. The proposals made in this chapter (at part 1.8) are easily achievable and should not be overlooked because of fears that the command structure will be affected. An effective accountability mechanism can only further enhance the reputation of both the command structure and the United Kingdom Armed Forces.

CHAPTER EIGHT

CONCLUSIONS

"Democracy's best oversight mechanism is public interest disclosure"

9/11 Commission Panel Report[1063]

This thesis has aimed to provide an insight into authorised reporting of concerns through the official mechanisms available, and unofficial disclosures made to the media and the possible consequences for making those disclosures. It has also considered the position of members of the Security and Intelligence Services and armed forces who have special duties and obligations and do not have access to the Public Interest Disclosures Act.

Chapter one of this thesis identified a number of theoretical justifications for freedom of expression, identifying that an individual has a right follow his own moral which may differ from societal norms. Whistleblowing speech may be justified to enhance the individual and, consequentially the recipient audience. It may be identified that the strongest arguments for raising concerns in the public interest are the justifications from truth and from participation in a democracy. In particular, these arguments most closely cohere with article 10 values.

Crown servants have an instrumental part to play in the running the Executive and the nation. If Executive malpractice occurs, it is the Crown servant who will most likely be

[1063] July 2004, 103.

aware of it. In a democratic society, Crown servants are in the unique position to participate in the oversight of the Executive. In a Convention compliant democracy, citizens have a right to communicate and receive information which is of a public interest.[1064] Such information may include matters of serious public concern[1065] giving rise to criticism of the government or public figures[1066] that must be subject to close scrutiny, not only of the legislative authorities, but also of the press and public opinion.[1067]

The identified theoretical justifications and Strasbourg jurisprudence differ in relation to freedom of expression in employment. Whilst the theoretical justifications hold that freedom of expression can only be justified to prevent harm, Strasbourg has held that an individual's chosen employment may impact on his right to freedom of expression under art.10. Crown servants agree to abide by rules of conduct in relation to political activities, legal obligations in relation to the law of confidence and the Official Secrets Acts. Failure to abide by the aforementioned restrictions is likely to result in the Civil Servant losing his employment, or being prosecuted under the Official Secrets Acts. Restriction of political expression and activity may be justified under art.10 (2) ECHR, whereby an individual choosing to engage in such employment agrees to a voluntary restriction of his art.10 rights. It is submitted that the restriction of political expression and the restriction of the right to communicate information obtained in the workplace creates difficulties for Crown Servants who intend to (as Vickers correctly distinguishes) become a 'watchdog whistleblower' or a 'protest whistleblower.'

[1064] *Sunday Times v UK* (1979) A 30.
[1065] *Thorgeirson v Iceland* (1992) 14 EHRR 843.
[1066] *Lingens v Austria* (1986) 8 EHRR 103.
[1067] *Castells v Spain* (1992) 14 E.H.R.R. 445.

Crown servants owe a duty of loyalty to their minister and also to the government of the day. However, paragraph 8 of the Civil Service Code makes it clear that Civil servants 'must not deceive or knowingly mislead ministers, Parliament or others.' Moreover the Code states at, paragraph 13, thatCivil Servants must be politically impartial. The provisions of the code are undoubtedly in conflict, particularly in situations whereby the Crown Servant observes Executive malpractice.

An individual who becomes engaged in protest whistleblowing is likely to encounter the most difficulty in raising a concern about a policy decision which he believes to be wrong. Protest whistleblowing is currently not covered by the Public Interest Disclosure Act 1998. Where an individual discloses policy documents, not to prove wrongdoing or malpractice in the content of the information, but to prove that the substance of the decision making behind the policy is wrong, based upon his experiences, it will be necessary for a court to apply the most appropriate standard of review.

Strasbourg has traditionally provided a high standard of protection for political expression. This clearly extends to the protection for speech which may criticise the actions of a public authority.[1068] The right to express one's opinions must therefore be considered as worth of protection as the expression of factual or evidence based information. It will be for the domestic courts to determine the public interest value of the information concerned by engaging the proportionality analysis. In order to apply the appropriate standard of review it is submitted that where the court is making a determination of 'protest whistleblowing' the analysis should be based with particular reference to *Lingens v Austria*. Where the information concerns 'watchdog'

[1068] *Ibid.*

whistleblowing, it is submitted that the framework in *Guja v Moldova* should be used as it places emphasis on determining the truth of the disclosures.

It is identified that where the Crown servant has identified that an individual has purposefully mislead Parliament and or the general public, this is likely to provide evidence of wrongdoing to which the Crown servant may raise and obtain protection using the existing Civil Service Code. It is submitted that where the expression of value judgments is at issue, an Employment Tribunal must, as per their obligations in s.6 Human Rights Act, provide protection.[1069] Because the Public Interest Disclosure Act 1998 places emphasis on 'watchdog whistleblowing' it is noted that a tribunal may not place adequate consideration to the expression of value judgements. It is submitted that enforcement of art.10 rights may be dealt with separately to a Public Interest Disclosure Act claim. It may however, alternatively be necessary to use s.3 Human Rights Act in order to read down wording to ensure that s.43B is compatible with art.10 when the Employment Tribunal is making a determination regarding the disclosure of policy documents not covered by the 'protected disclosures' identified in that section.

In order to enhance protection for Civil Servants who raise concerns about policy issues, it is submitted that the Civil Service Code be amended to include a new section relating to 'gross mismanagement' based upon the approaches taken in the New Zealand and Canadian jurisdictions identified in chapter six of this thesis. By placing the amendment in the Civil Service code, the employee will be able to obtain already existing employment protection under s.43 B PIDA, for raising a concern about a breach of a legal obligation. It will be identified that in order for this reform to take effect, reforms

[1069] Based upon the reasoning identified in *Lingens v Austria.*

will be required to the accountability mechanisms available to Crown servants.[1070]

8.1 The Emergence of Online Outlets to Facilitate Disclosure

Whilst this thesis has identified that disclosures to *Wikileaks* or a similar organisation may be justified by using the theoretical arguments for freedom of expression, the resulting disclosures may cause identifiable problems. The anonymous disclosure of official documents, without information to provide an explanation of the contents may mean that the messages communicated may be either lost or misunderstood. Whilst the recipient audience may benefit from the disclosures, this thesis has identified that, so far, the organisation has been reliant upon traditional media outlets to provide accessible analysis and promotion of the material to the public. The consequences of *Wikileaks* acting as a conduit, however, mean that the proximity between the source and the recipient audience becomes much wider than the traditional journalist and source relationship. As Bok correctly identifies, this means that the messages communicated by the whistleblower may be lost whilst the potential for newspapers to publish inaccurate or misleading information because of an inability to check and confirm information directly with the source is increased.[1071]

Whilst Wikileaks has promoted a 'safe haven' for anonymous whistleblowing, chapter three of this thesis identified that the protections afforded may not be absolute. The process of contacting Wikileaks or a similar organisation may still require the Crown Servant to access his internet service provider, search via a search engine provided by organisations such as Google and to communicate using email or social networking

[1070] See further below.
[1071] *Above*, n 44.

websites. The apparent ease in which information has been obtained from those websites may undermine the systems that *Wikileaks* has in place to protect whistleblowers.

