



BRIEFING PAPER

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The *Official Secrets Acts* and Official Secrecy

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Summary

The *Official Secrets Acts 1911-1989*, provide the main legal protection in the UK against espionage and the unauthorised disclosure of official information.

This series of Acts stemmed from revisions to the first *Official Secrets Act* in 1889.

Law Commission review

The [Law Commission](#) published a consultation paper in February 2017 which suggests ways to improve the law around the protection of official information.

The relevant statutes – the Official Secrets Acts in particular – are being independently reviewed to "ensure that the law is keeping pace with the challenges of the 21st century."

The Commission has described its provisional proposals as including "greater safeguards for whistle blowers than under current laws."

There was so much public interest in the consultation that the Commission extended its deadline by a month to 3 May 2017. It will publish its final report in summer 2017.

The Commission has proposed repealing the 1911, 1920, 1939 and 1989 Acts and replacing them with a new Espionage Act. The changes to the 1911-1939 Acts are related to espionage, while changes to the 1989 Act are related to the disclosure of confidential information ("leaking").

While the Law Commission has proposed a wide range of revisions in the consultation paper, some negative stakeholder reaction has focused on the length of sentences for leaking offences, the fact that there is no restriction to the people that could be subject to the certain offences in the new Espionage Act, and the lack of a statutory public interest disclosure defence.

Key elements of the Official Secrets Acts

The *Official Secrets Act 1911* (Section 1) sets out offences related to espionage, sabotage and related crimes, while the *Official Secrets Act 1989* creates offences connected with the unlawful disclosure of official information in six specific categories by Government employees.

The *Official Secrets Act 1989* distinguishes between two types of Government employee. For members or former members of the security and intelligence services, any unlawful disclosure relating to security or intelligence is an offence.

For Crown Servants and Government contractors, however, an unlawful disclosure related to one of the six categories must be deemed "damaging" for it to constitute an offence. The categories are:

- Security and intelligence
- Defence
- International Relations
- Information which might lead to the commission of crime
- Foreign confidences
- The special investigation powers under the Interception of *Communications Act 1985* and the *Security Services Act 1989*

The decision to prosecute under the *Official Secrets Act* must be made by the Attorney General. Prosecutions under the Act are rare – there are fewer than one a year.

Other legislation on the disclosure of information

Other legislation relating to the disclosure of information includes the *Public Records Acts*, which provide a statutory right of access to government records after a twenty-year closure period. However, these Acts also allow for records to be retained “for any...special reason”. Risk to national security is regarded as a special reason, but the Lord Chancellor’s approval is needed for any retention. Successive Lord Chancellors have given their approval for the retention of defined categories of security and intelligence records.

Members of the public can also make requests for information from Government departments under the *Freedom of Information Act 2000*. A Freedom of Information request must be complied with, unless one or more of the exemptions in the Act are relevant. Most exemptions are subject to a public interest test but matters related to security bodies, e.g. the Security Service, have an absolute exemption.

Similarly, the *Public Interest Disclosure Act 1998*, which protects ‘whistleblowers’ who disclose information about malpractice at their workplace, also excludes protection for disclosures relating to the security services.

The security services themselves were placed under statutory control by the *Security Service Act 1989* and the *Intelligence and Security Act 1994*.

1. Introduction

There are a number of pieces of legislation in the United Kingdom which relate to official secrecy, the security and intelligence services, and the disclosure of information “in the public interest”.

These include:

- The [Official Secrets Acts 1911](#), [1920](#), [1939](#) and [1989](#)
- [Public Records Acts 1958](#) and [1967](#)
- [Security Services Act 1989](#)
- [Intelligence Services Act 1994](#)
- [Public Interest Disclosure Act 1998](#)
- [Freedom of Information Act 2000](#)

This briefing paper describes the main elements of each, focussing in particular on the *Official Secrets Acts 1911-1989* which provide the cornerstones in relation to as these provide the main legal protection in the UK against espionage and the unauthorised disclosure of official information.

2. Official Secrets Acts 1911-1989

The *Official Secrets Acts* 1911 to 1989 provide the main legal protection in the UK against espionage and the unauthorised disclosure of information. Section 1 of the 1911 *Official Secrets Act* (as amended by the 1920 and 1939 *Official Secrets Acts*) sets out offences related to spying, sabotage and related crimes. The 1989 *Official Secrets Act* creates an offence for the unauthorised disclosure of information by employees and former employees of the security and intelligence services, and for current and former Crown Servants and government contractors.¹

It is not necessary for a person to have signed the *Official Secrets Act* in order to be bound by it. The 1989 Act states that a person can be “notified” that he or she is bound by it; and Government employees will usually be informed via their contract of employment if they must observe the Act. Furthermore, members of the general public are also bound by a part of the Act. Section 5 of the *Official Secrets Act 1989* makes it an offence for a person to disclose information specifically covered by the Act which has been disclosed to them unlawfully by a Crown Servant.

Prosecution under the Acts

The decision of whether to prosecute someone under the *Official Secrets Act*, lies with the Attorney General.² Up to date figures on

¹ Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104, September 1972, [Hereafter cited as Franks Report], Volume 1, Appendix III, para 88

² [Official Secrets Act 1911, Section 8](#); [Official Secrets Act 1989, Section 9 \(1\)](#)

prosecutions under the Act have not been published. However, a response to a Parliamentary Question from 2004 suggests that prosecutions are rare – fewer than one a year.³ However, if someone is found guilty under the Acts, the penalty is likely to be severe.

How long is a person bound by the *Official Secrets Act*?

There is no specified duration under which a person is bound by the *Official Secrets Act*. However, the length of time between an unauthorised disclosure and the event or situation it relates to may be a factor in the Attorney General's decision whether to prosecute someone under the *Official Secrets Act 1989*.

2.1 The *Official Secrets Act 1911*

The *Official Secrets Act 1911* repealed an earlier *Official Secrets Act* from 1889, and was passed in response to the growing threat of international espionage. As originally enacted, section 1 of the *Official Secrets Act 1911* set out sterner provisions on spying, while section 2 made it an offence to disclose any official information without lawful authority.

The *Official Secrets Act 1911* has been amended a number of times. Most notably, section 2 of the act, which was described as a “catch-all” section and much criticised, was repealed and replaced by the *Official Secrets Act 1989*. However, parts of the *Official Secrets Act 1911* remain in force. The main offences which still form part of current law are those contained in section 1, and relate to spying and espionage.

Under section 1 of the *Official Secrets Act 1911*, a person commits the offence of spying if, “for any purpose prejudicial to the safety or interests of the state”, s/he

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or 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;

he shall be guilty of felony.⁴

Section 7 of the 1911 *Official Secrets Act* also makes it an offence for a person to knowingly harbour a spy.

The maximum term of imprisonment for espionage under the *Official Secrets Act 1911* (as amended by the *Official Secrets Act 1920*) is fourteen years. However, longer sentences are possible for a series of

³ [HC Deb 6 Feb 2004 c1120W](#)

⁴ [Official Secrets Act 1911, Section 1 \(1\)](#)

offences. For example, George Blake, who spied for the USSR during the 1950s, was sentenced to forty two years' imprisonment – three consecutive fourteen-year sentences.⁵

Is section 1 of the *Official Secrets Act 1911* limited only to spying?

The offences created by section 1 of the *Official Secrets Act 1911* have been the subject of some dispute. The 1911 Act was originally enacted in response to fears over German spying, and the marginal note to section 1 refers to "Penalties for spying". However, at no point in the body of the text of section 1 are the words 'espionage' or 'spying' used. Arguments have therefore been raised as to whether section 1 is entirely limited to spying.

In 1920 it was argued by the then Attorney General that "the marginal note is not part of a statute", and these do not therefore represent the entire content of a provision.⁶ This was a view endorsed by the Law Lords in the case of *Chandler v Director of Public Prosecutions (1962)*.⁷ During an appeal of the verdict for this case, the Lord Laws ruled that section 1 of the *Official Secrets Act*, despite its marginal heading, was not limited solely to spying, but included sabotage and other acts of physical interference.⁸

2.2 *The Official Secrets Act 1989* - Unauthorised disclosure of information

The Official Secrets Act 1989 replaced the "catch-all" section 2 from the 1911 *Official Secrets Act*, under which it was a criminal offence to disclose any official information without lawful authority. The 1989 *Official Secrets Act* came into force on 1 March 1990, and creates offences connected with the unauthorised disclosure of information in six categories by government employees. The categories are:

- Security and intelligence
- Defence
- International Relations
- Information which might lead to the commission of crime
- Foreign confidences
- The special investigation powers under the *Interception of Communications Act 1985* and the *Security Services Act 1989*

The maximum penalty for an unauthorised disclosure under the Act is two years' imprisonment or an unlimited fine, or both.⁹

⁵ Security Service MI5, [Espionage and the Law](#), Gov.uk

⁶ HC Deb 16 Dec 1920 c956; Thomas, *Espionage and Secrecy*, pp36-37

⁷ *Chandler v Director of Public Prosecutions* [1962] 3 W.L.R. 694

⁸ Thomas, *Espionage and Secrecy*, pp36-37

⁹ *Official Secrets Act 1989*, section 10

The distinction between government personnel under the 1989 Act

When creating offences under these six categories, the 1989 Act distinguishes between two types of personnel – employees and former employees of the security and intelligence services, and Crown Servants.

For employees or former employees of the security and intelligence services, any unauthorised disclosure of a document or information relating to security or intelligence is an offence. Section 1 of the 1989 Act states that a person “who is or has been” a member of the security or intelligence services:

is 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.¹⁰

However, a Crown servant (e.g. a civil servant, government minister, member of the Police or the Armed Forces) or a government contractor is guilty of an offence under the *Official Secrets Act 1989* only if they make a disclosure which is deemed “damaging”. Section 1 (3) states that

(3) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of 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 such but otherwise than as mentioned in subsection (1) above.

(4) For the purposes of subsection (3) above a disclosure is damaging if—

(a) it causes damage to the work of, or of any part of, the security and intelligence services; or

(b) 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.¹¹

The significant point for a Crown Servant therefore, is whether an unlawful disclosure is deemed “damaging” to the national interests of the United Kingdom. This is in contrast to the provisions relating to members of the security and intelligence services, for whom any unlawful disclosure relating to security or intelligence is an offence.

When is a disclosure deemed damaging?

The 1989 Act sets different criteria for a damaging disclosure for each category of information. These so called ‘damage tests’ essentially require the Government to prove that a disclosure is damaging.

It is for the Attorney General to decide whether a disclosure is deemed damaging, and to bring a prosecution under the 1989 Act. Ultimately, it

¹⁰ [Official Secrets Act 1989, Section 1 \(1\)](#)

¹¹ [Official Secrets Act 1989, Section 1 \(3\)](#)

is then up to a court, when the case comes to trial, to decide whether damage has in fact occurred.

