A Report by

JUSTICE

Freedom of Expression and the Law

Chairman of Committee

Lord Deedes

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JUSTICE

Extracts from the Constitution

PREAMBLE

Wheareas JUSTICE was formed through a common endeavour of lawyers representing the three main political parties to uphold the principles of justice and the right to a fair trial, it is hereby agreed and declared by us, the Founder Members of the Council, that we will faithfully pursue the objects set out in the Constitution of the Society without regard to consideration of party or creed or the political character of governments whose actions may be under review.

We further declare it to be our intention that a fair representation of the main political parties be maintained on the Council in perpetuity and we enjoin our successors and all members of the Society to accept and fulfil this aim.

OBJECTS

The objects of JUSTICE, as set out in the Constitution, are:

to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible; in particular to assist in the maintenance of the highest standards of the administration of justice and in the preservation of the fundamental liberties of the individual;

to assist the International Commission of Jurists as and when requested in giving help to peoples to whom the Rule of Law is denied and in giving advice and encouragement to those who are seeking to secure the fundamental liberties of the individual;

to keep under review all aspects of the Rule of Law and to publish such material as will be of assistance to lawyers in strengthening it;

to co-operate with any national or international body which pursues the aforementioned objects.

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CHAIRMAN'S INTRODUCTION

Our report springs from the belief that freedom of expression is imperative to a free society like ours. At no time, at least in modern history, has this freedom of expression been absolute. By the law of defamation, the law of obscenity, our race laws of more recent origin, the law governing official secrets, we have at different times qualified absolute freedom.

Generally speaking, however, we have taken care to see that these exceptions were founded on sound principles, such as the protection of the rights of others, the safety of the state or the prevention of disorder.

What has troubled us has been the impression that the Government and judiciary have grown progressively more careless about the principles which should govern all limitations on free expression. Instances of this abound, and we discuss these in this report.

It may be argued that certain threats arise from excesses by some newspapers. It is probably true that the public today, if asked, would show itself more eager to protect the privacy of the citizen than to defend the liberties of newspapers or broadcasting.

That if anything underlines the prevailing danger to freedom of expression. It is when the antics of a minority provoke calls for new curbs on free expression, and when public indifference on the subject prevails, that the liberties of the majority are most at risk. When it comes to broadcasting, the coming pervasiveness of programmes by satellite is not in itself a legitimate reason for increasing censorship.

We see a need to shift the onus of proof back to where it belongs. Freedom of expression is our bedrock. It lies with those, who desire for one reason or another to impose fresh limitations on it, to adduce solid principles for so doing.

Just after our report was completed, the Broadcasting Bill was published, national newspaper editors agreed upon and issued a declaration of principles, and the Press Council released a document reviewing its functions and extending its code of newspaper practice.

W.F. DEEDES

'Lord and Commons of England, consider what nation it is whereof ye are: a nation not slow and dull, but of a quick, ingenious, and piercing spirit. It must not be shackled or restricted. Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties.'

Milton's *Areopagitica* (1644)

THE PROBLEM

1.1 This Committee was appointed during the summer of 1988, and first met in August. The terms of reference were 'to examine and make recommendations on those aspects of the law which enable public authorities (including the courts) to regulate or restrain the publication of information, or to require persons who disseminate information to the public to reveal the sources of that information.'

1.2 The Committee's appointment was prompted by several specific legal restrictions imposed on the right to receive and impart information. Channel 4 had been restricted in its reporting of court cases, BBC television tapes had been seized in the Zircon affair (under Official Secrets Act warrants, although no prosecutions were ever brought), a journalist was fined for refusing to disclose confidential sources in the *Warner*[1] case, and almost all of the early British judicial decisions in *Spycatcher* were against publication. As we began to deliberate, the Government's White Paper on section 2 of the Official Secrets Act 1911 became a Bill, and then an Act. The Home Secretary's ban on broadcasting the spoken words of Sinn Fein members and others was imposed, and the Broadcasting Standards Council was created while the White Paper on Broadcasting was being discussed. Freedom of expression then seemed to be increasingly restricted in this country. It still seems so.