Part of the motivation in contacting *Wikileaks* instead of directly contacting a traditional media outlet may stem from the reasoning that domestic courts in the United Kingdom have failed to afford adequate protection to journalistic sources. The cases of *Ashworth* and *Interbrew*, in particular, identify that the UK courts have failed to afford sufficient weight to the protection of journalistic sources by wrongly focussing on the malevolent motive of the source, to which the Strasbourg Court in *FT v UK* identified that determination of why the source was motivated to disclose the information can only be properly ascertained by cross examination of the source. The objective of an application for source disclosure is not to determine the guilt or innocence of the source and therefore the motivation of the source should not be afforded sufficient weight in the proportionality test.

8.2 Official Mechanisms

It is submitted that the ECtHR decision in *Guja v Moldova*, places a positive obligation on the Civil Service and Civil Service Commission (as per their obligations in s.6 Human Rights Act 1998) to provide effective alternatives to unauthorised disclosures.

If a Crown servant observes malpractice he may approach his line manager or alternatively his nominated officer. A report by the charity Public Concern at Work highlighted that the provision for nominated officers differed considerably from department to department, meaning that a Crown servant in one department is

considerably better off in reporting the concern than if he works in another.[1072] This does not appear acceptable when all Crown servants are expected to follow the same Civil Service Code. It is recommended that a uniform system of nominated officers should be implemented across the Civil Service. In order to build consistency in the service offered it is suggested that training be given to those officers by the Civil Service Commissioners. Based on the Canadian public service whistleblowing provisions, it is then suggested that reporting obligations should be put in place to require line managers and nominated officers who deal with whistleblowing concerns to record those concerns centrally for monitoring by the Civil Service Commission.

A Crown servant may also report the concern to the Civil Service Commissioners, if they do not believe the response from the line manager or nominated officer to be reasonable. The Civil Service Code also states that the Commissioners will 'consider taking a complaint direct.' The Commissioners do not publish the outcome of complaints so it is very difficult to ascertain whether or not their role is effective. It should be noted that a response to a Freedom of Information Act request by the author has highlighted that since 1996 the Commissioners have investigated very few allegations of wrongdoing.

In order to bolster Civil Service confidence in the Commission, it is suggested that the Commissioners should be engaged in the whistleblowing process at an earlier stage, rather than acting as an 'avenue of last resort' whereby the internal mechanisms have failed. It is submitted that the Commissioners' powers could be extended based upon the Canadian Public Sector Integrity Commissioner, to include the jurisdiction to investigate and make rulings on reprisals, this could also include a mediation service between an

[1072] See chapter two of this thesis.

aggrieved individual and those involved in the department.

In order to provide an authorised alternative to unauthorised leaking via *Wikileaks* and other online outlets, it is suggested that an anonymised reporting system be established. This would provide an encrypted platform for employees working in departments to raise concerns to the Commissioners or via the nominated officers. The encrypted system would prevent those investigating from tracing the whistleblower but would contain an online submission form including standardised questions so that the required information could be obtained. Whilst anonymous reporting should be actively discouraged, the whistleblower could be provided with a reference number to allow for subsequent communication between the investigator and the whistleblower. It is submitted that the theoretical justification for such a platform can be identified in the work of Raines and Scott who identify that receiver responses to anonymous communication is greatly improved where the recipient can interact with the communicator in order to evaluate the veracity of the claims made.[1073]

Further amendments are required to improve confidence in the Civil Service Commission. Currently, there is no course of appeal against the decision of the Commissioners. Paragraph 18 of the Code states that if the matters cannot be resolved and that a Civil Servant feels that he cannot carry out the instructions he has been given he will have to resign from the Civil Service.[1074]

Paragraph 18 places considerable importance on the Civil Service Commissioners to

[1073] S.Rains and C.Scott, *To Identify or Not to Indentify: A Theoretical Model of Reicever Responses to Anonymous Communication* [2007] Communication Theory 1, 74.
[1074] http://www.civilservice.gov.uk/about/values/cscode/rights.aspx *(accessed 06/01/10).*

carry out their role effectively. At the time of writing the Civil Service Commissioners had issued detailed guidance on their website identifying their role in handling complaints or appeals under the Civil Service Code. This may be identified as a positive step considering that prior to 8th January 2010 the Commissioner's website carried little information as to how appeals under the code would be handled or that it would accept complaints direct.

Paragraph 18 carries a negative message that if the Commissioners do not deal with the complaint the Crown servant will have to resign. There is a clear risk that a Crown servant who reads this passage may believe that he is better off making an unauthorised disclosure because he does not have trust in the Civil Service Commissioners to appropriately deal the concern and believes that he would have to leave the Service anyway.[1075]

Part of the mistrust in the Commissioners may stem from the fact that the Civil Service Commissioners are not consistent with the stepped disclosure regime of the Public Interest Disclosures Act. The Committee on Standards in Public Life stated clearly in their Third report that in order for a whistleblowing mechanism to work effectively employees should be able to go outside of the organisation in order to report the concern. The Civil Service Commissioners are not a prescribed regulator in PIDA. This places Civil Servants at a disadvantage to employees who work in the private sector or non Civil Servants who work in the public sector. An NHS nurse for example could report a

[1075]This proposition is supported by evidence provided by journalist David Henke before the PASC inquiry on leaks and whistleblowing that leaks mostly came about because the civil servant was 'concerned about a specific issue and became exasperated with internal processes' and that 'between 70% and 80% of civil servants who had leaked material to him had made some attempt to pursue the matter through official channels.' HC 83, para 70 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/83/83.pdf (accessed 02/02/10).

concern to the Care Quality Commission, prescribed under PIDA and would not be expected to leave his profession if he did not like the outcome of the investigation. It is recommended that Paragraph 18 be removed from the Civil Service Code in order to build greater confidence in the Civil Service Code and internal provisions.

The new guidance fails to mention what the Civil Service Commissioners will do if faced with an allegation that a minister has lied to Parliament or the Public or if he is putting pressure on the Crown servant to lie. In evidence before the PASC the first Civil Service Commissioner identified that if faced with such a situation she would pass the information on the Cabinet Secretary to investigate. The Commissioners can only investigate breaches of the Civil Service Code, not the Ministerial Code. Such a scenario highlights the difficulty in the Code's reliance on the Civil Service Commissioners. If the Commissioners fail to refer a matter to the Cabinet Secretary or the Cabinet Secretary fails to investigate the concern, the Crown Servant will have little option but to leave as per paragraph 18.

