The Bar Council
Competition organiser

Law Reform Essay Competition 2022
Runner up: Graduate Diploma in Law entry 1
Raphael Marshall
THE CITY LAW SCHOOL
CITY, UNIVERSITY OF LONDON
Competition sponsor

Reforming the Official Secrets Act 1989: Combining stronger protections for national security with greater parliamentary scrutiny.

Precis

The 1989 Official Secrets Act requires reform. Any recasting of the act will necessarily be an unsatisfactory compromise between facilitating democratic scrutiny and preventing damaging disclosures. The Government's present approach is unsatisfactory and excessively restrictive of legitimate scrutiny. A better balance could be achieved by placing greater emphasis on parliamentary scrutiny through the Intelligence and Security Committee (ISC) and parliamentary Select Committees more broadly.

The Intelligence and Security Committee of Parliament (ISC) Russia Report, published July 2020, concluded that 'it is very clear that the Official Secrets Act regime is not fit for purpose and the longer this goes unrectified, the longer the Intelligence Community's hands are tied'.[1] This conclusion reflects the long-standing consensus of the United Kingdom Intelligence Community (UKIC).[2] Given the increasingly contested and unstable international environment, there is clearly an urgent imperative to address this concern.

The Official Secrets Act regime is rightly controversial.[3] Informed parliamentary, press, and public scrutiny is a prerequisite for democratic governance. To fulfil its

---

[1] Intelligence and Security Committee, Russia, (House of Commons 2020) para 117.
[2] Christopher Andrew, *The Defence of the Realm: The Authorised History of Mi5,* (Penguin 2015).
[3] Law Commission, *The Protection of Official Data* (Law Com No 395, 2020) para 1.16.

role of encouraging honest and effective government this scrutiny must be informed. Clauses 1 to 4 of the Official Secrets Act 1989 criminalise unauthorised disclosure of 'protected' information related to security, intelligence, defence and international relations. The Act therefore aims to prevent fully-informed scrutiny of government policy in four important areas. Furthermore these are policy areas where the government exercises extensive and controversial powers. Although the activities of UKIC were placed on a statutory basis in 1989 and 1994, the government continues to make foreign policy and conduct military operations in large-part by the exercise of the royal prerogative without recourse to Parliament. It could therefore be viewed as particularly concerning to shield these policy-areas from scrutiny. The regime also requires care to reconcile with Article 10 of the European Convention on Human Rights (ECHR) which protects the freedom of expression and information while also recognising restrictions 'in the interests of national security'.

Nevertheless it would clearly be irresponsible for the UK not to institute a counter-espionage and official secrecy regime of some description. Given the UK collects information from covert sources and the potentially fatal consequences of revelation for sources, it would be immoral and damaging for the UK not to put in place strong legislative measures to protect the identity of British assets.[4] Moreover, as demonstrated by the leaking of Kim Darroch's diplomatic telegrams, the UK's diplomatic efficacy depends on maintaining some degree of diplomatic secrecy.[5] Moreover as demonstrated by attempted Russian interference in the 2016 US presidential election, malign foreign interference poses a significant ongoing threat to

[4] Christopher Andrew, *The Secret World: A History of Intelligence*, (Penguin 2015) p600-620.
[5] Haroon Siddique, 'Suspected leaker of Kim Darroch cables on Trump 'identified'' *The Guardian,* London 14 July 2019.

democratic life which must be resisted by covert means.[6] Moreover The UK's official secrecy measures and broader national security apparatus command significant democratic consent and largely enjoy a democratic 'licence to operate' from both parliamentarians and the wider electorate.[7]

The Official Secrets Act regime is composed of four acts; the Official Secrets Acts of 1911, 1920, 1939 and 1989.[8] The clauses of the 1911, 1920 and 1939 Acts which remain in force criminalise espionage. The clauses which dealt with non-espionage leaking of classified information have been replaced by the 1989 Official Secrets Act. This was in-large part because of the exceptional breadth of the 1939 Official Secret Act which criminalised the unauthorised release of any government information regardless of sensitivity.[9] The 1989 Act's provisions are somewhat narrower, dealing only with Security, Defence, Foreign Policy, and Crime; leaks about other policy-areas are dealt with using standard disciplinary procedures. Prosecutions are rare with fewer than one prosecution per year.[10] Except in the case of revelations concerning UKIC, successful prosecution is contingent on the Crown proving that the revelation in question was 'damaging'. Trial by jury is available which also provides a significant impediment to successful prosecutions most famously in the case of Clive Ponting.[11]