1.3 The major issue of freedom of expression and the law was then government secrecy, illustrated by the civil litigation over *Spycatcher* and the proposals to replace section 2 of the Official Secrets Act 1911. We published our comments on the Official Secrets Bill in an Interim Report in December 1988 (Appendix B. to this report). Those comments still represent our views on the Official Secrets Act 1989, which became law almost without amendment. The House of Lords allowed publication of information from *Spycatcher* on the ground that the book was already widely available.[2] Many of the issues in that case are now before the European Commission on Human Rights.

1.4 One year later the issues of freedom of expression receiving the most attention are the limitations in the law on blasphemy and in the interests of personal privacy, and the future structure of broadcasting. Threats to Mr Rushdie, the author of *The Satanic Verses*, by Muslims who were offended

[1] *Re an inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 A.C. 660.
[2] *Attorney General v. Guardian Newspapers and others (No. 2)* [1988[3 All E.R. 638.

by the book, have forced the writer into hiding and prompted a public debate about the law of blasphemy in particular and freedom of expression in general. A Committee on Privacy chaired by David Calcutt QC has been appointed by the Government, and another Committee on Defamation Law is to be appointed by the Lord Chancellor. Reasons for these committees include the unsuccessful Private Members' Bills on Privacy and the Right of Reply, increased libel damages, and criticism of press reporting of disasters. The future of broadcasting will be shaped by the Broadcasting Bill, the Council of Europe's Convention on Transfrontier Television Broadcasting, and a European Community Directive.

1.5 The dramatic shift in emphasis in only a few months, and the focus on particular problems and particular solutions, seem significant to us. The fundamental importance to society in general of freedom of expression seems to be considered almost as background to the specific interests that are said to require restrictions. It is difficult to point to a concrete benefit to society that is the result of a general freedom of expression, and it is far easier to point to particular offence that is caused by the exercise of freedom of expression. Few statutes are enacted to remove particular restrictions on the general freedom, and even fewer to increase its scope; many are enacted to impose particular restrictions for particular reasons. We believe, however, that freedom of expression is a basic value of our society, and that it should be restricted only when absolutely necessary for limited purposes. It is regrettable that in this country we have to begin by making this assertion, but in the present climate of opinion we must make it clear that it is the fundamental premise of the thinking in this report.

1.6 It is often provocative merely to argue for the liberty of people to say things that other people do not want to hear themselves, or for anyone to hear: the principle is not immediately conducive to ordered calm. Our reasons for doing so are long-term ones of human liberty and of efficiency. They are libertarian in the long term because today's censored political or cultural minority is all too likely to become tomorrow's censor. Voltaire may not actually have said that he would defend to his death the right to speak of those with whom he disagreed, but we endorse the sentiment. Our reasons of efficiency reflect a certain scepticism about the human potential for honesty and industry, and the effect of publicity to deter. Jeremy Bentham wrote that 'Publicity is the very soul of justice' and in 1913 the House of Lords quoted him with approval.[3] Democracy as well as justice suffers when people are deprived of information about their governance on which to base their political choices.

[3] in *Scott* v. *Scott* A.C. 417, at 447.

1.7 The effects of secrecy and censorship are cumulative and insidious: no news may seem to be good news, and it may even seem, for a while, that what people do not know cannot hurt them. Developments in other countries in the last year have, however, illustrated some of the cumulative effects of secrecy. It is difficult to ascribe particular shortcomings of life in Eastern Europe to the climate of secrecy that prevailed for decades; but there is a rapidly-growing opinion there that freedom of information and expression are essential if society is to be restructured.

1.8 In comparison to some countries, expression is still very free in the United Kingdom, of course. But the trend here is toward limiting what may be said and shown, particularly through the media of the press and broadcasting. (Proposals to restructure British broadcasting will allow more to participate in it; but what they communicate is still to be restricted by bodies such as the Broadcasting Standards Council.) In comparison to some other parts of the world, expression in this country is not particularly free. Freedom of expression has long been recognised as an important value in this country, beginning with the *Areopagitica* of Milton in 1644 and the lapsing of press licensing in 1695; perhaps we have grown careless of its value. As Roy Jenkins said in his 1975 Granada Guildhall address, if the British were to adopt a new Bill of Rights in this country, it is unlikely that freedom of expression would be valued highly enough to be the first right.