The scenario presents a sizeable gap in the accountability of Executive malpractice. The Committee on Standards in Public Life concedes that there is no specific individual or organisation to assess complaints against ministers. Currently, investigations may be carried out by Sir Philip Mawer the Independent Advisor on Ministerial Interests, but Sir Philip must be instructed by the Prime Minister to investigate. Furthermore, the decision to make public the outcome of the investigation is made by the Prime Minister alone.[1076]

The appointment of Sir Philip Mawer may be seen as a positive step in enhancing the

[1076] See chapter two, section 2.15 of this thesis.

accountability of ministerial actions however the role lacks the required independence and teeth to be fully effective. The Public Administration Select Committee has previously recommended that ministerial conduct could be investigated by the Parliamentary Ombudsman. Currently Civil Servants do not have direct access to the Ombudsman and furthermore the mechanism is available to members of the public, but only through the cumbersome MP filter.

There is a significant hurdle to overcome in that the doctrine of ministerial responsibility means that the Prime Minister is 'ultimately responsible to Parliament for the conduct of his administration.'[1077] A compromise is therefore needed between the requirements of constitutional convention and the requirements of Parliament to hold the Executive to account. It is also notable that the Ministerial Code has not been included in the Constitution and Governance Bill despite the inclusion of the Civil Service Code and a new code for Special Advisers.

It is recommended that the role of Independent Ministerial Advisor be replaced by a 'Commissioner for Ministerial Conduct.' The Commissioner should have the power to investigate concerns without needing the permission of the Prime Minister. The Commissioner should be able to submit his report to the Prime Minister and allow the Prime Minister a reasonable time frame, perhaps 21 days, in order to make corrective action. It would be then for the Commissioner to report his findings to Parliament.

It is not suggested that the Parliamentary Ombudsman should investigate ministerial misconduct, as the Ombudsman primarily deals with complaints on behalf of the public

[1077] http://www.cabinetoffice.gov.uk/media/135230/mawer_annualreport.pdf (accessed 05/01/10).

and would require significant modifications to take on the work, such as removal of the MP filter. However, if a member of the public is having difficulty with a government department and is alleging malpractice, it is the Crown servants who work in the departments who will be most likely aware. It makes sense that if the Crown servant is aware that a member of the public has been mistreated he should be able to provide the Ombudsman with such information.

In the most extreme cases, whereby it is apparent that a criminal offence has been committed , Chapter four of this thesis identifies that Civil Servants are expected to first approach an 'Offence Inquiry Point' with details of the offence. The wording of this instruction is contrary to Paragraph 17 of the Civil Service Code which states that allegations of criminal conduct should be reported to the police. It is submitted that the role of the Offence Inquiry Point be considered closely. It should be used as a means to obtain advice and should not dissuade a Crown servant from reporting allegations of criminal conduct.

The Public Interest Disclosure Act works as a backstop to allow employees who have suffered a detriment to sue their employer for damages. It allows for controlled internal disclosures, to be made to the nominated officer or line manager, for controlled external disclosures to be made to a regulator and a degree of protection for disclosures made to the media. What it does not provide for is mechanisms to investigate concern or provision for the concern to be investigated. In comparison the New Zealand Protected Disclosures Act facilitates the investigation of the concern by requiring the public servant to exhaust internal mechanisms before he can approach the NZ Ombudsman. Similarly, the Australian Public Service Regulations are 'sector specific' in that the

regulations only relate to Public Servants but aim to deal with both the concern and the investigation of the concern. The Canadian mechanism requires public servants to report concerns to Public Sector Integrity Canada in order to receive whistleblower protection.

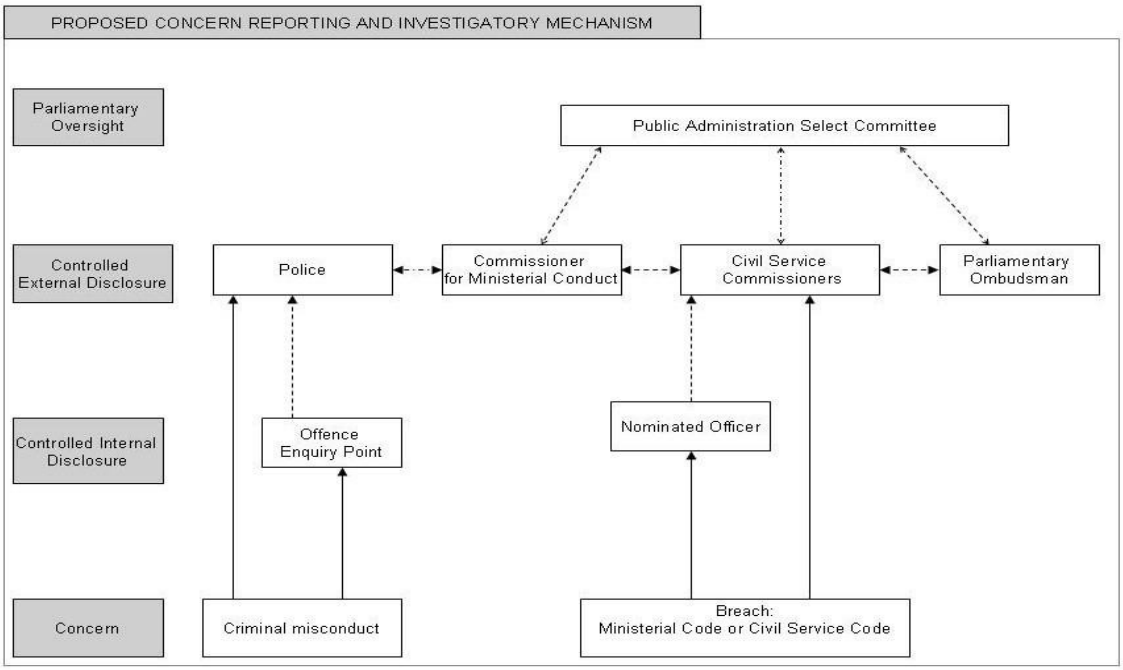
The United Kingdom provision contained in PIDA provides the least procedurally rigid means of obtaining employment protection for reporting a public concern. This means that in terms of employment protection, Crown servants may be seen as better off than public servants in many other jurisdictions, but as a consequence lack the robust mechanisms to deal with the reported concerns.

One must ask why a Crown servant would raise a public interest concern through official mechanisms. If the servant is raising the concern in good faith his motivation is most likely to be that he would like the concern to be investigated and the malpractice to stop. It is submitted therefore that in order to deal with the concern, first and foremost strong accountability mechanisms must be in place to first deal with the concern. The employment protection is a secondary motivation and the use of PIDA will only be necessary if the Servant suffers a detriment as a result of raising the concern.

The most recent introduction of guidance for Civil Servants to report concerns to the Commissioners is a welcome start to reform. The second and most important reform would be to make the Civil Service Commissioners a prescribed regulator under section 43F PIDA. This would bolster the employment protection for Crown servants but would have the effect of bringing the provisions closer to those enjoyed by private sector employees. Including the Commissioners into s.43F has become even more important following changes in April 2010 whereby tribunal claims are referred to prescribed

regulators to investigate the concerns.[1078] If the Commissioners fail to be included this will further disadvantage Civil Servants. Proposals to place the Commissioners on a statutory footing in the Constitutional and Governance Bill mean that the time is right for reform.