When is a disclosure made without lawful authority?

For a Crown Servant, a disclosure is only made with lawful authority “if, and only if, it is made in accordance with his official duty”.¹² For government contractors, a disclosure is made with lawful authority only if it is made in accordance with an official authorisation or for purposes of their function as a government contractor and without contravening an official restriction.¹³ In any other circumstance a disclosure is made without lawful authority.

2.3 Members of the public and the *Official Secrets Act 1989*

Members of the public are bound by the *Official Secrets Act*, it is not necessary for them to have signed it. Under Section 5, if a member of the public (or any person who is not a Crown Servant or government contractor) has in their possession official information in any of the six categories, and this information has:

- been disclosed to them by a Crown Servant without lawful authority; or
- was entrusted to them by a Crown Servant in confidence

then it is an offence to disclose this information without lawful authority.¹⁴

It is also an offence to make a “damaging” disclosure of information relating to security or intelligence, defence or international relations if this has been:

- communicated in confidence to another State or international organisation; and
- the information has come into the person’s possession without the authority of that State or organisation.

2.4 *Official Secrets Acts 1920 and 1939*

The *Official Secrets Acts 1920 and 1939* are amending acts. The 1920 Act amended sections of the 1911 *Official Secrets Act*. This included increasing the maximum term of imprisonment for espionage from two to fourteen years. It also created a number of new offences connected with spying and espionage, such as unlawfully using a police uniform or forging a military passport, in order to gain access to a prohibited place defined under the 1911 Act. Significantly, section 6 of the 1920 Act also removed a suspect’s right of silence in relation to offences under the 1911 *Official Secrets Act*. The *Official Secrets Act 1939* subsequently

¹² *Official Secrets Act 1989*, Section 7 (1)

¹³ *Official Secrets Act 1989*, Section 7 (2)

¹⁴ *Official Secrets Act 1989*, Section 5

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amended section 6, so that it only applies to offences under section 1 of the 1911 Act – that is, in cases of espionage.

3. History and Development of the *Official Secrets Acts*

3.1 The *Official Secrets Act 1889*

The first *Official Secrets Act* was originally entitled the “Breach of Official Trust Bill”, and was drawn up in 1888 following a number of unauthorised disclosures of information from government departments.¹⁵ When the Bill was reintroduced in the House of Commons as the Official Secrets Bill in 1889, Lord Halsbury justified it on the grounds that:

In recent years we have had very conspicuous examples of the necessity of guarding official secrets, and protecting official documents. It is a duty which every citizen owes to the country, that he should not facilitate the military operations of other countries by giving copies of official documents, and this Bill is intended to remedy existing defects in our law in that respect.¹⁶

The first *Official Secrets Act* provided the basic framework for all subsequent *Official Secrets Acts*. Section 1 dealt with espionage and the notion of unlawful disclosure of information; section 2 dealt with the concept of a breach of official trust. The Act also specified that prosecution under it could only be undertaken with the Attorney General’s permission, something which both the 1911 and 1989 *Official Secrets Acts* continued to follow.¹⁷

Passage through Parliament

During the Official Secrets Bill’s passage through Parliament in 1889, objections were raised that the Bill did not contain any sort of public interest defence.¹⁸ The Bill was subsequently amended, following concern that it may penalise the disclosure of information about corruption and misconduct in government departments.¹⁹ When passed, the 1889 *Official Secrets Act* therefore established a criminal sanction for a breach of official trust but this was limited to breaches which could be shown to be contrary to the public interest. Section 2 (1) of the 1889 Act stated that

Where a person, by means of his holding or having held an office under Her Majesty the Queen, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan, or model, or acquired any information, and at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan, model, or information to any person to whom the same ought not, in the

¹⁵ Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104, September 1972, [Hereafter cited as Franks Report], Volume 1, Appendix III, para 7; D Williams, *Not in the Public Interest: The Problem of Security in Democracy*, 1965, pp15-20

¹⁶ HC Deb 11 July 1889 c85

¹⁷ 52 & 53 Vict. c. 52

¹⁸ See, for example, HC Deb 20 June 1889 c320; C. Ponting, *The Right to Know: The Inside Story of the Belgrano Affair*, 1985, p16

¹⁹ Ponting, *Right to Know*, p16

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interest of the State, or otherwise in the public interest, to be communicated at that time, he shall be guilty of a breach of official trust.²⁰

In this respect, the 1889 Act was much narrower in scope than section 2 of its 1911 successor act, which would arouse controversy in later years.

Prosecutions and problems with the 1889 Act

Prosecutions under the *Official Secrets Act 1889* were rare, and were almost entirely undertaken under section 1. The majority of these were concerned with the disclosure of military and naval secrets.

Furthermore, the Act only applied to Crown Servants and government contractors (unlike its 1911 successor), and an offence was committed only if it could be established that information had been communicated to a person who it ought not to have been, and that this communication was not in the public interest.²¹

The 1889 Act was seen by many in government as being full of weaknesses and difficult to operate.²² Unsuccessful attempts were made to amend and tighten the legislation in 1896 and 1908, before the Act was finally repealed by the *Official Secrets Act 1911*.

3.2 The Official Secrets Act 1911

The perceived shortcomings of the *Official Secrets Act 1889* resulted in a new Official Secrets Bill being drawn up in 1909 by the Committee of Imperial Defence. Growing concerns over the naval arms race with Germany meant that the Government wanted to ensure spies were kept out of British dockyards. It took almost two years, however, until public anxiety over German spying and national security had reached a critical level", before the Bill was finally introduced in Parliament.²³

The opportunity came when a German gunboat was sent to the port of Agadir in Morocco, intensifying the fear of war with Germany. Historian Peter Hennessy has argued that the Government used this episode to help speed the Bill through Parliament.²⁴ However, while the debates which took place during the Bill's passage give a "clear impression of crisis legislation aimed mainly at espionage", Government files from 1911 suggest that the Government of the time

honestly believed that it [the Bill] introduced no new principle, but merely put into practice more effectually the principle of using criminal sanctions to protect official information.²⁵

Passage through Parliament

²⁰ 52 & 53 Vict. c. 52

²¹ D. Hooper, *Official Secrets: The Use and Abuse of the Act*, 1987, p23

²² R. Thomas, *Espionage and Secrecy: The Official Secret Acts 1911-1989 of the United Kingdom*, 1991, p3

²³ 'The Slow road to reform in a nation once ruled by secrecy', [Daily Telegraph](#), 15 August 2011

²⁴ 'The Slow road to reform in a nation once ruled by secrecy', [Daily Telegraph](#), 15 August 2011; Hooper, *Official Secrets*, pp28-29

²⁵ *Franks Report*, Volume I, para 25

The 1911 *Official Secrets Bill* was introduced in the House of Lords on 17 July, and had its Second Reading there on 25 July 1911.²⁶ When introducing the Bill, the Secretary of State for War, Viscount Haldane, stated that it was designed:

to strengthen the law for dealing with the violation of obligations with regard to official secrets and with espionage generally. It is a Bill that applies to our own countrymen as well as to strangers, and its purpose is not to enact any large body of new restrictions, but to make more effective the law as it was intended to be made by the *Official Secrets Act* of 1889.²⁷

Second Reading was agreed to in the Lords after just four speeches. Each of these was concerned with espionage rather than the provisions against the unauthorised disclosure of information held by servants of the State contained in section 2.²⁸ The Bill had gone through all stages in the Lords by 8 August, without amendment.²⁹

The Bill's passage through the Commons was even quicker. It was introduced there on 18 August, and in less than an hour it went through Second Reading, Committee and Report Stage.³⁰ Some concern over the speed at which the Bill was proceeding through its procedural stages was raised. Sir Alpheus Morton MP argued that it was certainly

very unusual and a very extraordinary thing to pass such a Bill without an opportunity of discussing it. Although I do not wish to insist upon the point, I submit that all the stages of a Bill ought not to be dealt with in this House without a proper opportunity of discussing every Clause.³¹

The Attorney General, argued, however, that the Bill was not new and that there was "nothing novel" in it. The Bill, he said, was merely a necessary remodelling of the legislation in order to deal with certain circumstances not foreseen at the time of the 1889 legislation.³²

Purpose of the 1911 Act

The 1911 *Official Secrets Act* had two distinct purposes. Section 1 of the Act set out sterner provisions on spying, while section 2 guarded against the unauthorised disclosure of information held by servants of the State in their official capacity.

Under section 1 of the 1911 Act, a person was guilty of felony if, "for any purpose prejudicial to the safety or interests of the state", they entered a prohibited place defined under the Act; made a sketch, plan, model or note which was calculated to be useful to an enemy; or communicated a sketch, plan, model, note or information calculated to be or intended to be useful to an enemy.³³ The 1911 Act therefore altered the burden of proof in spying cases. Under the 1889 Act, it was

²⁶ HC Deb 17 July 1911 c494; HC Deb 25 July 1911 cc641-7

²⁷ HC Deb 25 July 1911 c642

²⁸ HC Deb 25 July 1911 cc641-7

²⁹ Hooper, *Official Secrets*, p29

³⁰ D Williams, *Not in the public interest*, pp25-6

³¹ HC Deb 18 Aug 1911 c2252

³² HC Deb 18 Aug 1911 cc2252-3

³³ [Official Secrets Act 1911](#), Section 1

necessary to prove “a purpose of wrongfully obtaining information”. Section 1 of the 1911 Act ensured that a prosecutor no longer had to prove a person’s purpose was prejudicial to the safety or interests of the state.³⁴ According to Rosamund Thomas, in her study of the *Official Secrets Act*, the 1911 Act was designed to “shift the legal burden of proof in espionage cases from the prosecution to the accused”.³⁵

Section 2 of the 1911 Act made it an offence for a Crown servant to communicate official information without authorization.

If any person having in his possession or control any [...] document, or information [...] which has been entrusted in confidence to him by any person holding office under His Majesty [...] communicates the [...] document or information to any person, other than a person to whom he is authorised to communicate it [...]³⁶

Despite its short length, section 2 was later described as a “catch all” section, and it has been estimated that over 2,000 different charges could be brought under it.³⁷ Section 2 now brought within it all who communicated or received official information without authority. It has been argued that section 2 also extended to the disclosure of information which bore no relation to national security.³⁸

Yet despite these significant changes, section 2 was not discussed at all during the Bill’s passage through Parliament; nor did it receive interest among the press.³⁹ While there was some limited debate and resistance to the Official Secrets Bill in the Commons, this was focused entirely on section 1. It was only in later years, particularly after the Second World War, that section 2 began to cause significant controversy. The Franks Report (see below), published in 1972 by a committee established to look specifically at this section of the 1911 Act, concluded that it

catches all official documents and information. It makes no distinction of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his duty is “official” for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source [...] nothing escapes. The section catches all Crown servants as well as all official information.⁴⁰

Section 2 of the *Official Secrets Act 1911* was eventually repealed and replaced by the *Official Secrets Act 1989*.