[6] Intelligence and Security Committee, Russia, (House of Commons 2020) para 28.
[7] Christopher Andrew, *The Secret World: A History of Intelligence*, (Penguin 2015)
[8] 2017. *The Official Secrets Acts and Official Secrecy*. (HC, CBP07422). House of Commons Library: London.
[9] ibid, p18.
[10] ibid, p1.
[11] Clive Ponting (1987), 'R v Ponting', *Journal of Law and Society,* 14.3 p366.

The changes UKIC advocates to the Official Secrets Act regime primarily concerns the counter-espionage provisions of the 1911, 1920, and 1939 acts. These include replacing archaic language referring to 'enemy' states which impedes prosecutions, expanding to territorial ambit of to include offences by British citizens outside the UK, and criminalising knowingly assisting a foreign intelligence officer.[12] However UKIC also advocates increasing the deterrent to non -espionage unauthorised disclosures including increasing sentences from the present maximum of only two years to a maximum of 14 years.[13] The 1989 Act's relatively low sentence reflects its Cold-War context which predates the internet and the recent pattern of mass-disclosure of western classified information, most notably by Edward Snowden and Chelsea Manning.

Since 2015, the government has therefore been seeking to recast the Official Secrets Act regime. This necessarily requires a pragmatic and inherently unsatisfactory compromise between the competing imperatives of facilitating democratic scrutiny and protecting national security. Therefore in 2015 the Cabinet Office requested the Law Commission review 'the effectiveness of the criminal law provisions that protect official information from unauthorised disclosure'.[14]

The Commission undertook a lengthy and controversial consultation before reporting in September 2020. In addition to arguing for the replacement of the 1911, 1920 and 1939 Official Secrets Acts with a consolidated counter-espionage act, the

---

[12] 2022. *Legislation to counter state threats (hostile state activity) consultation: government response.* The Home Office. https://www.gov.uk/government/consultations/legislation-to-counter-state-threats/outcome/leg islation-to-counter-state-threats-hostile-state-activity-consultation-g overnment-response-accessible

[13] Ibid.

[14] Law Commission, *The Protection of Official Data* (Law Com No 395, 2020), para 1.8

Commission endorsed most of the Government's recommendations for increased restrictions on unauthorised disclosures. The commission suggested increased sentences for unauthorised disclosures, expanding the 1989 act's territorial ambit to include disclosures made abroad, and removing the requirement for prosecutors to prove disclosures to be 'damaging' (in-order to prevent the requirement for further disclosures of classified material in the course of proving damage had occurred).[15]

However, the Commission balanced these measures by proposing the introduction of two safeguards to protect wh istleblowers and facilitate public interest disclosures.

First, the establishment of 'an independent, statutory commissioner' to investigate wrongdoing on subject-areas where public disclosure would breach the Act.[16] This would essentially broaden the existing Investigatory Powers Tribunal established by the The Regulation of Investigatory Powers Act (2000) to include subject areas covered by the Act other than intelligence .

Second, the introduction of a 'public interest defence' whereby any defendant who could prove on the balance of probabilities that a disclosure was in the public interest would be acquitted.[17] Aside from disclosures related to UKIC, a 'public interest defence' is presently de-facto available under the 1989 Act with regard to disclosures because the Crown is required to demonstrate that the disclosures in question are damaging. The introduction of an explicit public interest defence would therefore balance the removal of the safeguard currently provided by this requirement.

---

[15] Law Commission, *The Protection of Official Data: Summary* (Law Com No 395, 2020).
[16] Law Commission, *The Protection of Official Data* (Law Com No 395, 2020), para 1.39.
[17] Law Commission, *The Protection of Official Data: Summary* (Law Com No 395, 2020).