8.3 Closing the Gaps in the Mechanisms of Executive Accountability.



The above diagram illustrates the proposed accountability mechanism and is in line with the current Civil Service Code.[1079] It is submitted that the proposed scheme aligns to art.10 values by providing mechanisms for the employee to raise concerns.

Civil Servants may report concerns to their nominated officer or to the Civil Service Commissioners. If the Civil Servant reports a matter to the Civil Service Commissioner

[1078] See further http://www.berr.gov.uk/files/file54221.pdf (accessed 07/02/10).
[1079] Note that for ease of understanding this diagram does not include an approach to a line manager.

it would be up to them to decide how to deal with the complaint. If the concern is regarding an alleged breach of the Ministerial Code it should be referred directly to the proposed Commissioner for Ministerial Conduct to investigate. If the matter falls within the remit of the Parliamentary Ombudsman it should be referred to the Parliamentary Ombudsman to investigate. If necessary the bodies would be able to pool resources to investigate allegations which cross their respective remits. If the matter is so serious as to amount to information regarding criminal conduct it may also be referred to the police. Ultimately, it will be for the respective body to deliver annual reports to Parliament and to give evidence to the Public Administration Select Committee as a matter of course. If the respective body fails to obtain the corrective action required to rectify the concern it would have the capacity to deliver a special report to Parliament.

The objectives of this proposal are to enhance existing accountability mechanisms and to provide Crown servants a means to report a public interest concern within the confines of the existing framework. The proposal fits within the stepped disclosure regime contained in the Public Interest Disclosure Act by allowing a Crown servant to make a controlled external disclosure to the Civil Service Commission. Most importantly, this does not place the Servant at risk of breaching the Civil Service Code, the Official Secrets Acts or Misconduct in Public Office.

It will be observed that the aforementioned proposal does not allow for Crown servants to report concerns to Members of Parliament or the Public Administration Select Committee. It is submitted that to allow the Crown servant to report directly to the PASC creates difficulties with regard to the employee's obligation to be politically impartial. The well established Osmotherly rules make it particularly difficult for a Crown servant

to appear before a committee. This reasoning is further supported by the Strasbourg decision in *Ahmed v UK* whereby a restriction of art.10 rights to maintain political impartiality in public service was held to be proportionate. It should be noted, however, that the *Guja v Moldova* framework allows protection for a disclosure made as a last resort whereby all other means of raising the concern have failed or where it is not practical to use alternative means. Therefore it is reiterated that where the information is of a particular value to the public interest disclosure to an opposition MP or Parliamentary committee the balance may be weighed in favour of protecting the disclosure.

8.4 Interaction with Freedom of Information

Article 10 ECHR does not currently convey a general of access to public information, as identified in Leander v Sweden, art.10 does not embody an obligation on governments to impart such information to the individual.'[1080] The lack of rights protection afforded to freedom of information must be considered alongside the established jurisprudential position of the importance of the communication of information for both communicator and audience interests.

Freedom of information is particularly important for the advancement of an informed democratic society. The justifications for providing such information bear close similarity to the justifications that freedom of expression is necessary for truth and for participation in a democratic society. Chapter three of this thesis provided an insight into the various sections contained in FOIA, it noted that the government objects to promote and improve transparency have been significantly undermined because of a number of qualified and

[1080][1987] 9 EHRR 433.

absolute exemptions which create a barrier to the disclosure of important public interest information. It was also identified that government departments have at times simply disregarded the time limits imposed by the Act. These failings create a justification for Crown servants to disclose information which has been purposefully covered up or wrongly exempted. Whilst breach of the existing Freedom of Information Act would be covered by s.43 B PIDA as a breach of a legal obligation, it is proposed that freedom of information be included as a new section of the Civil Service Code. It is submitted that this would promote the importance of freedom of information and bolster the existing protection for Civil Servants.

8.5 The Control of Official Information

It is submitted that the House of Lords in *R v Shayler* wrongly determined that the Official Secrets Act 1989 was compatible with art.10 because of the number of authorised channels for disclosure. During the proportionality analysis, consideration must be given to the public interest value of the information. The Official Secrets Act 1989 does not allow for such an assessment. It is reiterated that whilst domestic courts retain a margin of appreciation to determine national security matters, they are likely to overstep this margin of appreciation whereby the information concerned in the proportionality analysis is of a high value to the public interest or is not harmful to national security.

Certain reforms are required to ensure compliance with art.10 values. Firstly it is suggested that a closer link is needed between the classification of documents and the alleged categories of harm contained in the Act. The Franks Committee on the Reform of

s.2 OSA 1911 suggested that the classification of documents should be built into the Act. Whilst it has been argued that the classification of documents has no bearing on the required harm tests, research of the cases shows that the classification of documents is significant to determining the degree of harm caused by the unauthorised disclosure. Second, it is submitted that a public interest defence be drafted and that this should be modelled on the Canadian s.16 Security of Information Act 2001. It is submitted that this proposal is consistent with art.10 values as the *Guja v Moldova* framework allows for 'last resort' protection. It is argued that the common law offence of misconduct in public office is incompatible with art.10 values as it does not allow for an assessment of the public interest value of the information concerned.

With regard to breach of confidence actions this thesis has identified that enforcement of injunctions in the era of *Wikileaks* and extensive social networking will be extremely difficult. It may therefore be argued at alternatives should be considered such as a voluntary code for organisations such as *Google* and *Twitter*, based upon the DA Notice system. Breach of confidence may still be used where a government is seeking to recover the money from an individual who has sought to profit from the disclosure. Again the court will need to provide a thorough assessment of the competing interests when conducting the proportionality analysis.

8.5 National Security Employees

Employees of the Intelligence and Security Services have an enhanced responsibility to ensure that their work is not disclosed in the public domain, this reasoning is consistent with art.10 (2). Chapter six of this thesis argued that the reasoning in *Guja v Moldova*

should be applied to national security whistleblowers. Again, emphasis must be placed on the effectiveness of the official mechanisms as an alternative to unauthorised disclosure.

Currently, there appears to be no independent oversight by the Intelligence and Security Committee and subsequently critical analysis of the role is only provided by disgruntled former employees who have chosen not to use the Staff Counsellor. Information provided in the latest ISC annual report stated that a new 'Ethical Counsellor' has been introduced however there was no information in the report to explain how the new post interacts with the role of the Staff Counsellor, or indeed whether or not the Staff Counsellor has been replaced. Worryingly, the Staff Counsellor appears to have no input in the work of the Intelligence and Security Committee.

The New Zealand mechanism for national security employees provides the most useful comparator as the NZ Protected Disclosures Act was modelled on the UK Public Interest Disclosure Act. The New Zealand IGIS has both the capacity to receive whistleblowng concerns and to independently investigate and moreover employment protection is available to those who raise concerns. The New Zealand mechanism identifies the potential of including UK employees of the Security and Intelligence Services in PIDA. However it also identifies a failing in our own oversight mechanism. The fact that the UK lacks an investigatory capacity means that the ISC is weak in comparison to equivalent oversight bodies located in the comparative jurisdictions.