1.9 Some of our specific recommendations, particularly those relating to personal privacy, may fairly be characterised as restrictions on expression, by self-restraint if not by law. But these should have as a balance an underlying presumption in the minds of legislators and judges; **the fundamental rule should be that the free expression of ideas and information is only to be restricted for the most pressing of reasons, and that restrictions must be only those that are necessary for those reasons.** That general principle should be made specific by the revival of Blackstone's description that freedom of the press should be an absence of prior restraint.

1.10 The problem is that people often use freedom of expression to say things that we do not like, even to the point of offending us. As the character in Tom Stoppard's *Night and Day* blurted out: 'I'm with you on the free press. It's the newspapers I can't stand.'

THE STATE OF THE LAW IN THE UNITED KINGDOM

2.1 Freedom of expression in the United Kingdom has traditionally been defined as the residual liberty to impart information and ideas if it is not restricted by law. Quite apart from the fact that the United Kingdom has accepted the standards of the European Convention on Human Rights, Article 10 of that Convention at least provides a convenient structure for an assessment of the right to receive and impart information in the United Kingdom.

Article 10 of the European Convention on Human Rights

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

2.2 Taking Article 10 line by line and applying it to the law in the United Kingdom, the first obvious comment is that such a 'right' in this country is almost entirely residual. The 'almost' is necessary because the Bill of Rights does provide a positive right to freedom of expression for members of Parliament. This is sometimes presented as a virtue, with the argument that freedom of action in countries which have explicit rights is limited to those rights, which are suggested to be less than the residual freedom in the United Kingdom. It is tempting to pass over the debate about positive or residual theories of rights and proceed to more specific matters, but such theoretical matters can have very practical consequences.

2.3 It is now nearly a commonplace observation that the effect of a disputed disclosure of information is usually obvious and immediate, while the effect of restraining disclosures of information - of secrecy - are

obscure and cumulative. Faced with an application for an interlocutory injunction or even a permanent injunction, British judges balance a specific legal claim with immediate consequences against an abstract principle. Although reference is often made to the tradition of freedom of speech and even to Article 10, these are rarely considered by British judges to outweigh the immediate specific interest to be served by an injunction. Temporary injunctions to stop publication until there can be a full trial are normally granted on the basis of the 'balance of convenience' to maintain the status quo, with only two exceptions: such injunctions will not be granted in a libel case if the defendant intends to rely on the defence of truth, or in an action for breach of confidence if the defendant raises a reasonable defence of public interest.

2.4 The notion that there should be no previous restraint of communication, or at least that the legal balance should be very heavily weighted against it, is historically English, and is found no-where in the words or jurisprudence of the European Convention. It is an express provision of the Inter-American Convention on Human Rights, which says in Article 13 that the exercise of the right 'shall not be subject to prior censorship, but shall be subject to subsequent impositions of liability, which shall be expressly established by law and be necessary in order to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals'. The only prior restraint provided for by the Inter-American Convention is that 'public entertainments may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.'

2.5 In his *Commentaries* Blackstone defined the freedom of the press as an absence of prior restraint. 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.' It is true that he was describing an absence of censorship by officials rather than judges, but the test now applied for temporary injunctions makes judicial restraint at the request of government relatively easy. We agree with the interpretation of the U.S. Supreme Court that the prior restraint which Blackstone said should not be imposed by officials equally should not be imposed easily by the courts. We would add that 'censure for criminal matter when published' should be restricted to necessary ends, as should civil penalties.

2.6 In his *Introduction to the Study of the Law of the Constitution* A.V. Dicey said that 'Freedom of discussion is... in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.' But there is no right to trial by jury in cases involving alleged breaches of confidence, nor more generally where interlocutory injunctions are obtained restraining expression.

2.7 In the Committee's view, the bias against prior restraint of free speech is a traditional value that should be revived. This is not only because we think that the communication of information is a liberty which is different in quality from other activities, often commercial, but also because of the nature of information. In many media cases, the interlocutory injunction is effectively final because most news is extremely perishable, and a delay in publication of months or years is very nearly no publication. Also, information is unlike other property in being incapable of possession. An injunction against publication usually is not very effective to impose absolute secrecy on the information, with the forbidden publication replaced by rumour. The law has recognised (in *Oxford* v. *Moss*[4]) that information cannot be stolen, but instead of retreating from near-automatic prior restraints it has extended them by the *Spycatcher* rule that an injunction against publication by someone binds everyone.