³⁴ Hooper, *Official Secrets*, p31

³⁵ Thomas, *Espionage and Secrecy*, p6

³⁶ [Official Secrets Act 1911](#), Section 2

³⁷ Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104, September 1972, [Hereafter cited as Franks Report], Volume 1, para 16

³⁸ A W Bradley, K D Ewing & C J S Knight, *Constitutional & Administrative Law*, 16th edition, p525

³⁹ Franks Report, Volume I, Appendix III, para 12

⁴⁰ Franks Report, para 17

3.3 The *Official Secrets Act 1920*

After the First World War it was proposed to strengthen the *Official Secrets Act* further by incorporating some of the Defence of the Realm Regulations introduced to meet the need of wartime emergency.⁴¹ The *Official Secrets Act* of 1920 amended sections of the 1911, while also adding some of these additional powers.⁴²

Under the 1920 Act, it was possible to be sentenced to two years' imprisonment for a number of activities, including unlawfully wearing a police uniform, making a false statement, forging a military pass or possessing an official stamp, if this was done in order to gain admission to a prohibited place as defined under the 1911 Act, or "for any purpose prejudicial to the safety or interest of the State", as the 1920 Act stated.⁴³ It also became an offence to retain, for any purpose prejudicial to the State, any official document without authority.

Perhaps the most notable provision in the 1920 Act, however, was section 6. Under its provisions, the Secretary of State could authorise the police to call a potential witness to provide information about an offence under the 1911 Act. Failure to attend or to provide information was itself an offence.⁴⁴ Section 6 of the *Official Secrets Act 1920* therefore removed a suspect's right of silence.

Other new offences contained in the 1920 Act included section 7, which made it a crime to attempt to commit an offence under the 1911 Act or to incite or persuade someone else too. Section 8 also permitted a court to exclude the public from the trial of an offence under the Acts if the prosecution applied for this on the grounds that the publication of evidence would be prejudicial to national security.

Again, the *Official Secrets Bill* of 1920 only received limited debate during its passage through Parliament. Although section 2 was this time discussed, debate continued to focus on espionage.⁴⁵ During its passage through the Lords, Viscount Burnham raised concerns regarding the offence created by Clause 1 of the bill, that any person who was in possession of any official document, the return of which is demanded by a competent authority, would be guilty of a misdemeanour. He told the House that

I do not know a single editor of a national paper who from time to time has not been in possession of official documents which have been brought into his office, very often not at his own request, and which it may be inconvenient to the Minister of the responsible Department should have gone out.

He added that he thought the words in the subsection "dangerously wide".⁴⁶

⁴¹ Thomas, *Espionage and Secrecy*, p11

⁴² Williams, *Not in the Public Interest*, p35

⁴³ Official Secrets Act 1920, Section 1, Hooper, *Official Secrets*, p34

⁴⁴ *The Official Secrets Act 1920*, Section 6

⁴⁵ Hooper, *Official Secrets*, p33

⁴⁶ HC Deb 25 June 1920 cc896-7

The Bill received its Second Reading in the Commons on 2 December 1920. Introducing the Bill there, the Attorney General argued that it was necessary to amend and extend the 1911 Act due to the “ingenuity of spies”.⁴⁷ However, there was some strong opposition to the Bill in the Commons. Sir Donald Maclean MP argued that the Bill would interfere with the legitimate exercise of the functions of the Press, and impinge on the liberty of the individual.⁴⁸ When discussing what would become sections 6 and 8 of the Act, Sir Donald was particularly critical, stating

I find it difficult to confine my language in regard to this Bill within the range of Parliamentary propriety. It is another attempt to clamp the powers of war on to the liberties of the citizen in peace.⁴⁹

It has been argued, however, that the debates in the Commons are most remarkable for what was said about the Act by the then Attorney General, Sir Gordon Hewart. According to one historian, Hewart “produced a series of misleading and wrong answers to those who questioned the need for such wide-ranging powers”.⁵⁰ Rosamund Thomas, in her study of the *Official Secrets Act*, also concluded that the Attorney General “misconstrued aspects” of the 1920 legislation,⁵¹ while the Franks Report of 1972 noted that in one of the speeches during the Bill’s passage, Sir Gordon “implied that the whole of the 1911 Act, including section 2, was concerned with spying [...] It is not clear how he came to make this obviously erroneous statement”.⁵²

Nevertheless, despite stronger opposition to the 1920 *Official Secrets Bill* in the Commons, it was still passed by 143 votes to 34, without significant changes.⁵³

3.4 The Official Secrets Act 1939

The Official Secrets Act 1939 replaced section 6 of the *Official Secrets Act 1920* with a new provision which limited the scope of section 6. It was passed largely in response to the Duncan Sandys affair in 1938 (see below).

Section 6 of the 1920 *Official Secrets Act* removed a suspect’s right of silence by requiring anyone under interrogation to give information about an offence, or suspected offence, under either the 1911 or 1920 Acts, to a chief officer of police. Any person who refused to give such information was liable to prosecution. The amending act of 1939 provided that the interrogation powers of section 6 would only apply to offences or suspected offences under section 1 of the 1911 Act, that is only in espionage cases.⁵⁴

⁴⁷ HC Deb 2 Dec 1920 c1537

⁴⁸ HC Deb 2 Dec 1920 c1542

⁴⁹ HC Deb 2 Dec 1920 c1546

⁵⁰ Hooper, *Official Secrets*, p33

⁵¹ Thomas, *Espionage and Secrecy*, p12

⁵² *Franks Report*, Volume I, Appendix III, para 14

⁵³ HC Deb 2 Dec 1920 cc1582-3; Hooper, *Official Secrets*, p38

⁵⁴ *Official Secrets Act 1939*, Section 1

The amending act also incorporated further safeguards, including the provision that a chief officer of police must apply to a Secretary of State for permission to exercise the powers conferred in section 6. However, subsection 2 of the 1939 Act relaxed this provision somewhat, by specifying that a chief officer could exercise the powers conferred without applying for permission if he has grounds to believe “the case is one of great emergency and that in the interest of the State immediate action is necessary”.⁵⁵

Passage through Parliament

The 1939 Act was given its Second Reading in the House of Lords on 23 February 1939.⁵⁶ Concern was raised there that having to apply to a Secretary of State before being able to exercise the powers contained in section 6 of the 1920 Act might enable a spy to escape out of the country.⁵⁷

The Bill reached the Commons in November. Introducing the Bill, the Secretary of State for the Home Department, Sir John Anderson MP, said that the Bill’s objective was to “restrict the scope” of section 6 of the 1920 Act. He added that

As the law stands at present, that Section empowers the police—or any member of His Majesty’s Forces engaged on guard, sentry, patrol or other similar duty—to require any person to give any information in his power relating to an offence or suspected offence under the Official Secrets Acts, 1911 and 1920, and any person refusing to give such information on demand is liable to prosecution. That is a drastic power, and it has been generally recognised that it is a power which should be used only in rare and exceptional cases.⁵⁸

The Home Secretary also argued that the *Official Secrets Bill 1939* “strikes a proper balance between the rights of the individual and the interests of the State”.⁵⁹

3.5 The Franks Report, 1972

Between 1945 and 1971, 23 prosecutions were brought under section 2 of the *Official Secrets Act 1911*.⁶⁰ One of the most controversial was the unsuccessful prosecution of the *Sunday Telegraph* in 1971 for publishing Foreign Office documents related to the Labour Government’s policy toward the Nigerian Civil War. The trial judge said during that case that section 2 should be “pensioned off” and replaced with a measure that provided greater clarity.⁶¹

Following that case, a committee was appointed in 1971, chaired by Lord Franks, to “review the operation of section 2 of the Official Secrets

⁵⁵ *Official Secrets Act 1939*, Section 1 (2)

⁵⁶ HC Deb 23 Feb 1939 cc917-931

⁵⁷ HL Deb 23 Feb 1939 c926

⁵⁸ HC Deb 15 Nov 1939 c783

⁵⁹ HC Deb 15 Nov 1939 c785

⁶⁰ *Franks Report*, Volume I, Appendix II

⁶¹ Ponting, *Right to Know*, p33

Act 1911 and to make recommendations".⁶² The Committee's report was published in 1972.

The Committee's main conclusion was that

[...] the present law is unsatisfactory, and that it should be changed so that criminal sanctions are retained only to protect what is of real importance.⁶³

In particular, the Committee "found section 2 a mess":

Its scope is enormously wide. Any law which impinges on the freedom of information in a democracy should be much more tightly drawn. A catch-all provision is saved from absurdity in operation only by the sparing exercise of the Attorney General's discretion to prosecute. Yet the very width of this discretion, and the inevitable selective way in which it is exercise; give rise to considerable unease. The drafting and interpretation are obscure. People are not sure what it means, or how it operates in practice, or what kinds of action involve real risk of prosecution under it.⁶⁴

The Franks Report recommended:

- The replacement of Section 1 by an Espionage Act (para 103)
- The replacement of Section 2 by an Official Information Act (para 100)

The report suggested that an Official Information Act should define both general categories of official information, the unauthorised disclosure of which might injure "the security of the nation or the safety of the people", and also the particular items of information within these broad categories, the unauthorised disclosure of which might cause "serious injury".⁶⁵

Franks also proposed that the mere receipt of information should no longer be an offence but that its further communication would, provided the prosecution could prove (a) that there had been a contravention of the Act by some other persons and (b) that the accused knew this or had reasonable ground to believe that this was the case. The Act would also create a new offence of communicating or using official information of any kind for public gain.⁶⁶

The Government took nine months to issue a formal response to Franks. In 1973 the Home Secretary said that the Conservative Government accepted the essential recommendations. However, the recommendations were never implemented.⁶⁷

3.6 *The Official Secrets Act 1989*

Attempts at reforming section 2 of the 1911 Act

Following the Franks Report, a series of Private Members' Bills attempted to repeal section 2 of the 1911 *Official Secrets Act*.⁶⁸ A

⁶² *Franks Report*, Volume I, para i

⁶³ *Franks Report*, Volume I, para 275

⁶⁴ *Franks Report*, Volume I, para 88

⁶⁵ *Franks Report*, Volume I, para 119

⁶⁶ *Franks Report*, Volume I, paras 205, 233, 236

⁶⁷ Hooper, *Official Secrets*, p230

⁶⁸ Thomas, *Espionage and Secrecy*, p210

notable Private Members Bill was introduced by Richard Shepherd MP in 1987. Discussing the Bill, Shepherd said:

We wish to distinguish between that information which should lead to criminal prosecution, and general information, which needs lesser disciplinary controls. Without that distinction, we will not have a free society.