Like the NZ IGIS, the Australian IGIS can receive whistleblower complaints from employees. With regards to protection from detriment the position is more uncertain as it

is up to the Director General of the respective agency to decide what internal provisions are implemented to mirror the protections available to public servants not involved in national security matters.

The protections available to employees in the US intelligence community have received criticism. However, US employees do have access to the various Inspector Generals and may, with consent, approach the Congressional Intelligence Committees. With regards to the Canadian mechanism provided by the Security and Intelligence Review Committee, it is not certain whether direct approaches by employees will be investigated however there is scope for employees to raise concerns. Regardless of the provisions available Canadian employees have the benefit of a public interest defence, built into their official secrets legislation. A common feature of the aforementioned mechanisms is that employees have access to an oversight body outside their department.

It is recommended that the ISC take a much more active role in the work of the Staff Counsellor. It is submitted that the first stage should be to include special provision in PIDA for employees who report concerns to the Staff Counsellor. The second stage would be to develop an effective parliamentary oversight mechanism. The ISC requires an inspector to function more effectively. It is suggested that in order to ensure that the role of inspector is a permanent appointment, the role should be enshrined in statute. As an alternative, the role of the Staff Counsellor should be formalised and replace the role of the ISC's investigator in order to provide both the much needed investigatory capacity and connection to the ISC in order to ensure that the ISC has the critical information it requires to effectively perform its function.

8.6 Armed Forces

Members of the United Kingdom Armed Forces, like their counterparts in the UK Security and Intelligence Services, do not have access to the employment protection afforded by the Public Interest Disclosures Act 1998. Similarly, jurisprudence from the European Court of Human Rights is clear that persons who sign up to the armed forces agree to a restriction of freedom of speech under Article 10 ECHR. Members of the UK Armed Forces also have an obligation to adhere to a rigid command structure whereby the failure to carry out the instructions of a superior officer may result in criminal sanction. As a consequence, the armed forces restrict the moral autonomy right of the individual. It is therefore argued that the most detrimental impact is to the exercise of political expression and protest whistleblowing, which is arguably likely to result in disciplinary action.

The aforementioned obligations are likely to weigh heavily against a military whistleblower in a proportionality analysis. However, it is recognized that whilst soldiers act as citizens in uniform, the restrictions on speech may be outweighed whereby the information disclosed is of a high value to the public interest. It is submitted that the *Guja v Moldova* framework is sufficiently flexible to incorporate members of the armed forces.

In terms of the effectiveness of alternative mechanisms, the rigid obligations placed on members of the armed forces make the implementation of an independent complaints

mechanism a difficult task. Following the Blake Review into the deaths of soldiers at Deepcut Barracks it was recommended that an ombudsman be established to receive and investigate concerns from Services personnel. In response to the recommendation a Services Complaints Commissioner was introduced.

The Services Complaints Commissioner falls short of the recommendations made in the Deepcut Review. If a Serviceman contacts the Commissioner, he will be advised on whether or not the complaint should be dealt with informally or formally by way of a 'service compliant.' If the matter is dealt with by a service complaint the SSC will then refer the matter to the Commanding Officer for investigation. The SSC has no investigatory remit and cannot make findings. In the absence of any such powers the SSC's power appears to extend little further than the ability to make telephone calls to the respective commanding officer.

Despite the difficult task in implementing a complaints mechanism for the armed forces, this thesis has identified several comparative jurisdictions whereby an independent body have been established with both the power to investigate and make findings. Most notably, members of the Australian armed forces have two available complaints mechanisms. The UK Government's justification for disallowing one independent review mechanism investigatory powers on the basis that it would undermine the chain of command does not hold weight considering that the Australian armed forces are historically based upon our own UK armed forces.

It is submitted that a considerable rethink of the powers of the SSC is required in order to reflect the recommendations of the Blake Review. In the absence of such reform the

author proposes that the Commissioner be able to sit as an 'independent person' on Services Complaints Panels in order to assist in the adjudication of complaints made by members of the armed forces.[1081] An independent person is currently required to sit on the panel in order to provide the reasoning of a person who is not a member of the armed forces. There is nothing in the Armed Forces Act or the Regulations which state that the independent person should possess any specialist skills or attributes, merely that they are independent of the armed forces or the Civil Service. Therefore the Complaints Commissioner could sit in that role. Whilst one may argue that this would give the Services Complaints Commissioner too much power, as she would be involved in investigation and adjudication, it should not be forgotten that the Parliamentary Ombudsman in the UK jurisdiction and Inspectors General in other jurisdictions both investigate and make findings on a complaint, much needed powers that the current SSC currently lacks.

8.7 Final Observations

The recommendations identified in this chapter and elsewhere in the thesis do not provide a complete solution to unauthorised disclosures. Unauthorised disclosures or leaking of information by Crown servants can be potentially harmful to national security and to the source of the information. Leaks can also be highly embarrassing to the government and can act as a means of holding the government or government departments to account, thus providing important information for members of the public to come to their own

[1081] Chapter 5 at section 5.9.

conclusions about executive actions, and to make an informed decision on polling day, something which is vital in a democracy.

Unauthorised disclosures may occur because the source is motivated 'out of profit or spite' but leaks can also identify the failure of our democratic oversight mechanisms to hold the Executive to account. The Crown servant may be distrustful of the mechanism or may have raised concerns and is unsatisfied at the response. Crown servants are placed in a unique position to observe Executive malpractice if it occurs and to report on it. It is therefore vital that robust mechanisms are in place to allow Crown servants to raise concerns and to provide a viable alternative to unauthorised disclosures. Most importantly, if members of the government chose not to engage in malpractice, the risk of unauthorised disclosures would undoubtedly diminish, but whilst instances of Executive malpractice continue to occur, public interest whistleblowers will continue to provide an important check on Executive action.

"But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

James Maddison[1082]

[1082] http://www.constitution.org/fed/federa51.htm

Bibliography

BOOKS

Aitken, J. Officially Secret (Weidenfield and Nicolson, London, 1971).

Allen, R , Crasnow R, and Beale, A, Employment Law and Human Rights (OUP, Oxford, 2nd Edition 2007)

Andrew, C. Secret Service (Heinman, London 1985).

Barendt, E. Freedom of Speech (OUP, Oxford, 2005)

Barnett, H. Constitutional & Administrative Law (4th Edition, Cavendish, London 2002)

Barry, K. Political Argument (Harvester Wheatsheaf, London 1990).

Benemy, F.W.G. The Elected Monarch: the Development of the Power of the Prime Minister (London, Harrap, 1965).

Birkinshaw, P. Freedom of Information: the Law the Practice the Ideal (Butterworths, London, 2001)

Birkinshaw, P. Government & Information: The Law Relating to Access, Disclosure & Their Regulation, (Tottel, Haywards Heath, 2005).