2.8 The 'freedom to hold opinions' guaranteed by Article 10 is relatively unrestrained in the United Kingdom. The key phrase in the Article is the freedom 'to receive and impart information and ideas without interference by public authority and regardless of frontiers.' The Commission and Court in Strasbourg have said[5] that the right to receive information assumes that someone is willing to impart that information. In other words, the Convention right is not a basis for enforceable rights of access to government records. Although the Committee has limited this report to considering legal restraints on communication, it is worth pointing out that countries are free to provide greater rights than those provided for by the Convention. Many Council of Europe countries (Sweden, Norway, Denmark, France, the Netherlands and Greece) have adopted laws providing public rights of access to government records. Similarly, it is open to the United Kingdom to re-adopt a rule limiting prior restaints even though such a rule is not required by the Convention.

2.9 The provision that 'this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises' has rarely been interpreted in Strasbourg, but it seems almost certain that any such licensing must be applied without discrimination forbidden by Article 14, and very likely that licensing restrictions should be for one of the purposes described by the second paragraph. It is difficult to use Article 10 as a basis for criticism of the Broadcasting Bill, although it is very possible to use it against the broadcasting ban orders and their legal authority. The Convention concentrates on permissible restrictions on freedoms rather than on any state obligations such as public service broadcasting.

[4] (1978) 8 Cr. App. R. 183.

[5] *Leander* v. *Sweden* (1987) 9 E.H.R.R. 433.

2.10 The 'formalities, conditions, restrictions or penalties' allowed by paragraph 2 are subject to two Strasbourg interpretations that deserve consideration. One is that the words 'necessary in a democratic society' means that the particular interest must not merely support a restriction, but that it must amount to a 'pressing social need' to require a restriction; the other is that such restrictions must be proportional to the pressing social need, and should not be more restrictive than is required for such a purpose. The requirement of proportionality amounts to a rule against using legal sledgehammers to crack nuts. The law restricting freedom of expression in this country is far too often on the sledgehammer model, even when there are nuts that require cracking. The requirement that restrictions also be 'required by law' does not require statutory restrictions and can be satisfied by common law doctrines if they are 'reasonably ascertainable'.

2.11 'National security' is probably the broadest, and perhaps most important, reason for restricting the communication of information. It is also the one which the Strasbourg institutions are least likely to query, saying (as in *Leander*) that there is a very wide 'margin of appreciation' for individual countries. In the United Kingdom, the most obvious example of such a restriction is the Official Secrets Act 1911, and we repeat our critical comments on the replacement of section 2 of that Act. 'National security' has had a gradually expanding definition in the United Kingdom in recent years, particularly in the Interception of Communications Act 1985 and the Security Service Act 1989.

2.12 Although his report was about invasions of privacy by telephone-tapping rather than restraints on communication (but surveillance may have a 'chilling effect' on communication) the 1989 Commissioner's Report on Interception of Communication was worrying in saying that 'national security' cannot really be defined and must be decided on a case-by-case basis. We disagree, and suggest that it can be defined as protection of the realm from external attack or subversion. Section 1 of the Official Secrets Act 1911 makes it a serious offence for anyone who 'for any purpose prejudicial to the safety or interests of the State... communicates... information... which is calculated to be or might be or is intended to be directly or indirectly useful to the enemy.' Section 1 has rarely been used, in our opinion, to restrict freedom of expression without justification. When it was used in the ABC case it was withdrawn after the trial judge commented that such use was 'oppressive'.

2.13 'Territorial integrity or public safety' is not very well defined in Strasbourg case-law, and it is not very obvious which British restrictions might be placed under it, particularly given the next reason: 'prevention of disorder or crime'.