The Bill applies only to specified classes of protected information. Disclosures of other information would not be a criminal offence. That is not to say that such information would become freely available. Much of it will continue to require protection, but that protection would not include the threat of prosecution.⁶⁹

The Labour Opposition supported Shepherd's Bill, but it was defeated by 271 to 234.⁷⁰

A similar Bill was introduced in the House of Lords in February 1988 by Lord Bethall. This received an unopposed Second Reading there on 20 April but made no further progress.⁷¹

The Labour Government indicated in 1976 that they would replace section 2 of the 1911 Act with an Official Information Act, along the lines of that recommended by the Franks Report.⁷² A White Paper was published in 1978, entitled *Reform of Section 2 of the Official Secrets Act*, but the proposals failed to translate into law before the General Election of 1979.

The Conservative Government set out new legislative proposals to reform section 2 in a White Paper in 1988. The Government's Official Secrets Bill followed in November of that year. By this time it had become widely accepted that the existing legislation had become discredited and unworkable; and a number of high-profile cases had drawn attention to the weaknesses in the law.

Purpose of the *Official Secrets Act 1989*

The *Official Secrets Act 1989* repealed and replaced the "catch-all" section 2 of the 1911 Official Secrets Act, and removed the disclosure of much official information from the scope of the criminal law. In its place, there were six categories of official information which were subject to criminal sanctions if disclosed. The concept of harm or damage caused by particular disclosure of information by Crown servants and government contractors was applied to these categories. However, the new Act exempted the intelligence and security services from the 'damage' tests, and made the fact of disclosure by members of these services an 'absolute' offence.

The new Act did not, as had been hoped by some reformers, contain provision for a public interest defence. Amendments were proposed

⁶⁹ HC Deb 15 Jan 1988 c564

⁷⁰ HC Deb 15 Jan 1988 c637

⁷¹ HL Deb 20 April 1988 cc1566-1610

⁷² HC Deb 22 Nov 1976 c1879

during the Bill's passage in both Houses to provide for this, but these were defeated.⁷³

The *Official Secrets Act 1989* came into force on 1 March 1990.

4. Law Commission proposals for reform (2017)

The [Law Commission](#) published [Protection of Official Data: A consultation paper](#) in February 2017 which suggests ways to improve the law around the protection of official information.⁷⁴ There was so much public interest in the consultation that the Commission extended the consultation by a month to 3 May 2017.⁷⁵ The Commission will publish its final report in summer 2017.

The Law Commission is reviewing the relevant statutes – the Official Secrets Acts- to "ensure that the law is keeping pace with the challenges of the 21st century."⁷⁶ The Commission is a non-political independent body, set up by Parliament in 1965 to keep all the law of England and Wales under review, and to recommend reform where it is needed.

House of Commons Library briefing [The Law Commission and procedure on Law Commission Bills](#) (March 2015) provides further information on the Commission.

The Cabinet Office referred the *Protection of Official Data* project to the Law Commission in late 2015 and the Commission started work on the project in February 2016. The project's terms of reference are to "review the effectiveness of criminal law provisions that protect official information from unauthorized disclosure."

In its consultation, the Commission proposes repealing the 1911, 1920, 1939 and 1989 Acts and replacing them with new Acts with updated provisions.

Changes to the 1911-1939 Acts are related to espionage, while changes to the 1989 Act are related to the disclosure of confidential information ("leaking").

These proposals are the result of a pre-consultation phase where the Law Commission consulted government departments, lawyers, human rights NGOs and the media.⁷⁷

⁷³ See, for example, HC Deb 2 Feb 1989 cc519-535; Thomas, *Espionage and Secrecy*, p211. Full details about the debates in the Commons on the Bill are available in the House of Commons Research Note No. 437, *The Official Secrets Bill 1988-89: The Commons debates*, 2 March 1989

⁷⁴ Law Commission, [Protection of Official Data: A consultation paper](#) (Consultation paper No.230), February 2016

⁷⁵ Law Commission News Release, [Protection of Official Data – Consultation deadline extended](#), 7 March 2017

⁷⁶ Law Commission News Release, [Protection of Official Data – Consultation deadline extended](#), 7 March 2017

⁷⁷ Law Commission News Release, [Official Secrets Acts reviewed to meet the challenges of the 21st century](#), 7 March 2017

4.1 Proposed changes to the 1911-1939 Acts

The Law Commission proposes that the Official Secrets Acts 1911-1939 should be repealed and replaced by a single Espionage Act. The main provisional conclusions of the review are below.

Selected areas where the Commission recommends no change

No restriction on who can commit espionage

Under the current provisions of the 1911 Act, there is no restriction on who can commit espionage offences. This differs from the restrictions for the offences related to the leaking of information in the 1989 Act, which are restricted to people with certain characteristics.

The Commission recommends that, “like the overwhelming majority of criminal offences, there should continue to be no restriction on who can commit these offences.”⁷⁸ This would not be a change to the current law.

An offence to “obtain or gather” prohibited information

Section 1 of the 1911 Act (as amended by the 1920 Act) makes it an offence not only to communicate prohibited information, but to “obtain, collect, record or publish” the prohibited information.

The Commission recommends that any redrafted offence continue to be committed by somebody who not only communicates information, but also by somebody who obtains or gathers it.⁷⁹

Despite this proposal seeking to maintain the law as it currently stands, this particular proposal has resulted in a great deal of stakeholder commentary. See [Stakeholder Comment](#) in this briefing. [Public commentary](#)

Proposed changes in the redrafted Acts

The need for an “enemy” to be changed

Some offences under section 1 of the 1911 Act require there to be an “enemy” to whom disclosures are “directly or indirectly useful”. The Commission calls this requirement “problematic” because of the issues of defining an enemy, especially during a period where the United Kingdom is not at war with a foreign power but does face threats of terrorism.⁸⁰

The Commission cites the (USA) *Espionage Statutes Modernization Bill*,⁸¹ which was introduced in Congress in 2011. It would have replaced the term “foreign nation” in the *Espionage Act 1917* with a list of entities including “a group engaged in international terrorism” and “a foreign based political organisation”.

⁷⁸ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, page 33

⁷⁹ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 33

⁸⁰ *Ibid*, p 36

⁸¹ [Espionage Statutes Modernization Bill](#), S.355, 112th Congress (2011)

The Commission does not suggest that the list be reproduced wholesale into any new law, and invites consultees' views on whether the list would be a good starting point for revising the requirements of the 1911 Act.

From “safety or interests of the state” to “national security”

Section 1 of the 1911 Act sets as one of the requirements of committing certain offences that the offender's conduct be “prejudicial to the safety or interests of the state”.

In *Chandler and others v Director of Public Prosecutions*, the phrase “interests of the state”, was interpreted to mean the objects of state policy determined by the Crown on the advice of Ministers.

The Commission argues that this is too broad a scope, especially if “an enemy” is replaced with “foreign power”, as in the previous recommendation.⁸²

Citing the European Court of Human Rights' decision in *Kennedy v United Kingdom* that the meaning of the term “national security” is sufficiently clear to satisfy Article 8(2) of the European Convention, the Commission recommend replacing “safety or interests of the state” with “national security”.

Conduct “prejudicial” to the safety or interests of the state

Section 1 of the 1911 Act makes it an offence if the defendant acted with a purpose “prejudicial” to the safety or interests of the state. It is the defendant's intentions in their action which is the test, not the outcome:

In short, the defendant must have a specific purpose in mind (for example disrupting an airbase), which must objectively prejudice the safety or interests of the United Kingdom. The defendant's opinion as to whether his conduct prejudices the safety or interests of the United Kingdom is irrelevant.⁸³

The Law Commission concludes that the defendant should only commit an offence if they knew, or had reasonable grounds to believe, that their conduct was prejudicial to the safety or interests (or “national security”, as above) of the state.

It would also be the case that there is no need to actually prove that the actions *were* prejudicial to the interests of the state. The Commission makes an analogy to a case involving section 1(2) of the *Criminal Damage Act 1971*, which makes it an offence to cause damage to property with intent to endanger life. In the case cited, a defendant who started a fire in his semi-detached house had his conviction upheld by the Court of Appeal despite the fact his neighbours were absent so never at any risk.

⁸² Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 35

⁸³ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 35

From prohibited places to designated sites

Section 3 of the 1911 Act sets out a definition of prohibited places at which trespassing may lead to a person committing an offence under the Act. The list is extensive, but outdated, included such references as places storing “munitions of war”.

The Commission recommends replacing this system with that used in the [Serious Organised Crime and Police Act 2005](#), by which the Secretary of State designates sites that are subject to the provisions of the Act. For example, the Houses of Parliament is a designated site for the purposes of Section 128 the 2005 Act.

There is currently an inconsistency between the two lists. Some sites are designated for the purposes of the 2005 Act, but not subject to the provisions of the 1911 Act, or vice versa.

The Commission proposes a modified version of the approach taken in the 2005 Act. That approach is the creation of a list of protected sites by primary legislation, which can then amended by secondary legislation using the affirmative procedure.

Territorial ambit of offences to be expanded

Crimes committed outside of the United Kingdom and its territories cannot, ordinarily, be prosecuted under English law. The 1911 Act provides that an offence can be committed by someone outside the United Kingdom if he or she is a British Officer or subject, which means that it has extraterritorial effect.

There is legislation that expands the territorial ambit of certain offences, such as the [Serious Crime Act 2015](#), which the Commission explains amends the [Computer Misuse Act 1990](#) like so:

An individual can commit an offence contrary to the *Computer Misuse Act 1990* even if they were outside the United Kingdom when they are alleged to have committed the offence provided there is a “significant link” with the United Kingdom.⁸⁴

The Commission has proposed that the new Espionage Act has similar provisions, expanding the territorial ambit of espionage offences.

Provisions intended to ease the prosecution’s burden of proof to be removed

The 1911-1939 contain a number of provisions intended to ease the prosecution’s burden of proof when prosecuting espionage offences. The Commission recommends these provisions not be included in any redrafted law, as they are “difficult to reconcile with principle”.⁸⁵

The Protocol should be “improved”

The “Protocol” is the process related to any investigation regarding a possible offence under the Acts. When the protocol was being recommended for development by Her Majesty’s Inspectorate of Constabulary, they said:

⁸⁴ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 45

⁸⁵ Ibid, p 48

The aim of the protocol is to develop a staged process between the police, the Crown Prosecution Service, Cabinet Office and a designated Parliamentary official to deal with investigations of this nature. The Protocol describes a process which encourages key stakeholders to contribute to the decision making, whilst recognising the independence of each organisation.⁸⁶

The Protocol is set out on pages 126 and 127 of the Law Commission's report. The Commission concluded that "improvements could be made".⁸⁷ This would include defining the term "serious offence".