Blacksone, W. Commentaries on the Laws of England (Volume 1, Clarenden Press, Oxford, 1766).

Bok, S. Secrets: on the Ethics of Concealment and Revelation, (Vintage, New York, 1989)

Born, H. and Leigh, I. Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies (Publishing House of the Parliament of Norway, Oslo, 2005).

Born, H. Johnson, L. and Leigh, I. Who's Watching the Spies?: Establishing Intelligence Service Accountability (Potomac Books, Dulles Virginia, 2005).

Bowers, J. Whistleblowing Law and Practice (Oxford, 2007).

Calland, R. and Dehn, G. Whistleblowing around the World: Law Culture and Practice (Public Concern at Work, 2005).

Chapman, L. Your Disobedient Servant (Chatto and Windus, London, 1978).

Chesterton, G.K. The Autobiography of G K Chesterton (Ignatious Press, New York, 1936).

Churchill, W. The Second World War (Mariner Books, 1951).

Cripps, Y. The Legal Implications of Disclosure in the Public Interest (Second Edition, Sweet & Maxwell, London, 1994).

De Smith, Woolf and Jowell, Judicial Review of Administrative Action (Sweet and Maxwell, London,1995).

Dicey, A. Introduction to The Study of the Law of The Constitution (Liberty Classics, Indianapolis, 1885).

Drewry, G. in Administrative Law: Facing the Future, Eds Leyland, P. and Woods, T. (Blackstone press, London, 1997).

Dworkin, R. A matter of principle (Harvard University Press, Cambridge MA, 1985)

Dworkin, R.Taking Rights Seriously (Harvard University Press, New York, 1978)

Edwards, J.Ll.J. The Law Officers of the Crown (Sweet & Maxwell, London, 1964).

Elliot, M. The Constitutional Foundations of Judicial Review (Hart, Oxford, 2001).

Feldman, S. and Morris, G. The State as Employer: Labour Law in the Public Services (Mansell, London, 1989).

Fenwick, H. and Phillipson, G. Media Freedom under the Human Rights Act (Oxford University Press, Oxford, 2007).

Fenwick, H. Civil Liberties and Human Rights (Cavendish, London, 2007)

Finnis, J. Natural Law and Natural Rights (Clarendon Press, Oxford, 1980).

Gregory, R. and Huchinson, P. The Parliamentary Ombudsman: A study in the Control of Administrative Action (George Allen & Unwin, London, 1975).

Habermas, J.Toward a Rational Society (Beacon Press, London, 1971)

Hamrick, S.J. Deceiving the Deceivers (Yale University Press, New Haven, 2004).

Hooper, D. Official Secrets: The Use and Abuse of The Act (Secker & Warburg, London, 1987).

J.Rawls, A Theory of Justice (OUP, Oxford, 2nd Edition 1999)

Jennings, I. Cabinet Government (Cambridge University Press, Cambridge, 3rd Edition 1959).

Jowell, J. and Oliver, D. The Changing Constitution (5th Edition, Oxford University Press, Oxford, 2004).

Leigh, I. and Born, H. Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, (OSCE/ODIHR, 2008).

Leyland, P. & Woods, T. Administrative Law Facing the Future: Old Constraints & New Horizons (Blackstone Press, London 1997).

Linklater, M. and Leigh, D. Not with Honour: The Inside Story of the Westland Scandal (Sphere Books, London, 1986).

Lustgarten, L. and Leigh, I. In From The Cold (Clarenden Press, Oxford, 1994).

Machon, A. Spies Lies & Whisleblowers (The Book Guild, Lewes, 2005).

McColgan, A. Human Rights At Work (The Institute of Employment Rights, London) 2000.

Mclean, J. The Crown In Contract and Administrative Law OJLS 2004.24 (129).

Munro, C.R. Studies In Constitutional Law (2nd Ed, Butterworths, London 1999).

Oliver, D. Government in the United Kingdom: The Search for Accountability Effectiveness and Citizenship (Open University Press, Milton Keynes, 1991).

Perry, M.J. Morality Politics & Law (Oxford University Press, Oxford, 1991).

Plowden,W. Ministers and Manderins, (Institute for Public Policy Research, London,1994).

Ponting, C. The Right To Know (Sphere, London, 1985).

Press, Oxford, 1999).

Rawls, J. A Theory of Justice (Oxford University Press, Oxford, 1972).

Rowe, P. The Impact of Human Rights Law on Armed Forces (Cambridge University Press, Cambridge, 2006).

Schwartz B. and Wade, H.W.R. Legal Control of Government: Administrative Law in Britain and the United States (Clarendon Press, Oxford, 1972).

Shauer, F. Free Speech: A Philosophical Enquiry (CUP, Cambridge, 1982)

Smith, B. and Hague, D. The Dilemma of Accountability in Modern Government (MacMillan, London, 1971).

Sunkin, M. and Payne, S. The Nature of the Crown: A Legal and Political Analysis (Oxford University

Tagart, M. The Province of Administrative Law (Hart, Oxford 1997).

Thoreau, H.D. Walden, or, Life in the woods; and On the duty of civil disobedience (New American Library, New York, 1960).

Tomkins, A. Our Republican Constitution (Hart, Oxford, 2005).

Tomkins, A.The Constitution After Scott: Government Unwrapped (Clarendon Press, Oxford, 1998).

Vickers, L. Freedom of Speech and Employment (OUP, Oxford, 2002)

Wade, H.W.R & Forsyth, Administrative Law (9th Edition, Oxford University Press, Oxford, 2004).

Wade, H.W.R. Constitutional Fundamentals (Stevens, London 1980).

Wheare, K.C. Maladministration and its Remedies (Stevens & Sons, London)

JOURNAL ARTICLES

Allan, TRS. Disclosure of Journalists Sources and the Rule of Law [1991] CLJ 50 (1) 144.

Andrews, J. Public Interest and Criminal Proceedings [1988] LQR 104, 413.

Armstrong, R. Ministers, Politicians and Public Servants, Public Money, September (1985), 39.

Bailin, A. The Last Cold War Statute [2008] Crim LR 625.

Birkinshaw, P. Is access to Government information, or Freedom of Information a Basic or Fundamental Human Right? [2006] Admin.L.Rev 58 1.

Blasi, V. The Newsman's Privilege: An Empirical Study [1971] Mich.L. Rev, 232

Brazier, R. Who Owns State Papers? [1996] CLJ 55 1 68.

Bronitt, S. & Stellios, J. Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' [2007] 30 Melb. U. L. Rev. 923.

Brudner, A. A Theory of Necessity [1987] OJLS 7 3, 340

Burnett, D. and Thomas, R. Spycatcher- The Commodification of Truth [1989] J.Law & Soc 16 2 210

Butler, D. A Tort of Invasion of Privacy in Australia? [2005] 29 Melb. U. L. Rev. 339.

Camp, C. Openness and Accountability in the Workplace [1998] NLJ 149 46.