2.14 'Prevention of disorder or crime' We are primarily concerned with freedom of expression and the law, rather than the freedom of assembly which is sometime used as a demonstration of expression, and which is now primarily governed by the Public Order Act, 1986. We are concerned, however, by the threat of disorder or crime itself as a restriction on freedom of expression. Many bookstores have refused to display or even to stock *The Satanic Verses* after threats of violence. We accept that restriction on freedom of expression by the authorities may be necessary to prevent an imminent threat of a breach of the peace. But we agree with the interpretation of the European Court of Human Rights that a failure of the public authorities to protect from violence those peacefully exercising their right to freedom of expression can itself be a violation of that right.[6]

2.15 'Protection of health or morals' There are few restrictions on freedom of expression for the protection of health alone, most of which relate to restriction on advertising. We are apprehensive about the prospects of further restriction on freedom of expression to protect morals.

2.16 'Protection of the reputation or rights of others' This is best applied to the laws of this country by considering measures to protect reputation separately from those to protect the rights of others. The law of libel is one of the pressing issues of law and freedom of expression, and it is now being considered along with that of personal privacy by the Calcutt committee, as it will be by the Lord Chancellor.

2.17 The lottery of libel is out of control. At one extreme the absence of legal aid for libel means that the poor (and not-so-poor) can be libelled with impunity and have no means of remedy. At the other extreme, the level of libel damages (and of settlements in anticipation of them) make libel trials a very expensive game, which is made even more of a gamble by the rules on payment into court. There must be a better way of protecting the right to reputation.

2.18 There is a better way through a combination of remedies, not all of them requiring changes in the law. It would help if newspapers and broadcasters were more ready to admit error and to provide channels for correction and even dispute. If this were generally done through systems such as an independent 'ombudsman' for a newspaper, it might reduce the considerable pressure which the Press Council is now under. The Broadcasting Complaints Commission provides a remedy of sorts against unfairness and invasions of privacy in broadcasting, and the European Community Directive adopted in October 1989 requires a legally-enforceable right of reply for television.

6 *Plattform 'Ärzte für das Leben'* European Court for Human Rights judgment of 21 June 1988. Series A. no. 139.

2.19 Newspapers and broadcasters are sometimes perhaps reluctant to admit error because it would be an admission of liability that could lead to damages. The availability of such informal remedies should affect the level of damages awarded if a libel case goes to trial. There is precedent for this in the list of statements protected by qualified privilege if there is an opportunity for reply by the Defamation Act 1952. If damages are to be awarded, we think that a choice must be made between requiring proof of actual damage in libel cases (as is generally required in slander actions) or making the general level of damages subject to judicial direction, as recommended by the Faulks Committee. On balance, we recommend judicial direction as to the general level of damages to be awarded. Legal aid should be as available for libel as for other civil actions.

2.20 Another right to be protected is the right to privacy. Justice has long urged that there should be legally enforceable rights to privacy, and some rights to privacy have been established by the Data Protection Act 1984. One step towards protecting the right to privacy against journalistic intrusion would be the use of the quick and informal means of redress which we recommend for dealing with complaints of defamation. A specific legal reform to affect some rights of privacy would be the enactment of the Law Commission's draft Bill on the law of confidence. That deals with aspects of confidentiality beyond personal privacy, and is considered under the next heading.

2.21 'Preventing the disclosure of information received in confidence' This has never been interpreted authoritatively by the European Commission or Court of Human Rights, although the law of confidence in the United Kingdom was considered when the Court ruled in the *Malone* case that British law on the interception of communications (or rather the lack of it) violated the right to private life guaranteed by Article 8 of the Convention. The British Government responded to that ruling by enacting the Interception of Communications Act 1985. The question of whether that Act adequately safeguards the right to privacy has not yet been raised before the Commission or the Court.

2.22 One aspect of the *Malone* case remains to be dealt with by the British government. Justice and Interights were given permission by the Court to submit observations on the issues in the *Malone* case. One observation was that the existing law of confidence, as interpreted by Vice Chancellor Megarry in the action brought by Mr Malone in the High Court, did not impose an obligation of confidentiality on information obtained by interception or surreptitious surveillance.[7] The observations submitted referred to the provisions of the draft Bill included by the Law Commission in its report on the law of confidence which would have

7 *Malone* v. *Metropolitan Commissioner of Police (No. 2)* [1979] Ch. 344.

imposed just such an obligation. After the *Malone* decision the then Home Secretary, Leon Brittan, gave an undertaking in the House of Commons on 12 March 1985 that legislation along the lines of the Law Commission's draft Bill would be introduced. That has not been done.