The Law Commission's recommendations with regard to the Official Secrets Acts of 1911, 1920 and 1939 have been included in the National Security bill introduced into Parliament in May 2022. No Legislation has yet been introduced addressing reform to the Official Secrets Act 1989. However the government has undertaken a consultation, the conclusions of which indicate the government is currently minded to only partially accept the Law Commission's recommendations on reforming the 1989 Act.[18] Specifically the Government proposes to accept the Commission's recommendations of increased custodial sentences for unauthorised disclosures and removal of the requirement disclosures be proved to be damaging. However it does not propose to accept the Commission's recommendations for a new statutory commissioner and the introduction of a public interest defence. This is an invidious combination. In-particular the proposed removal of the requirement that a disclosure can be proven to be harmful without any concurrent introduction of a statutory public interest defence would in theory allow successful prosecutions even in cases where a disclosure could credibly be argued to be in the public interest.

In practice it is likely that the Director of Public Prosecutions would exercise discretion and not allow prosecutions from proceeding in such cases. Nevertheless combined with the increased the maximum custodial sentence to 14 years, the seeming increased possibility of a successful prosecution in these circumstances could be expected to deter public interest disclosures.

[18] 2022. *Legislation to counter state threats (hostile state activity) consultation: government response*. The Home Office.

The Government's response to these concerns is that existing internal whistleblowing mechanisms provide an outlet for any legitimate concerns. This is cogent to some extent. Civil servants and intelligence personnel can indeed raise-concerns to theoretically independent Staff Counsellors in their own department or agency. Civil servants can also raise alleged breaches of the Civil Service Code with the Civil Service Commission whilst intelligence personnel have recourse to the Investigatory Powers Tribunal.

It is difficult to accurately assess the credibility of these internal whistleblowing procedures. However available evidence largely suggests Civil Service whistleblowing procedures are insufficiently rigorous. The Foreign Affairs Committee's Afghanistan concluded that in response to Wh istleblower allegations of impropriety and incompetence during the withdrawal from 2021 Kabul the Permanent UnderSecretary of the Foreign Office sought to systematically mislead the Committee and were 'more focused on defending themselves from criticism than on identifying and resolving issues'.[19] Less seriously Sue Grey concluded that staff with concerns about breaches of Covid rules in Downing Street had felt unable to raise them.[20] The Civil Service Commission has less than 20 full-time staff despite being theoretically responsible for overseeing half a million civil servants.[21] From April 2019 to April 2020 the Commission conducted only four investigations. More recently the role of the Prime Minister's Independent Advisor on Ethics has been

[19] 2022. *Missing in action: UK leadership and the withdrawal from Afghanistan* (HC 169 incorporating HC 685) para 38.
[20] 2022. *Findings of Second Permanent Secretary's investigation into alleged gatherings on Government premises during Covid Restrictions.* Cabinet Office.
[21] Ben Barnard (2021), *Open, Meritocratic and Transparent*, *reforming civil service appointments.* Policy Exchange: London.

rendered systematically unviable by repeated restrictions on the advisor's independence.

Cou nterintu itively, the intelligence services whistleblowing procedures are likely to be more justifiable and effective. Despite the revelation in July 2020 that Secret Intelligence Service had apologised to the Investigatory Powers Tribunal for inappropriate interference, the Tribunal's statutory basis and judicial system are likely to secure it a measure of genuine independence.

Even if internal whistleblowing institutions were meaningfully independent, their scope is restricted. The Civil Service Code is not primarily concerned with efficacy but only with deliberate impropriety. Similarly the Investigatory Powers Tribunal is not intended to assess whether UKIC is functioning effectively but only whether it is acting lawfully. There are two purposes of scrutiny, preventing impropriety and ensuring efficacy. Whitehall's existing whistleblowing mechanisms only fulfil one of these two purposes. This is unfortunate because the primary problem from which Whitehall appears to suffer is not rampant impropriety but weak administrative capacity.

The government's proposal might also be judged to significantly breach the UK's obligations to respect free speech under Article 10 of the European Convention on Human Rights (ECHR).[22] The ECHR permits restrictions on free-speech in the interests of national security but requires that they are proportionate.[23] The Law

[22] Law Commission, *The Protection of Official Data* (Law Com No 395, 2020), chapter 9.
[23] R Clayton and H Tomlinson, The Law of Human Rights (2nd edn, OUP 2010) 15.239.