Coady, C.A.J., Messy Morality and the Art of the Possible (1990) Proceedings of the Aristotelian Society, 64.

Collins, D. Spies Like Them: The Canadian Security Intelligence Service and Its Place in World Intelligence, [2002] Sydney L. Rev. 24 505.

Crook, T. Is Your Source Ever Really Safe? [2003] BJR 14 4 8.

Cunningham, B. Journalistic Privilege from a European Perspective [1995] Ent. L.R. 6 (1) 25-26

Dean, J. Publicity's Secret (2009) Political Theory 29 (5) 646

Drewry, G. Ministers and Civil Servants [1986] PL 514.

Fenster, M. Seeing the State: Transparancy as Metaphor [2010] Admin.L.Rev. 62 669

Freedland, M. Contracting the Employment of Civil Services- A Transparent Exercise [1995] PL 224 223.

Gregory, R. and Alexander, A. 'Our Parliamentary Ombudsman. Part II: Development and the Problem of Identity', Public Administration, Spring 1973.

Gwyn. W.B. Ombudsman or Ombudsmouse? [1973] J POLIT 35 1, 50.

Hand, M. ASIO, Secrecy and Lack of Accountability 11 4 Murdoch University Electronic Journal of Law

[2004], paras 22 and 83.

Howard Dennis, I. On Necessity as a Defence to a Crime, Possiblities, Problems and Limitations of Justification and Exuse [2009] Crim Law and Philos 3 1

Johnson, L. The US Congress and the CIA: Monitoring the Dark Side of Government [1980] LEGIS STUD QUART V 4 494.

Kitroser, H. Congressional Oversight of National Security Activities: Improving Information Funnels, [2007] Cardozo L.Rev.

Lee, Y. The Defence of Necessity and Powers of the Government [2009] Crim Law and Philos 3 133

Leigh, I. Spycatcher in Strasbourg [1992] PL 200 208.

Lewis, D. Whistleblowing Statutes in Australia: Is it Time for a New Agenda? [2003] DeakinLRev 16

Martin-Clarke, N. When a Journalist Must Tell [2003] BJR Vol. 14, No2, 35.

McHarg, A. Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the EctHR [1999] MLR 671.

Merris, A. Can We Speak Freely Now? Freedom of Expression under the Human Rights Act [2002] EHRLR 6 750.

Neocleous, M. Privacy, Secrecy, Idiocy (2002) Social Reseach 69 1

Newcomb, T. In From the Cold:The Intelligence Community Whistleblower Protection Act of 1998 53 [2001] Admin. L. Rev. 1243.

Palmer, S. Protecting Journalists' Sources: Section 10, Contempt of Court Act 1981, [1992] P.L. SPR, 61-62.

Perry, N. Indecent Exposures: Theorizing Whistleblowing [1998] Organization Studies 19/2, 237

Phillips, J. The Spy Who Came in From the Cold [2006] J.I.P.L.P. 1 13 913.

Pinto, T. How sacred is the rule against the disclosure of journalist's sources? [2003] Ent. L.R. 14(7), 170.

Preston, P. How Not To Defend Your Source [2005] BJR 16 3 47-52.

Rains, S and Scott, C. To Identify or Not to Identify: A Theoretical Model of Reciever Responses to Anonymous Communication [2007] Communication Theory 1, 74

Rivers, J. Proportionality and Variable Intensity of Review [2006] CLJ 65 (10) 174 - 207.

Sadler, P. Still Keeping Secrets? The DA-Notice System post 9/11 [2007] Comms. L. 12(6), 205.

Savage, A and Mora, P.D. Independent Judicial Oversight to Guarantee Proportionate Revelations of Journalistic Sources: The Grand Chamber's Decision in Sanoma Uitgevers B.V. v The Netherlands [2011]

Ent LR 65

Savage, A and Mora, P.D. Security service memoirs and the jurisdiction of the Investigatory Powers Tribunal: the Supreme Court's decision in A v B, [2010] Ent LR 21 5 196.

Simmel, G. The Sociology of Secrecy and of Secret Societies, American Journal of Sociology (1906) 441

Smith, A.T.H. Security Services: Leaks and the Public Interest [2002] CLJ 514.

Steele, I. Judging Judicial Inquiries [2004] P.L. 738.

Stellios, J. Using Federalism to Protect Political Communication: Implications from

Federal Representative Government [2007] Melb. U. L. Rev. 31 239.

Szikinger, I. Privacy, Secrecy, Idiocy: A Response to Mark Neocleous, Social Research (2002) 69 1

Thomas, R. The British Official Secrets Act 1911-1939 and the Ponting Case [1986] Crim L.R. 506.

Tsaknis, L. The Commonwealth Secrecy Provisions: Time for Reform? [1994] CLJ 18.

Unknown. Attorney's Note Sparks Gag Claim [2002] M.L.N. 61, 10.

Unknown. Criminal Law and Procedure, The Intelligence Services Act 2001[2002]

Commw. L. Bull. 28, 13.

Unknown. Newspaper Chiefs Rally for Changes to Contempt Laws, The Lawyer, Nov 18th 2002, 15.

Wadham, J. Comment- A question of confidence- by proposing to limit the right to trial by jury, the government risks alienating the people who already have the least faith in British justice [1999] LSG (14) 96.

White, F. Audit, Accounting Officers and Accountability: The Pergau Dam Affair. [1994] PL 526.

Willheim, E. Review of Australian Public Law Developments [2006] Melb. U. L. Rev. 30 269.

Yihdego, Z. and Savage, A. The UK Arms Export Regime: Progress and Challenges [2008] PL 546.

MEDIA ARTICLES

Calvert J. and Leigh, D. Tories' Cash Scandal: Honours Dossier Sent to the Police, The Observer, 13 April 1997.

Carr, S. The Sketch: The PM's Constitutional Renewal Bill is Just PR, The Independent, 26 March 2008.

European Federation of Journalists (EFJ), Protecting Our Sources of Information: Why Journalists Need to Resist Legal Attacks, EFJ/IFJ publication May 2003.

Gopsill, T. Protection of Journalist's Sources, National Union of Journalists of Britain and Ireland, May 2003.

Herbert, S. Law Report: Diary Details not the Issue, The Guardian, 2nd November 1987.

Hopkins, N. and Norton-Taylor, R. Army Whistleblower will not be Prosecuted, Guardian, 30th November, 2000.

Leake, C. Gagged...the SAS embassy siege hero who gave survival tips on the BBC, Mail on Sunday, 16th January 2005.

McSmith, A.What happened to Ministerial Accountability?, Daily Telegraph, 8th May 2002.

Miles, A. Military Whistleblowers Need Protections, Buffalo News, 21 March, 2007.

Norton-Taylor, R. Legal Gag on Bush-Blair war row, Guardian, 23rd November 2005.

Parry, K. Investigatory Inquiries and the Inquiries Act 2005, House of Commons Library, July 2007, SN/PC/2599.