2.23 We urge that the Law Commission's Bill be enacted as soon as possible. Although the *Malone* case only concerned the narrow question of whether an obligation of confidentiality should be imposed on information obtained by interception or surveillance, the Bill would establish rules to balance the interests of confidentiality and freedom of information far more clearly and fairly than the existing law.

2.24 From its best-known expression in *Prince Albert* v. *Strange*[8] in 1849 to the case of *Argyll* v. *Argyll*[9] the law of confidence was used in this country almost entirely to protect information commercially valuable to the person seeking to exploit it. In the *Argyll* case it was used to protect personal privacy by imposing an obligation of confidentiality on marital information. In 1975 the doctrine was applied to information about government in an unsuccessful attempt to stop publication of the diaries of a former Cabinet Minister, Richard Crossman.[10] Since then its use has expanded, and it is now a major part of the law restricting freedom of expression and information.

2.25 One of the most significant aspects of the law of confidence is the element of the public interest to be considered. Until the Crossman Diaries case, this was narrowly employed and defined. It was only a defence that might justify a breach, and a breach could only be justified to disclose 'iniquity'. The decision of Lord Widgery in that case suggested a different approach which was elaborated by the Law Commission. If an injunction or other remedy to preserve confidentiality was sought, the burden would be on the plaintiff to justify the remedy in the public interest once the issue was raised by the defence. The bill did not attempt to define the public interest test to be applied, but argued that it should be broader than simply justifying a breach of confidentiality to disclose iniquity.

2.26 'Maintaining the authority and impartiality of the judiciary' We are here primarily concerned with the Contempt of Court Act 1981, which was adopted after British contempt of court law was found to violate Article 10 in the *Sunday Times* case.[11] Comment on judicial decisions is far more free than it was only a few years ago, but there are aspects of contempt other than 'scandalising the court' which worry us. One product of the *Spycatcher* litigation is the doctrine, upheld by the House of Lords in May 1989, that an injunction against one publication binds all who know or should know of it. This dramatically increases the range of prior restraint which we have already said is far too readily granted. It should not be possible for a brief hearing resulting in an order against a poor, inept, or complaisant publisher to bind those who wish to publish without an opportunity for them to be heard. Another aspect of contempt is the increased use of orders to limit public access to and reporting of judicial proceedings. Some of these are said to be justified under the Contempt of Court Act to prevent prejudice, while other restrictions under the Judicial Proceedings (Regulation of Reports) Act 1926, Sexual Offences (Amendment) Act 1976, and Children and Young Persons Acts 1933, 1963, or 1969 are to protect various privacy interests. At the very least there seems to be little consistency in the reasoning behind such restrictions. For example, there is no apparent reason why a hearing of the same matter should be open in the Chancery Division but closed in the Queen's Bench. Some of these restrictions are now being challenged in Strasbourg.

8 1 Mac & G. 25.
9 [1967] Ch. 202.
10 *Attorney General* v. *Jonathan Cape* [1976] Q.B. 752.
11 (1979) 2 E.H.R.R. 245.

BRITISH FREEDOM OF SPEECH IN STRASBOURG

3.1 Freedom of expression in the United Kingdom has been measured and found wanting more often than not by the institutions of the European Convention on Human Rights. (Although British freedom of speech has been measured against the European Convention on Human Rights by the Commission and Court in Strasbourg, there is also a possibility that the European Court of Justice in Luxembourg may have more to say about freedom of expression in future. The Court of Justice is mostly concerned with European Community economic questions, but there are some activities, such as broadcasting and publishing, that are not only economic but also involve the exercise of the right to receive and impart information. In such cases the Court of Justice has said several times that the standards of the Human Rights Convention would be applied.)

3.2 The British Government won the first Article 10 case against them that got to the Court of Human Rights, and this may have misled them. In *Handyside*[12] the Court ruled in 1976 that the UK did not violate the Convention in prosecuting the publishers of *The Little Red Schoolbook* under the Obscene Publications Act. The book, translated from Danish, urged young people to take a liberal attitude towards sex.