Commission's conclusions on the ECHR-compliance of the 1989 Act were notably equivocal. The European Court of Human Rights (ECtHR) has upheld the right of states to prevent unauthorised disclosures by public servants, most notably in Hadjianastassiou v Greece (1992) which concerned a Greek Air-force officer convicted of unauthorised disclosures.[24] In 2001, the House of Lords also upheld this interpretation in convicting former Security Service Officer David Shayler for unauthorised disclosures; the decision hinged in part on Mr Shayler's failure to make any use of such internal mechanisms as were available to him.[25]

However the Court's sufferance is conditional. Long-standing ECtHR case law established in *Klass and others v Germany* permits restrictions of rights in the interests of national security but requires 'adequate and effective guarantees against abuse'.[26] Moreover in *Guja v Moldova* the Court upheld the Article 10 Rights of a public servant responsible for unauthorised disclosures because he had no other effective remedy to expose impropriety.[27] This has been followed in subsequent case law including *Heinisch v Germany* and *Bucur and Toma v Romania*.[28] The UK Supreme Court has adopted an increasingly stringent interpretation of 'proportionality' in government infringement on convention rights, especially since Bank Mellat v Her Majesty's Treasury.[29] As such the Law Commission judged it possible that the Shayler judgement would be concluded differently today. The Law

[24] Hadjianastassiou v Greece (12945/87) [1992] ECHR 78, (1993) 16 EHRR 219.
[25] R v Shayler [2002] UKHL 11.
[26] Klass and others v Germany (5029/71) [1978] ECHR 4, (1978) 2 EHRR 214.
[27] Guja v Moldova (14277/04) [2008] ECHR 144, (2011) 53 EHRR 16.
[28] Bucur and Toma v Romania (40238/02) [2013] ECHR 14. Heinisch v Germany (28274/08) [2011] ECHR 1175, (2014) 58 EHRR 31.
[29] Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39.

Commission sought to address this potential problem by introducing a Independent Statutory Commissioner.

Given the Government's proposed approach to Official Secrets Act reform removes the requirement to prove disclosures were damaging without bolstering Whitehall's relatively weak existing whistleblowing mechanisms, it is reasonably likely that the UK courts or European Court of Human Rights would judge it to be unlawful. In addition to the UK government's broader obligation to abide by the ECHR, such a finding would potentially undermine UK national security because it would create a period of legal uncertainty during which damaging disclosures would be more likely. As a general-rule, the UK government also wishes to avoid any litigation on national security matters in Strasbourg because unlike the UK courts the ECtHR has no capacity to conduct secure closed sessions.

How can this quandary be adequately addressed? One potential remedy would of course be for the Government to fully implement the Law Commission's proposal including implementing a public interest defence and a statutory commissioner. This approach would strike a more acceptable balance between the legitimate imperatives. The simultaneous removal of the requirement for the Crown to demonstrate the unauthorised disclosures in-question caused damage and creation of a public interest defence appears to be a well-judged compromise.

However it is very difficult to imagine how a statutory commissioner would function in practice. As noted above, the remit of a Statutory Commissioner would likely be largely limited to impropriety; it would not be viable or appropriate for apolitical civil

servants or judges to enquire into policy to any meaningful extent. It would therefore not fulfil some key functions of scrutiny. To be credible, effective, and acceptable to the ECtHR, the Commissioner would presumably need to be permitted to publish at least some of their reports in general form. Otherwise even the most assiduous and independent Commissioner would be at risk of being largely ignored and circumvented by politicians and civil servants. It is unclear who would appoint the Commissioner. If, as is likely, the Commissioner were in-practice appointed by the Government (or a board appointed by the Government) their independence could reasonably be doubted. If the staff of the Commissioner were Civil Servants, it is difficult to see how the institution could be genuinely independent of the Government and Civil Service.

A preferable alternative to creating a new institution of doubtful efficacy and credibility would be to improve parliamentary scrutiny through strengthening the Intelligence and Security Committee (ISC) in-particular and Parliamentary Select Committees in-general. Established by the 1994 Intelligence Services Act 1994 and subsequently strengthened by the Justice and Security Act 2013, the ISC is a unique institution.[30] Although its nine members are appointed by Parliament, its discussions are subject to the Official Secrets Act and review classified information in secret. The Committee's reports are either entirely unpublished or published in a heavily redacted form, subject to the approval of the Prime Minister. Although arguably initially characterised by excessive deference to UKIC, the Committee has become increasingly independent-minded. Moreover as a political committee its remit is

[30] Andrew Deftly (2018) 'Coming in from the cold: bringing the Intelligence and Security Committee into Parliament', *Intelligence and National Security* 34.1.

necessarily broad and essentially self-defined, its recent inquiries include inefficient procurement of a new 'National Cyber Centre' in Central London.[31] As independent parliamentarians, the ISC's members enjoy credibility, legitimacy, and at least a reasonable degree of independence.