Exclusion of the public from the court should be made subject to a necessity test

Section 8(4) of the 1920 Act confers a power upon the court to exclude members of the public from the court during proceedings on an offence under the 1911 Act, on an application from the prosecution.

The Commission describes that as a "statutory exemption to the principle of open justice".⁸⁸ The Commission recommends that the power be amended so that it may only be used "if necessary to ensure national safety is not prejudiced".⁸⁹

Defence to be notified where an "authorized check" has taken place

Section 118 of the *Criminal Justice Act 1988* abolished the right of the defence to challenge jurors without cause. The prosecution right (the right of "stand by") is, however, retained. However, it is considered exceptional and only used in cases of terrorism or national security.

The guidelines of the use of the power provide that the Director of Public Prosecutions may apply to the Attorney General for an "authorised check" to be conducted:

In order to ascertain whether in exceptional circumstances of the above nature either of these factors might seriously influence a potential juror's impartial performance of his duties or his respecting the secrecy of evidence given in camera, it may be necessary to conduct a limited investigation of the panel. In general, such further investigation beyond one of criminal records made for disqualifications may only be made with the records of the police.

However, a check may, additionally be made against the records of the Security Service. No checks other than on these sources and no general inquiries are to be made save to the limited extent that they may be needed to confirm the identity of a juror about whom the initial check has raised serious doubts.⁹⁰

⁸⁶ Her Majesty's Inspectorate of Constabulary, [Review of the Lessons Learned from the Metropolitan Police Service's Investigation of Home Office Leaks](#) (2009) para 9.4.

⁸⁷ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, page 129

⁸⁸ *Ibid*, p 132

⁸⁹ *Ibid*, p 135

⁹⁰ Attorney General's Guidelines (Juries: Right to Stand By) (1989) 88 Cr App R 123. Discussed in D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (2017), at D13.45.

The Commission recommends that the guidance be amended to state that if an authorised check has been undertaken, this should be brought to the attention of the defence representatives.⁹¹

Removing archaic language

The Commission makes a general recommendation that the provisions of the 1911-1939 Acts are archaic and in need of reform. This would include removing references to “sketches, plans, models, notes and secret official pass words and code words”, which are now anachronistic.⁹²

4.2 Proposed changes to the 1989 Act

The Law Commission proposes that the *Official Secrets Act 1989* ought to be repealed and replaced with new legislation.

Selected areas where the Commission recommends no change

Disclosure to solicitors or barristers to remain exempt

The Law Commission provisionally concluded that disclosures made to a solicitor or barrister for the purposes of receiving legal advice in respect of an offence under the 1911 Act should continue to be an exempt disclosure.⁹³

No statutory public interest defence to be created

There is no statutory public interest defence in any of the Official Secrets Acts.

The judgment of the House of Lords in *Shayler* remains binding, and has found that compliance with Article 10 of the European Convention of Human Rights (on freedom of expression) does not necessitate the availability of a public interest defence for offences under the 1989 Act.

The Government White paper that preceded the 1989 Act considered whether a public interest defence should be included in the Act:

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 in sentencing - but on the nature and degree of the harm which their acts cause.⁹⁴

The Commission discussed a number of the “very few” offences that are provided with a public interest defence in statute.

The Commission rejected the creation of a statutory public interest defence, saying that the “problems associated with the introduction of

⁹¹ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 139

⁹² Ibid, p 44

⁹³ Ibid, p 89

⁹⁴ Reform of Section 2 of the Official Secrets Act 1911 (1988) Cm 408, para 60.

a statutory public interest defence outweigh the benefits”,⁹⁵ and that “The legal safeguards that currently exist are sufficient to protect journalistic activity without the need for a statutory public interest defence”.⁹⁶

Proposed changes in the redrafted Act **Offences to explicitly not be strict liability offences**

The Commission writes that the offences in the 1989 Act *appear* to be strict liability offences, meaning that there is no need to prove that the offender intended to, for example, cause damage to the capability of the Armed Forces to be guilty of a Section 2 offence. However, as a result of a judgment of the Court of Appeal in *Keogh* “it is not accurate to describe the offences as being offences of strict liability”.⁹⁷

The Commission provisionally concludes that some offences under the 1989 Act should explicitly require proof of “mental fault”, meaning that these offences will explicitly not be offences of strict liability.

However, offences under the 1989 Act committed by members of the security and intelligence agencies, and by ‘notified persons’, should continue to be strict liability offences, the Commission provisionally concluded.⁹⁸

Clarifying who is subject to the 1989 Act and reforming the notification procedure

At present, the provisions of the 1989 Act apply to:

- Members and former of the security and intelligence services;
- persons notified they are subject to the provisions of the Act;
- Crown servants and former Crown servants;
- Government contractors;
- Any member of the public who has received the information in one of the six categories, which has been disclosed to them by a Crown Servant without lawful authority; or was entrusted to them by a Crown Servant in confidence.

The Commission suggests that there are problems with this situation, specifically that it is unclear what the meaning is of “Members” and “Crown Servant”, and that the notification process is not working as well as it should.

Although this procedure sounds unproblematic in theory, our initial consultation with stakeholders suggests that in practice the statutory procedure for notification is overly bureaucratic, which impedes its effectiveness and may mean a person is not notified when they ought to be. This has the potential to cause gaps in the

⁹⁵ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 175

⁹⁶ *Ibid*, p 177

⁹⁷ *Ibid*, p 81

⁹⁸ *Ibid*, p84

protection the Official Secrets Act 1989 is intended to afford to information.⁹⁹

The Commission recommends that the notification process is reformed for greater efficiency.

Increasing the maximum sentence length, possibly to 14 years

The Law Commission says that the maximum sentences available for offences under the 1989 Act appear low compared to other offences that criminalise the unauthorized disclosure of information.¹⁰⁰

The overwhelming majority of offences in the Official Secrets Act 1989 are triable either in a magistrates' court or in the Crown Court. For most of the offences, the maximum sentence if tried in the magistrates' court is a fine and/or six months' imprisonment.

If tried in the Crown Court, the maximum sentence is a fine and/or two years' imprisonment.

By way of contrast, the Law Commission makes the comparison to an employee of the National Lottery Commission disclosing information that has been supplied by Her Majesty's Commissioners for Revenue and Customs, which would carry the same sentence under a different Act. The Commission's argument is that protected information under the categories in the 1989 Act are more serious than that kind of information, and should carry a higher sentence.

Also by way of contrast, sections 57 – 59 of the *Investigatory Powers Act 2016*, when commenced, will make it an offence punishable by up to five years' imprisonment for a Crown servant to disclose without authorisation anything to do with the existence or implementation of particular warrants granted pursuant to the Act, including the content of intercepted material and related communications data.

The Law Commission does not explicitly propose increasing the sentence to 14 years, contrary to media reports. The Law Commission's conclusion reads:

We provisionally conclude that the maximum sentences currently available for the offences contained in the Official Secrets Act 1989 are not capable of reflecting the potential harm and culpability that may arise in a serious case.¹⁰¹

However, the conclusion itself does not state what an alternative sentence length would be. A 14 year sentence would, however, bring this sentence into line with the possible sentences for offences under the 1911 Act – that is, offences related to providing information harmful to the state to an enemy or foreign power.

The Commission does, however, mention the 14 year sentence existing in Canadian law:

⁹⁹ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 85

¹⁰⁰ *Ibid*, p 87

¹⁰¹ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 88

Additionally, the maximum sentence for the offences in the Official Secrets Act 1989 is low when compared with offences that exist in other jurisdictions that criminalise similar forms of wrongdoing, as suggested by our comparative law research in Appendix A. For example, the maximum sentence for making an unauthorised disclosure in Canadian law under the Security of Information Act 2001 is 14 years' imprisonment.¹⁰²

The possibility of increasing the sentence length for offences under the 1989 Act has been a part of much of the stakeholder commentary on the proposals. See [Stakeholder Comment](#) in this briefing. [Public commentary](#)

Leaking economic information

Sensitive economic information is not one of the protected categories of information under the 1989 Act. The Law Commission said that:

One specific issue that has been brought to our attention however, and that we believe merits further consideration, is the fact that sensitive economic information is currently not protected by the Official Secrets Act 1989.¹⁰³

The Commission asks for consultees' views on the proposal that information that would harm the economic interests of the state be subject to the provisions of the Act:

Whilst being mindful of the need to ensure that the legislation only encompasses information the disclosure of which could damage the national interest, we invite consultees' views on whether information that relates to the economy ought to be brought within the scope of the legislation.

One way to define this category is to specify that it only encompasses information that affects the economic well-being of the United Kingdom in so far as it relates to national security.¹⁰⁴

The Commission goes on to suggest the formulation used in the *Investigatory Powers Act 2016*. In that Act, one of the grounds upon which the Secretary of State may issue a targeted interception warrant or a targeted examination warrant is where it is:

In the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security.¹⁰⁵

In this matter, however, the Law Commission does not make a specific conclusion that this definition should be used and says that consultees may take the view that a broader definition is required.

Prior publication defence

The Official Secrets Act 1989 contains no express defence of prior publication. The Commission says that this has been described as "problematic", and concludes the following:

A defence of prior publication should be available only if the defendant proves that the information in question was in fact

¹⁰² Ibid, p 87

¹⁰³ Ibid, p 92

¹⁰⁴ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 92

¹⁰⁵ [Investigatory Powers Act 2016](#), Section 2

already lawfully in the public domain and widely disseminated to the public.¹⁰⁶

This would be an expansion of the current law, which contains no express defence of prior publication.

Territorial ambit

Crimes committed outside of the United Kingdom and its territories cannot, ordinarily, be prosecuted under English law. The 1989 Act is an exception to this because an individual who is a British citizen or Crown servant can commit an offence contrary to the Official Secrets Act 1989 even if they are outside the United Kingdom when the information in question was disclosed without authorisation¹⁰⁷ by a person who is not a British citizen or Crown servant does not commit an offence if they disclose the information outside the United Kingdom. This is true even if they are a “notified person”.

For example, an individual may be a non-British citizen seconded to a government department and in that role have access to information that relates to security and intelligence. Such an individual may be a notified person for the purposes of section 1 of the Official Secrets Act 1989. If that person were to retain the information and disclose it upon their return to their home country, however, they would not commit an offence contrary to the law of England and Wales.¹⁰⁸

The Commission proposes an approach similar to that taken in section 11(2) of the *European Communities Act 1972*. That section creates an offence that applies to members of the European Atomic Energy Community institutions or committees, regardless of whether that person is a British citizen or whether they were in the United Kingdom at the time.