3.3 The next British Article 10 case was in 1979, when the Court ruled that the use of contempt of court against the Sunday Times to stop publication of articles about pending thalidomide cases violated the Convention. That decision led to the Contempt of Court Act 1981, and it is possible to argue that the Act did not really comply with the Court's ruling. (One of the problems with the Convention procedure is that there is no easy way to test such compliance.)

3.4 *Handyside* and the *Sunday Times* are the two British Article 10 cases that have gone all the way to the Court of Human Rights, and that record appears to be 1-all. But other cases that have not reached the Court (at least not yet) and some under other Articles make the score a little different. In 1987 the British Government took a tactical decision about Strasbourg cases in general: if defeat looked likely, an out-of-court settlement was to be preferred to a formal defeat unless the principle was thought to be worth the risk. The 'out of court' procedure in Strasbourg is formally called a 'friendly settlement' supervised by the Commission. It has the advantages of being relatively discreet and less binding than a Court ruling after a public hearing. Harriet Harman's complaint that her Article 10 right to impart information had been violated was one of the first to be settled in this way. In her capacity as a solicitor she had been found in contempt of court for showing a journalist documents which had been read out in open court after being obtained on discovery from the Home Office.

[12] (1976) 1 E.H.R.R. 737.

3.5 Two other British cases of freedom of expression have also been settled in favour of the applicants. The *Hodgson*[13] case challenged contempt orders banning the nightly broadcasts of readings on Channel 4 of transcripts from the Ponting trial. Another complaint, *Crook*, challenged an order by a trial judge forbidding identification of a prosecution witness. Both were settled on the basis of an amendment in the Criminal Justice Act allowing the press to obtain judicial review of such banning orders in Crown Courts. An application by the *Sunday Times* challenging restrictions on the publication of *Spycatcher* extracts has passed the first stage and been found admissible.

3.6 Other cases involving communication of information have also gone against the British Government, although not necessarily under Article 10. The United Kingdom has been found by the Court in violation of the right to respect for private life and correspondence, guaranteed by Article 8, in three cases. Two, *Golder*[14] and *Silver*[15], involved prisoners' correspondence, and *Malone*[16] concerned telephone tapping in a criminal investigation that resulted in acquittal.

3.7 It is sometimes forgotten that cases from other Council of Europe countries may have an effect on the United Kingdom. There are now twenty-three members (with the recent additions of Finland and San Marino), and all of them have accepted the Convention on Human Rights. Any decision by the Court or Commission against one of them should be binding against the others. In practice the others, including the United Kingdom, have a tendency to wait until they are actually the subject of a complaint before taking any action.

3.8 Some Article 10 cases against other countries suggest what could happen if similar complaints were made about the United Kingdom. In *Lingens*[17] the Court ruled that the conviction for criminal libel of a journalist who had criticised the Austrian President violated Article 10. Two pending cases against Switzerland could have implications for British broadcasting. In *Groppera Radio*[18] the Commission found that Switzerland

[13] 11553/85.
[14] (1975) E.C.H.R. Series A. No. 18.
[15] (1984) E.C.H.R. Series A. No. 80.
[16] (1984) 7 E.H.R.R. 14.
[17] (1986) 8 E.H.R.R. 407.
[18] 10890/84.

had violated Article 10 by refusing to allow a Swiss cable company to retransmit signals from a radio station in Italy; in the *Autronic*[19] case a similar Swiss prohibition on retransmission of Soviet satellite signals is being challenged.

[19] 12726/87.

PROPOSALS FOR REFORM

4.1 We have already indicated our proposal for reform of the Official Secrets Act 1989 in our interim report in December 1988. (Appendix B.) There should be a defence that an unauthorised disclosure of protected information was justified in the public interest, having regard to the exhaustion of any internal avenues of complaint. We have not changed our opinion, although no such provision was incorporated in the Act.

4.2 We have also indicated to the Calcutt Committee our view that the Law Commission's draft Bill on breach of confidence should be enacted. (Appendix B.) Such a Bill would increase the protection for personal privacy by imposing an obligation of confidentiality on information obtained by surreptitious surveillance. It is by no means a complete privacy protection measure, if only because it does nothing to affect the surveillance itself, but it would be a useful measure on its own. It also would require more judicial consideration of the public interest in enforcing obligations of confidentiality. Other privacy protection measures should not be enacted in isolation without similar balancing provisions to protect freedom of the press.