However the ISC is currently hindered in its work by two significant problems. The first is that the statutorily prescribed system for vetting reports ahead of release is vulnerable to political abuse. Clause 3 paragraph 3 and 4 of the Justice and Security Act 2013 requires the ISC to seek Prime Ministerial approval before publishing its reports. The Prime Minister holds a veto on the release of any reports. The Justice and Security Act does not specify any timeline for the Prime Minister to give or decline to give approval to an ISC report. For this reason the publication of the ISC's March 2019 Russia report was delayed for over a year until July 2020, allegedly because it contained material the Prime Minister judged to be politically inconvenient. This discretion excessively strengthens the Prime Minister's hand in negotiations with the ISC and likely decreases the ISC's incentives to criticise the government. A future amendment to the Official Secrets Act could easily correct this by specifying a timeframe within which the Prime Minister must veto or decline to veto an ISC report.

Secondly, Intelligence Officers with sincere concerns are statutorily entitled under the Regulation of Investigatory Powers Act of 2000 to wh istleblow to the Investigatory Powers Tribunal without suffering detriment. Given the greater scope

[31] 2020, Intelligence and Security Committee, *GCHQ accommodation procurement: a case study* (HC 991).

of the ISC, any future legislation should instead provide a mechanism for whistleblowers to raise concerns directly with the Intelligence and Security Committee. Although in-practice this mechanism would likely be used very rarely, it would provide a secure and appropriate way for Intelligence Officers to exercise their Article 10 ECHR rights by having recourse to a genuinely independent and credible political body. Intelligence officers' right of recourse to the ISC should therefore be explicitly recognised in the clause of future Official Secrets Act legislation.

More broadly, there is currently considerable ambiguity about the relationship of the Official Secrets Act to Parliamentary Privilege. Article 9 of the Bill of Rights of 1689 states that absolute privilege protects freedom of speech in parliamentary proceedings. Parliamentary documents, including the most recent edition of Erskine and May, state that this immunity extends to select committee witnesses.[32] However the exact scope of a parliamentary proceeding is arguably ambiguous, given that Select Committees are not referred to explicitly in the Bill of Rights, and the Official Secrets Act 1989 itself makes no reference to exceptions for parliamentary privilege. In practice, it is likely difficult to imagine circumstances in which an Official Secrets Act prosecution would be brought against a Select Committee witness. However the arrest of Damian Green MP in November 2008 for alleged misconduct in public office related to possession of government materials intended for use formulating parliamentary questions suggests a lack of discretion with regard to Parliamentary Privilege on the part of the police. Given the existing significant barriers faced by would-be whistleblowers removing this potential area of legal ambiguity would be an important reform. Parliament could of-course demonstrate discretion in refusing to

[32] 2016. *Guide for witnesses giving written or oral evidence to a House of Commons select committee* (HC 123). House of Commons. P12.

accept evidence it judged to be not in the national interest; such evidence would then not attain parliamentary privilege.

The Official Secrets Act regime is a necessary evil which cohabits only uncomfortably with the norms of British parliamentary democracy and the European Convention on Human Rights. Any official secrecy regime is a delicate and evolving compromise between competing unpalatable options. Although it is clear that the 1989 Official Secrets Act requires adaptation to reflect the new possibilities modern technology presents for mass indiscriminate leaking, the government's current proposals threaten this delicate cohabitation and are arguably incompatible with Article 10 of the ECHR because they do not offer whistleblowers sufficient remedies. Although the Law Commission’s 2020 proposals are preferable to the Government’s present approach, they place excessive faith in the credibility and efficacy of newly-established institutions with unclear powers. A more effective approach would be to strengthen the ISC and improve whistleblowers access to both the ISC and other parliamentary committees; this would strike the most effective balance between national security, democratic scrutiny and the UK’s obligations under the European Convention.

Word Count: 2953