Ratnesar, R. and Wiesskopf, M. How The FBI Blew The Case, Time Magazine, 26th May 2002.

Raymant, S. and Hennessey, P. Whitehall farce that's Beyond a Joke, Telegraph, 16th April 2007.

Ripley, A. and Sieger, M. Time Persons of the Year 2002: The Special Agent, Time Magazine, 22nd December 2002.

Rosin, H. When Joseph Comes Marching Home, Washington Post, 17 May 2004.

Sands, S. Sir Richard Dannatt: A very honest General, Daily Mail, 12 October 2006.

Sturcke, J. July 7 Victims Deliver Inquiry Demand, The Guardian Newspaper, 1st May 2007.

Unknown, Coleen Rowley's Memo to FBI Director Robert Mueller, Time Magazine, 21st May, 2002.

Unknown, Internet Undermining DA-Notices, says DPBAC Secretary, Press Gazette, 19th May 2006.

Unknown, Police Defend Journalist's Phone Probe, East Anglian Daily Times, 1st December 2006.

Unknown, Sethia v Stern, The Times, 4th November, 1987.

Unknown, The Threat To Press Freedom, The Guardian, 24 November 2005.

Woolf, M. Cash for Honours, What am I bid? £10,000? £1M? A Loan No Questions Asked? People Who Gave Loans Got Knighthoods Those Who Gave Millions…, The Independent, 12 March 2006.

OFFICIAL PUBLICATIONS (BY JURISDICTION)

UNITED KINGDOM

Armed Forces Bill Proposal for a Service Complaints Commissioner: Government Response to the Committee's Fourteenth Report of Session 2005-2006, HC 180.

Armed Forces Bill: Proposal for a Services Complaints Commissioner, 2006, HC 1711.

Civil Servants and Ministers: Duties and Responsibilities, Seventh Report, 2005, HC 91-1.

Departmental Committee on Section 2 of the Official Secrets Act 1911, Volume 1, Report of the Committee, 1972, Cmnd 5104.

Eighth Report from the Treasury and Civil Service Committee, Civil Service Management Reform: The Next Steps, 1987-8, HC 494.

First Report from the Select Committee on the Official Secrets Acts HC 101 (1938/1939)

First Report of the Committee on Standards in Public Life, 1995, Cm 2850-1.

Government Consultation Paper, DCA, Effective Inquiries, CP 12/04 (6 May 2004)

Public Administration Committee, Government By Inquiry, First Report of Session 2004-2005, Volume I HC 51-1.

Public Administration Select Committee, Government by Inquiry, First Report of Session 2004-2005, Volume I, HC 51-1.

Public Administration Select Committee, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, 4th Report, 2004.

Public Administration Select Committee, The Ministerial Code: the Case for Independent Investigation,

Seventh Report of the Session 2005-2006. HC 1475.

Public Administration Select Committee, The Ombudsman in Question: the Ombudsman's report on Pensions and its Constitutional Implications, Sixth Report HC 1081 (2005-06).

Redress of Individual Grievances: Service Complaints, Issue 1.0, Ministry of Defence, JSP 831 2007. released in February 2000.

The Civil Service: Taking Forward Continuity and Change, Cm 2748.

The Governance of Britain- Constitutional Renewal, White Paper, Cm 7342-1.

The Governance of Britain, Green Paper, Cm 7170.

The Government's Response to the Deepcut Review, June 2006 Cm 6851.

The Ministerial Code: Improving the Rule Book, HC 235, Session 2000-2001.

The Ministerial Code: the Case for Independent Investigation, HC 1457.

The Parliamentary Commissioner for Administration, Cmnd 2767, 1965.

The Parliamentary Ombudsman: Withstanding the test of time, 4th Report Session 2006-2007 HC 421

UNITED STATES OF AMERICA

Statement of Dr. Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, S.Rep.No. 105-165.

Statement of Michael R.Bromwich, Inspector General, U.S. Department of Justice concerning H.R.3829: The Intelligence Community Whistleblower Protection Act of 1998, 10th June 1998.

Statement of Representative Udall 124 Cong. Rec. 28770 (1978).

Testimony of N. Schwellenbach, Investigator Project On Government Oversight, House Oversight and Government Reform Committee, Examining the Executive Branch Reform Act of 2007 and the Whistleblower Protection Enhancement Act 2007, February 13, 2007.

The 9/11 Commission Panel Report, July 2004.

AUSTRALIA

Australian Public Service Commission, Handling misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct, Commonwealth of Australia, 2007.

CANADA

Evidence of Joanna Gualtieri, lawyer, former whistleblower and president of Federal Accountability Initiative for Reform (FAIR)"Bill C-11, Tuesday, February 15, 2005.

Groene, S. Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom, Public Service Commission of Canada October 2001.

The Royal Commission of Inquiry into Certain Activities of the RCMP, Established 1977.

OTHER MATERIALS (BY JURISDICTION)

UNITED STATES OF AMERICA

CRS Report for Congress, The Whistleblower Protection Act: An Overview, RL33918, 2007.

Fisher, L. National Security Whistleblowers, CRS Report for Congress, RL33215, 30th December 2005.

Friedman, G. Snyder, B. Impact of the Inspector General Concept & the Federal Inspector General Community Presentation, September 2006.

Government Accountability Office, US Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress, Press Release, March 2004.

Government Accountability Office, US Office of Special Counsel: Selected Contracting and Human Capital Issues, GAO-06-16 November 2006.

Government Accountability Project, Groups Urge Congress to Deny Funds to Discredited Special Counsel, press release, 11 October 2007.

M. Goodman, C. Crump, S. Corris, Disavowed: The Government's Unchecked Retaliation against National Security Whistleblowers, American Civil Liberties Union, 2007.

Project on Government Oversight (POGO), Homeland and National Security Whistleblower Protections: The Unfinished Agenda, 28 April 2005.

Project on Government Oversight, Complaint of Prohibited Personnel Practices of Scott Bloch, 24 March, 2005.

Project on Government Oversight, Defining Whistleblower, Whistleblower Protection, 11th January 2006.

Project on Government Oversight, Whistleblower groups call on President Bush to fire Special Counsel Scott Bloch in wake of revelations he destroyed evidence and obstructed investigation of his misconduct, press release, 28 November 2007.

The Art of Anonymous Activism, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002.

AUSTRALIA

Brown, A. Public Interest Disclosure Legislation in Australia: Towards the Next Generation, Commonwealth Ombudsman, 2006.

De Maria, W. Whistleblowers and Secrecy: Ethical Emissaries from the Public Sector, paper presented to Freedom of the Press Conference, Bond University, 11 November 1995.

Rose, G. & Nestorovska, D. Terrorism and National Security Intelligence Laws: Assessing Australian Reforms, Faculty of Law Research Paper, University of Wollongong, 2005.

Whistleblowing in Australia- Transparency, Accountability…but above all, the truth, Research Note, Parliament of Australia Department of Parliamentary Services, February 2005, no.31, 2004-2005.