Enabling public servants to make lawful disclosures

The Commission considers how public servants may be permitted to make disclosures legally. The provisional conclusions on this topic are:

- It should be enshrined in legislation that current Crown servants and current members of the security and intelligence agencies are able to seek authority to make a disclosure;¹⁰⁹
- There should be a non-exhaustive list of the factors to be considered when deciding whether to grant lawful authority to make a disclosure;¹¹⁰
- A member of the security and intelligence agencies ought to be able to bring a concern that relates to their employment to the

¹⁰⁶ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, January 2017, p 92

¹⁰⁷ This does not apply to those offences that can only be tried in the magistrates’ court, which are contained in section 8(1), 8(4) and 8(5) of the *Official Secrets Act 1989*.

¹⁰⁸ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, p 93

¹⁰⁹ Law Commission, [Protection of Official Data: A Consultation Paper](#), Consultation Paper No 230, p 189

¹¹⁰ *Ibid*, p 190

attention of the Investigatory Powers Commissioner, who would be able to investigate the matter and report their findings to the Prime Minister.¹¹¹

4.3 Stakeholder Comment

Media response to the Law Commission's proposals has been largely negative. It has focused on the proposed changes to the 1989 Act, particularly with comment on possible implications for public interest disclosures ("leaking") and journalism. Much of the press comment has concerned the inclusion of those who "obtain or gather" secrets in any redrafted offence, despite this being true of the current law. The SNP has particularly highlighted the proposals in the House of Commons.

Journalistic comment

In a February 2017 editorial, *The Guardian* said that the new proposals "threaten democracy", particularly highlighting that reporters publishing stories based on a leak could be subject to criminal charges (however, this is not a change to the current law). *The Guardian* also opposed the increase of sentences to up to 14 years, and criticised the consultation process:

In its report, the Law Commission lists Guardian Media as one of the organisations that was "consulted" on its proposals. This consultation was brief and informal and ended with a promise, honoured only in the breach, that everyone would be kept informed about the next steps.¹¹²

In its February 2017 editorial, *The Times* said that the proposals are "worthy of the Stasi", and ran the risk of putting whistle blowers and journalists in jeopardy:

It suggests broadening the range of suspects who could be jailed for disseminating official material to include journalists, charity workers and elected politicians. It suggests lengthening maximum sentences to 14 years, and it suggests extending the act to cover "information that affects the economic wellbeing of the United Kingdom in so far as it relates to national security".

There is no shortage of laws on the statute book with which to punish those who steal or misuse official secrets. But official Britain is already far too fond of secrets and public interest journalism is already under grave legal and commercial threat. The Cabinet Office should thank the Law Commission for its ideas, and reject them.¹¹³

The Sunday Telegraph's editorial comment called the proposals a "outrageous and nothing less than a threat to Britain's free press and thus its democracy". The paper stated:

That could be committed not just by someone who discloses secret information but, crucially, by a person who obtains it. There

¹¹¹ Ibid, p 185

¹¹² *The Guardian*, "[The Guardian view on official secrets: new proposals threaten democracy](#)", 12 February 2017

¹¹³ *The Times*, "[Official Nonsense](#)", 13 February 2017

would be "no restriction on who can commit the offence", the commission proposes.¹¹⁴

Michelle Stanistreet, General Secretary of the National Union of Journalists said that the Union was "concerned at the ramifications for journalists and press freedom as a consequence".¹¹⁵

Parliamentary comment

[Early Day Motion 1002](#) was tabled by Helen Goodman MP on 1st March expressing concern about the proposals, calling the proposals "draconian". At time of writing, it has been signed by 24 MPs, primarily members of the Scottish National Party.

Helen Goodman MP is Chair of the National Union of Journalists.

Other than this, there has so far been no parliamentary discussion of the Law Commission's proposals.

However, similar issues regarding the protections afforded to journalists making public interest disclosures were discussed at Report stage of the *Digital Economy Bill*. In response to an SNP amendment to the Bill, Matt Hancock MP said that public interest is already taken into account by any public prosecution:

I can confirm that any public prosecution has to be in the public interest. The public interest is not covered in this Bill, but that is because the nature of a public prosecution is that it has to be in the public interest. I hope that deals with my hon. Friend's concern.¹¹⁶

The amendment was not selected for separate decision.

¹¹⁴ *The Sunday Telegraph*, "Law Commission's threat to democracy", 12 February 2017

¹¹⁵ *The Guardian*, "[Government advisers accused of 'full-frontal attack' on whistleblowers](#)", 12 February 2017

¹¹⁶ [HC Deb 28 November 2016 Col 1349](#)

5. Notable cases involving the *Official Secrets Act* or leaks of Government information

5.1 Duncan Sandys MP (1938)

On 27 June 1938 Duncan Sandys MP raised on the floor of the House the fact that he had been asked by the Attorney General about the sources of information he had used to draft a parliamentary question. Mr Sandys told Mr Speaker

...on Thursday last I received a letter from the Attorney-General asking me to go and see him that evening. At this interview the Attorney-General informed me that the question which I had sent to the Secretary of State for War showed, in the opinion of the War Office, a knowledge of matters covered by the Official Secrets Act, and he asked me to reveal the sources of my information.

The Attorney General had, Mr Sandys said, threatened him with prosecution under section 6 the *Official Secrets Acts*.¹¹⁷ This was denied by the Attorney General.

The details of Mr Sandys allegations and the general question of the applicability of the *Official Secrets Acts* to Members was referred to a special select committee, the Select Committee on the Official Secrets Act. This issued a first report in September 1938 and a further report in April 1939. The first considered the statement to the House by Sandys and his summons to appear before the military court.¹¹⁸ The second looked at the applicability of the *Official Secrets Acts* to Members in discharge of their Parliamentary duties.¹¹⁹

The reports concluded that the soliciting or receipt of information was not a proceeding in Parliament, but that it would be inadvisable to attempt to define "the extent of immunity from prosecution under the Official Secrets Act to which members of parliament are or ought to be entitled".¹²⁰

5.2 William Owen MP (1970)

In January 1970 William Owen, the then Member for Morpeth, was arrested and charged with communicating evidence useful to the enemy, under section 1 of the *Official Secrets Act 1911*. On 6 May he was found not guilty of all eight charges. The charges were reported in *The Times* as:

...communicating information calculated to be, or which might be, or was intended to be, useful to an enemy between August 1961, and June, 1962; a similar offence between January and

¹¹⁷ HC Deb 27 June 1938 cc1534-1535

¹¹⁸ HC 173 1937-38

¹¹⁹ HC 101 1938-39

¹²⁰ HC 101 1938-39 paras 16 and 22

December 1963, and on three charges of doing an act preparatory to communicating information by receiving money from a member of the Czechoslovakian Embassy for periods between January and December, 1967, January and December 1968, and January and December 1969.¹²¹

The Times further reported that:

Throughout the trial Mr Owen insisted that he never passed classified information to two Czechoslovak intelligence officers working in London. He admitted that during a period of nine years he received from them about £2,300 but claimed that often he would invent information to pass on to them when the "pumped" him during lunchtime appointments.¹²²

5.3 Jonathan Aitken and the Daily Telegraph (1971)

In 1971 Jonathan Aitken, who was then a prospective parliamentary candidate, was accused of offences under the Official Secrets Act for passing on classified information to the *Sunday Telegraph* about the Biafran war in Nigeria.

He was acquitted of all charges having pleaded that it was his "duty in the interests of the state" to have done so.¹²³ In 1970, the Attorney-General refused to prosecute Sir Hugh Fraser MP who had demanded his own prosecution alongside that of Aitken.

5.4 Sarah Tisdall (1983)

Sarah Tisdall was a junior civil servant employed in the private office of the Foreign Secretary and engaged principally in clerical duties.

In October 1983 she anonymously delivered two documents written by the then Defence Secretary, Michael Hesteltine, to *The Guardian* newspaper. The documents contained information on the expected arrival date for cruise missiles at Greenham Common, along with information about the manner in which the Defence Secretary proposed to handle the announcement in Parliament and the press.

After being interviewed by the police, Sarah Tisdall admitted leaking the documents. On 9 January 1984 she was charged under Section 2 of the Official Secrets Act. In a hearing held at the Central Criminal Court, Miss Tisdall pleaded guilty. The judge, Mr Justice Canty, gave her a custodial sentence of six months. He stated:

Unfortunately, in these days, it is necessary to make perfectly clear, by example, that any person entrusted in confidence with material which is classified as secret, who presumes to give himself permission but decides that, none the less, it will be published, will not escape a custodial sentence by asserting, however, honestly, that he thought it would do no harm, or even that he thought it was a good think to do.

¹²¹ 'Owen is cleared on all eight charges', *The Times*, 7 May 1970

¹²² 'Owen is cleared on all eight charges', *The Times*, 7 May 1970

¹²³ Hooper, *Official Secrets*, pp87-103;

A 1985 article in *Political Quarterly* by Robert Pyper discussed the reasons why Miss Tisdall leaked the information:

Public statements by Miss Tisdall at a later date show that she had two reasons for leaking the documents. The first was quite specific: Michael Hesteltine's plans for dealing with the public relations aspects of the missiles' arrival amounted, in Miss Tisdall's words, to a decision that "he was not going to be accountable to Parliament that particular day". He was going to leave the House of Commons in order to conduct a press conference at the base, before the Opposition had a chance to question him in detail about his statement. The second reason was her general disenchantment with government policies which were affecting her as a civil servant and as a voter.¹²⁴

5.5 Ian Willmore (1983)

In December 1983 Ian Willmore, an administrative trainee at the department of Employment, leaked a memorandum to *Time Out*. The memorandum included information about advice the Master of the Rolls, Sir John Donaldson, had given advice to Michael Quinlan, the Permanent Secretary in the Department of Employment, on the future of the law relating to industrial relations. Pyper has written that:

Like Sarah Tisdall, Ian Willmore had two sorts of grievance against the Government, and these provided the motivation for him to leak a secret document to the press. He was discontented in a general sense because of what he saw as cynical government interference in the traditional independence of Civil Service departments... Willmore's second, immediate reason for leaking was (although tinged with political considerations) mainly concerned with his deeply felt need to publicise what he viewed as an instance of constitutional subversion.¹²⁵

Willmore had been a member of the Labour Party for almost seven years at the time.

The Attorney-General, Sir Michael Havers QC, decided against prosecuting Willmore, saying that Section 2 should be used sparingly and only when absolutely necessary.

5.6 Clive Ponting (1985)

In 1985 Clive Ponting sent two documents about the sinking of the ship the *General Belgrano* to Labour MP Tam Dalyell. Ponting admitted sending Mr Dalyell the documents, and was prosecuted under the *Official Secrets Act 1911*. Ponting's defence was that the disclosure had been in the public interest, and that the information was privileged as it was to a Member of Parliament. The trial summing up by the judge contained the following points:

The prosecution have got to prove that Mr Dalyell was not a person to whom it was in the interest of the state in his [Ponting's] duty to communicate the information. His duty, I direct you, means an official duty, a duty imposed upon him by his

¹²⁴ R Pyper, 'Sarah Tisdall, Ian Willmore, and the Civil Servant's "Right to Leak"', *Political Quarterly*, Vol 56, 1985, p73

¹²⁵ Pyper, 'Civil Servant's "Right to Leak"', p74

office... namely that of Assistant Secretary in the Ministry of Defence.

...What, then of the words, 'the interests of the state'? Members of the jury I direct you that those words mean the policies of the state as they were in July 1984 when Mr Ponting communicated the information to Mr Dalyell, and not the policies of the state as Mr Ponting, Mr Dalyell, you or I might think they ought to have been... I direct you in law that it is no defence that he honestly believed that it was his duty to leak the documents in the interests of the state if, in fact, it was not his duty to do so in the interests of the state.¹²⁶

The jury, nevertheless, found Mr Ponting not guilty.

5.7 David Shayler (1997)

David Shayler was charged under three counts of passing documents and information to the *Mail on Sunday* in August 1997.

The documents and information contained potentially serious allegations against the secret services. After a French court refused to agree to a British extradition request, Mr Shayler eventually returned to Britain to face trial. He was prosecuted under Section 1 of the *Official Secrets Act 1989*. He was supported in his case by Liberty. In November 2002 he was jailed for six months. The judge, Mr Justice Moses, told Mr Shayler that he "had taken it upon himself to decide what he thought was in the public interest".

The House of Lords examined the defences available to Shayler and noted that, firstly, the 1989 Act afforded no public interest defence and secondly, that it was compatible with Article 10 of the European Convention on Human Rights (right to free expression), since the ban on disclosure was not absolute, but referred to disclosure without lawful authority.¹²⁷ The Court of Appeal had earlier found that the defence of duress or necessity of circumstance was not available to Shayler, but held that this defence was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury.¹²⁸

When Mr Shayler was found guilty, the *Guardian* wrote:

Stella Rimington, the former head of MI5, told the *Guardian* last year that the absolute ban imposed by the secrets act was "unrealistic". There is not even a system in place to enable former civil servants - let alone security and intelligence officers - to have their books or memoirs vetted, she said.

We are not saying there should be no criminal charge for revealing genuinely secret information, merely that a person, if prepared to take the risk of disclosure, should be allowed to argue before a jury that he or she acted in the public interest. If necessary the court could go in camera and the jury could even be vetted. Ironically, this could lead to more openness. Shayler's trial

¹²⁶ R M Thomas, 'The British Official Secrets Acts 1911-1989 and the Ponting Case', *Criminal Law Review*, 1986, pp497-498; 'Ponting judge tells Jury Belgrano leak was against the interests of the state', *The Times*, 12 February, 1985

¹²⁷ *R v David Michael Shayler [2002]* HL 11

¹²⁸ 1 WLR 2206 [2001]

was heard in public, which meant that he was not allowed to argue his case fully in front of a jury.

The security and intelligence agencies should be subject to more scrutiny, with a system protecting genuine whistleblowers, because the onus is on these services to show they are not indulging in political activities or abusing civil liberties [...]

[...]It [the Government] is trying in particular to stop journalists from writing about allegations that MI6 officers were involved with Islamist extremists plotting to assassinate the Libyan leader, Muammar Gadafy. More than two years ago, dismissing attempts by the government to gag the *Guardian* and *Observer*, the appeal court described the Gadafy allegation as raising "critical public issues". It added: "Inconvenient or embarrassing revelations, whether for the security services or for public authorities, should not be suppressed."

In opposition, Labour frontbenchers, including Tony Blair, argued and voted for a public interest defence as the Official Secrets Act passed through parliament in 1989. Now they are in power, they should introduce it.¹²⁹

5.8 Katherine Gun (2004)

An employee of GCHQ, Katherine Gun admitted to leaking an email calling for British help in spying on UN diplomats in January 2004.

The Attorney General announced in February 2004 that a prosecution against Katherine Gun, an employee at GCHQ, would not proceed. According to press reports, the legal doctrine of necessity was a main aspect of the defence Katherine Gun's lawyers would have offered, if the Crown Prosecution Service had not withdrawn the case against her.¹³⁰ Necessity is a common law doctrine, defined as pressure of circumstances compelling one to commit an illegal act.¹³¹

The Court of Appeal held in the Shayler case that a defence of necessity was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury. The act was subject to a test of proportionality, so that the act should be no more than reasonably necessary to avoid the harm feared. There was no reason in principle why the defence should not apply to offences under the 1989 Act.

Ms Gun's lawyers argued for the release of the Attorney General's advice to the Government about the legality of the war in Iraq in order to support her case that she was attempting to prevent unnecessary deaths in the conflict. In his statement on the Gun case, the Attorney General, Lord Goldsmith, said:

Yesterday at the Central Criminal Court, the Crown offered no evidence in the case of Katharine Gun. Ms Gun had been charged under Section 1 of the Official Secrets Act. The effect of offering no evidence was that the case against Ms Gun was discontinued.

¹²⁹ Richard Norton-Taylor and John Wadham, '[The public has the right to the truth](#)', *The Guardian*, 6 November 2002

¹³⁰ '[Risky business of prosecutions under the Official Secrets Act](#)' *The Guardian*, 26 February 2004

¹³¹ *Oxford Dictionary of Law* 1997

I hope that it will help the House if I first explain what the process is in respect of prosecutions under the Official Secrets Act. Prosecutions under it are governed by the normal rules applied by the Crown Prosecution Service when considering any prosecution—the code for Crown prosecutors—and there is the additional requirement of the Attorney-General's consent before a prosecution can go ahead.

I should say at the outset that, when making decisions under the code for Crown prosecutors, the Crown Prosecution Service acts in the public interest and decisions for which it is responsible are taken by it independently. I also remind the House that, when making decisions about whether to consent to a prosecution, the Attorney-General makes his decision in the public interest, and not in the interests of the Government.¹³²

The Attorney General continued:

I recognise that many in the House will want to know more about the detailed basis on which counsel concluded that there was no longer a realistic prospect of conviction. However, as the matter concerns issues of intelligence it is not appropriate for me to do so, even to this House. As to the impact of the decision on the conduct of future prosecutions, it is the case that the substantive law is always kept under review and the effect of particular prosecutions on the substantive law considered.¹³³

The DPP, McDonald, was reported as stating that there was no prospect of conviction since the prosecution could not disprove the defence of necessity.¹³⁴

Subsequently, a Parliamentary question appeared to reveal that the Home Office was undertaking some sort of review of the Official Secrets Act:

Mr. Shepherd: To ask the Prime Minister who is to chair the review of the Official Secrets Act 1989; and if he will make a statement. [158687]

The Prime Minister: The Official Secrets Act, as with all areas of the criminal law, is kept under review. The Home Secretary has made it clear that the Home Office is considering the implications of recent events for this legislation.¹³⁵

However, no further information has been forthcoming about any particular review of the Act.

5.9 David Keogh and Leo O' Connor (2004)

In this case, a civil servant, David Keogh, and an MP's researcher, Leo O'Connor who worked for Anthony Clarke MP, were found guilty of breaching the Official Secrets Act after disclosing a classified letter from Tony Blair's private secretary for foreign affairs in April 2004. Mr Clarke immediately sent the letter back to Number 10. He lost his seat in 2005 and was not charged under the Act.

¹³² HL Deb 26 February 2004 c338

¹³³ HL Deb 26 February 2004 c341

¹³⁴ 'Secrets law to be revealed in wake of Gun case', *Financial Times*, 27 February 2014

¹³⁵ HC Deb 4 March 2004 c1093w

The Government argued that the contents of the document could be heard only by the jury with no press or public present. The judge agreed and also made it clear he regarded the contents of the document as sensitive enough that the press could not report what Mr Keogh said when he was asked in open court about what preyed on his mind when he first saw the document.

The judge, Mr Justice Aikens, said Keogh's "reckless and irresponsible" actions could have cost British lives:

You decided that you did not like what you saw. Without consulting anyone, you decided on your own that it was in the best interest of the UK that this letter should be disclosed. Your reckless and irresponsible action in disclosing this letter when you had no right to could have cost the lives of British citizens. This disclosure was a gross breach of trust of your position as a crown servant.¹³⁶

5.10 Derek Pasquill (2005-2006)

Derek Pasquill was a Foreign Office official accused of leaking confidential documents to the *New Statesman* and the *Observer* newspaper during 2005 and 2006. The documents concerned the Government's views on secret CIA rendition flights and contacts with Muslim groups. The case was abandoned on 9 January 2008 when prosecutors said that documents to be disclosed as part of legal proceedings would have undermined its case that the leaks were damaging. The *Guardian* reported the *New Statesman's* editor as saying:

This was a misguided and malicious prosecution, particularly given that a number of government ministers privately acknowledged from the outset that the information provided to us by Derek Pasquill had been in the public interest and was responsible in large part for changing government policy for the good in terms of extraordinary rendition and policy towards radical Islam.¹³⁷

The Foreign Office was quoted with the following comments:

It is important that the necessary confidentiality of government information is protected and the leaking of any official documents is therefore absolutely contrary to the good business of government," a Foreign Office spokesman said.

"As Mr Pasquill may be subject to internal disciplinary procedures, any further comment would be inappropriate."¹³⁸

David Howarth tabled an Early Day Motion on the Pasquill affair:

That this House notes the collapse of the case against Derek Pasquill; believes that the law about official secrets should be based on preventing damage to the public interest rather than preventing embarrassment for the leading party; and calls for an

¹³⁶ Quoted in 'Gagging order as two are jailed for leaking Blair-Bush memo', *The Guardian*, 11 May 2007

¹³⁷ "'Victory for press freedom" over leaks', *The Guardian*, 9 January 2008

¹³⁸ "'Victory for press freedom" over leaks', *The Guardian*, 9 January 2008

enquiry into the case of Derek Pasquill and for a review of the Official Secrets Act 1989.¹³⁹

The Motion received 51 signatures.

5.11 Thomas Lund-Lack (2007)

In July 2007 a senior civilian worker at Scotland Yard was jailed for eight months for leaking information about a planned al-Qaeda attack on the West. Thomas Lund-Lack, a retired detective inspector with the Metropolitan Police, admitted wilful misconduct in public office by disclosing a Joint Terrorism Analysis Centre report to a *Sunday Times* journalist. A second charge of breaching the *Official Secrets Act 1989* was, it was reported, expected to "lie on file".¹⁴⁰

The judge who sentenced him, Mr Justice Gross, said, "Disclosure of this nature should and ought to attract immediate custody. I shall impose such a sentence in this case with no little sadness but equally no hesitation".¹⁴¹

5.12 The Loss of Government Papers

During 2007 and 2008 a number of cases have come to light where civil servants have mislaid sensitive information. At least one civil servant has faced prosecution under the Official Secrets Acts. In a case reported by The Daily Telegraph Richard Jackson, a Cabinet Office official, was fined £2,500 under the Official Secrets Act after he left classified papers relating to al-Qaeda and Iraq on a train.¹⁴² According to The Independent the paperwork was found by a member of the public and handed over to the BBC. It was subsequently produced on the evening news by the security correspondent, Frank Gardner.¹⁴³

In October 2008 the Cabinet Minister James Purnell left confidential papers on a train which related to the case of a constituent. Jonathan Baume, the head of the FDA, said that Mr Purnell should suffer the same consequences as civil servants in such cases.¹⁴⁴

¹³⁹ [Early Day Motion 690](#), Derek Pasquill and the Official Secrets Act 1989, Session 2007-08

¹⁴⁰ 'Met employee jailed for Sunday Times leak', PA Business, 27 July 2007

¹⁴¹ 'Former police officer jailed for secrets leak', PA Business, 27 July 2007

¹⁴² 'Purnell's papers: union wants action', *The Daily Telegraph*, 3 November 2008

¹⁴³ 'Officer faces charges over secret files left on train', *The Independent*, 30 September 2008

¹⁴⁴ 'James Purnell "should face action" for leaving papers on train', *The Daily Telegraph*, 2 November 2008

6. Other legislation concerning the disclosure of official information

6.1 *Public Records Acts, 1958 - 1967*

The *Public Records Act 1958*, which came into force on 1 January 1959, provided a statutory, general public right of access to government records for the first time.¹⁴⁵

Under section 5 (1) of the Act, public records would be available to members of the public after a period of fifty years.¹⁴⁶ The *Public Records Act 1967* subsequently amended the fifty-year closure period to thirty years. Following an independent review of the thirty-year access rule, the *Constitutional Reform and Governance Act 2010* reduced the closure further, to twenty years.¹⁴⁷ A ten-year transition period was also put in place, during which two years' records will be released every year to get down from the thirty-year limit to the twenty-year limit.¹⁴⁸

There are, however, certain exemptions to the right of access to public records after twenty years. The *Public Records Act 1958* specified that records could be retained by the Government beyond the specified fifty (now twenty) year period if, in the opinion of the person responsible for them, they are required "for administrative purposes or ought to be retained for any other special reason".¹⁴⁹ The Lord Chancellor's approval is needed for this retention.

The risk of prejudice to national security is regarded as the "special reason" in relation to the retention of security and intelligence records.¹⁵⁰ Successive Lord Chancellors have given their approval for the retention of defined categories of security and intelligence records. This approval has been recorded in instruments which authorise (rather than require) the retention of records where the retention remains necessary for national security reasons. Guidance on the Lord Chancellor's Security Instrument states that

Records retained by public bodies under security and intelligence instruments are reviewed at intervals of no more than 10 years.

¹⁴⁵ The first Public Records Act was passed in 1838 to "keep safely the public records". See The National Archives, [History of the Public Records Act](#) [accessed 17 November 2015]

¹⁴⁶ [Public Records Act 1958](#), section 5 (1)

¹⁴⁷ [Constitutional Reform and Governance Act 2010](#), section 45

¹⁴⁸ [The Freedom of Information \(Definition of Historical Records\) \(Transitional and Savings Provisions\) Order 2012](#) SI 2012/3029

¹⁴⁹ [Public Records Act 1958](#), section 3 (4)

¹⁵⁰ Ministry of Justice, [Transparency Data: Signed Instrument for the Retention of Public Records](#), *Notes on the Lord Chancellor's Security and Intelligence Instrument*, 11 October 2012, para 3

For the security and intelligence agencies it is their records retention policies that are reviewed at least every 10 years.¹⁵¹

The current Security Instrument took effect on 1 January 2012 and will expire on 31 December 2021.¹⁵²

On 17 September 2015 the Government announced via a written statement that the responsibility for government records management policy would be transferred from the Ministry of Justice to the Cabinet Office. The changes took effect on 17 September 2015.¹⁵³ The Lord Chancellor's responsibilities under the *Public Records Act 1958* will also be transferred to the Secretary of State for Culture, Media and Sport.

6.2 Public Interest Disclosure Act 1998

The *Public Interest Disclosure Act 1998* came into force in July 1999, following attempts during the 1990s to protect 'whistleblowers' who raise wrongdoing at work, and who were then victimised or punished for doing so. It amends the *Employment Rights Act 1996*, and protects workers that disclose information about malpractice at their workplace, or former workplace, provided certain conditions are met.

However, section 11 of the *Public Interest Disclosure Act 1998* amended section 193 of the *Employment Relations Act 1996* to exclude whistleblowing protection for disclosures relating to "employment for the purposes of the Security Service, the Secret Intelligence Service or Government Communication Headquarters". Section 193 of the 1996 Act has been amended since,¹⁵⁴ although it has retained the exclusion for those types of employment.

The issue of a public interest defence has long been associated with the *Official Secrets Acts*. It will be recalled that the very first Official Secrets Bill from 1889 had been amended to include a public interest defence, following concerns that the Bill would penalise the disclosure of information about corruption in government (see section x above). There has also been some debate as to whether the *Official Secrets Act 1911* contained a public interest defence in section 2. During his trial in 1985, Clive Ponting attempted to use section 2, subsection 1 (a), part of which states that communication of information is not an offence under the Act if it is communicated to "a person to whom it is in the interest of the State his duty to communicate it".¹⁵⁵ However, Douglas Hurd MP, the Home Secretary in 1989, declared during the Second Reading of the Official Secrets Bill 1988-89 that:

¹⁵¹ Ministry of Justice, [Transparency Data: Signed Instrument for the Retention of Public Records](#), *Notes on the Lord Chancellor's Security and Intelligence Instrument*, 11 October 2012, para 4

¹⁵² Ministry of Justice, [Transparency Data: Signed Instrument for the Retention of Public Records](#), *The Lord Chancellor's Security and Intelligence Instrument*, 11 October 2012

¹⁵³ [HCWS209](#) [Machinery of Government Changes: Data protection policy; Information Commissioner's Office; The National Archives; and Government records management policy], 17 September 2015

¹⁵⁴ By *Employment Relations Act 1999*, Schedule 8, para 1

¹⁵⁵ Official Secrets Act 1911, Section 2 1 (a)

Many have sought to argue such an interest but the judgements have never given cause to accept the argument. We are talking about the proposition that there should be a defence, rather than that we should retain an existing defence. We do not believe that a blanket defence of public interest should have a place in the proposals...¹⁵⁶

Similarly, during the Commons debates on the Official Secrets Bill of 1989 the issue of a public interest defence was aired in relation to Health and Safety matters.¹⁵⁷ Two Members in 1995-96 also attempted to create protection for whistle-blowers. Don Touhig introduced a Private Member's Bill in 1995 to "protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; to protect the identity of sources of information."¹⁵⁸ Tony Wright (the Member for Cannock Chase) likewise introduced a ten-minute rule bill, the Whistleblower Protection Bill, in 1995.¹⁵⁹

The *Official Secrets Act 1989* does not contain a public interest defence.

The House of Commons Library Briefing Paper [Whistleblowing and Gagging Clauses](#) (January 2016) contains further details on the *Public Interest Disclosure Act 1998*.

6.3 Freedom of Information Act 2000

The [Freedom of Information Act 2000](#) provides public access to information held by over 100,000 public authorities, including government departments. Under the Act, public authorities are required to publish certain information about their activities.¹⁶⁰ Since 1 January 2005 individuals have also been able to make requests for information under the Freedom of Information Act. A request for information must be complied with unless one or more of the public exemptions set out in the Act are relevant. Most of the exemptions are subject to a public interest test. Section 2 (2) states that

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest, however, is not defined, and this follows precedent in overseas jurisdictions.

Section 23 of the *Freedom of Information Act* specifies that information supplied by, or relating to, security bodies, such as the Security Service, have an absolute exemption from section 2, i.e. it is not subject to a public interest test. Section 24 of the Act specifies that matters relating to national security are also exempt, but these matters are subject to a

¹⁵⁶ HC Deb 21 Dec 1989 c465

¹⁵⁷ HC Deb 2 Feb 1989 cc450-454

¹⁵⁸ *Public Interest Disclosure Bill*, Bill 20 of 1995/96. See Julia Lourie, [Public Interest Disclosure Bill 1995/96](#), House of Commons Library Research Paper 96/26, 19 February 1996

¹⁵⁹ Bill 152 of 1994/95

¹⁶⁰ *Freedom of Information Act 2000*, Section 19

public interest test. In both instances, a certificate signed by a Minister of the Crown is required for the exemption.

7. *Security Service Act 1989*

The [*Security Service Act 1989*](#) established the first elements of statutory control over the UK's Security Service (MI5). The Act imposed duties and obligations on the Security Service and confirmed that accountability for the Security Service would function by ministerial responsibility to Parliament.¹⁶¹

Section 1 of the Act sets out the duties of the Security Service as being

(2) [...] the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.¹⁶²

The Act gave statutory authority for a Director General of the Security Service, who is appointed by the Secretary of State, who in turn answers in Parliament for the Service (in practice, this is the Home Secretary). The Director General's responsibilities are set out in section 2 of the *Security Services Act*. These include ensuring that the Service does not act to further the interests of a political party.

The Act also provided for a complaints procedure for those aggrieved by what they believed the Service had done in relation to them. This is now set out in the Regulation of Investigatory Powers Act 2000; the Investigatory Powers Tribunal now hears complaints into the conduct of the Security Service.

The *Security Service Act 1989* did not include provision for a Parliamentary committee to examine the policy, expenditure or administration of the Security Service. That Committee, the Intelligence and Security Committee, was established by the 1994 *Intelligence Service Act* (see section 7).

¹⁶¹ Thomas, *Espionage and Secrecy*, p217

¹⁶² [*Security Services Act 1989*](#), section 1

8. *Intelligence Services Act 1994*

The [Intelligence Services Act 1994](#) provides the statutory framework for the Secret Intelligence Service (MI6) and for the Government Communications Headquarters (GCHQ) – the signals intelligence agency.

Section 1 of the Act sets out the functions of the Secret Intelligence Service as being

- (a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and
- (b) to perform other tasks relating to the actions or intentions of such persons.

The 1994 Act also created a statutory committee, drawn from both Houses of Parliament, called Intelligence and Security Committee (now the [Intelligence and Security Committee of Parliament](#)).¹⁶³ The Act established the Committee's remit as being to examine the expenditure, administration and policy of all three intelligence services. The functions of the Intelligence and Security Committee of Parliament have since been increased by the *Justice and Security Act 2013* to increase its powers and remit.

Members of the Committee are now nominated by the Prime Minister (following consultation with the Leader of the Opposition) but appointed by Parliament.

¹⁶³ [Intelligence and Security Act 1994](#), section 10

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