4.3 The law of defamation is related to privacy in having the protection of reputation as its purpose. But it does not protect against the communication of embarrassing but true private information, as the law of confidence could. The combination of the rule against legal aid in defamation cases and the assessment of damages by juries has made defamation law into a lottery for those with the money to play; it must be changed. We endorse the proposal made by the Faulks Committee that judges should have the power to direct juries as to the amount of damages in libel cases, and we also support the extension of legal aid to defamation cases. One unfortunate aspect of libel has been the reluctance of many editors, perhaps deterred by the prospect of damages, to admit errors in reporting. We endorse the recent institution of readers' advocates, newspaper 'ombudsmen', and reply programmes as alternatives to formal legal proceedings. Such informal systems for the resolution of complaints by readers, listeners and viewers should be encouraged. One method of encouragement would be for the courts to consider the availability of such remedies in determining the scale of damages to be awarded in defamation cases that do go to court. There is already a precedent for such recognition in the Defamation Act 1952, which provides a qualified privilege for statements made under the circumstances described in the Act if opportunity is provided for their explanation or contradiction.

4.4 Most journalists insist that they must protect the confidentiality of their sources, and that the information which they communicated would be much more limited if they were required to reveal them. The law which now enables public authorities, including the courts, to 'require persons who disseminate information to the public to reveal the sources of that information' is expressed in section 10 of the Contempt of Court Act 1981 and sections 11-14 of the Police and Criminal Evidence Act 1984. The first says that 'No court may require a person to disclose...the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.' The Police and Criminal Evidence Act establishes rules limiting the reasons and procedures for search warrants to obtain journalistic material in general and journalistic material which is held in confidence. The balance struck in the Contempt of Court Act is generally satisfactory as a statement of principle, but we are anxious about its interpretation in cases such as *Warner*.[20] We are also concerned that the special procedures under the Police and Criminal Evidence Act for search warrants to seize journalistic material may be circumvented by search warrants under other statutes. This was dramatically illustrated in 1988 when untransmitted film was seized by police under the Criminal Law Act (Northern Ireland), the Emergency Provisions Act (Northern Ireland) 1978 and the Prevention of Terrorism Act 1976. Section 11 of the Prevention of Terrorism Act created a duty to give the police any information that might be material in preventing or detecting terrorism, whether it is requested or not.

4.5 When this Committee was appointed the common law offence of blasphemy was not considered to be a major restriction on freedom of expression, although it had been revived by the House of Lords as an offence of outraging a Christian by attacking the Christian religion (with no intention to blaspheme or likelihood of breach of the peace required).[21] Since then the author of *The Satanic Verses* has been threatened with death for outraging Muslim feelings, and there have been proposals that the protection of the criminal law should be extended to include Islam. We are strongly against such proposals. Notwithstanding the possible appearance of religious discrimination and other political difficulties, we favour the abolition of the crime of blasphemy.

4.6 We do not know what the final form of the Broadcasting Bill will be after its scrutiny by Parliament; nor do we know how the provisions of the Council of Europe Convention and the European Community directive will be interpreted. It is, however, clear that the future of British broadcasting will be marked by a new pluralism, with television outlets coming much more closely to resemble the national press in terms of viewer choice. It will also be more international, making even Europe-wide standards relating to content difficult, if not impossible, to enforce. In the light of this two-fold transformation, we consider that the carrying forward into the 1989 Broadcasting Bill of the tight consumer protection restrictions enacted a decade earlier for a wholly different broadcasting environment is inappropriate and an unjustified restriction of freedom of expression.

[20] *Re an inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 A.C. 660.
[21] *R. v. Lemon* [1979] A.C. 617.

APPENDIX A

INTERIM REPORT ON THE OFFICIAL SECRETS ACT 1989

The Official Secrets Bill 1988

An Interim Report by the JUSTICE Committee on Freedom of Expression and the Law.

1. Our Committee has been appointed by JUSTICE (the British Section of the International Commission of Jurists) with the following terms of reference: "to examine and make recommendations on those aspects of the law which enable public authorities (including the courts) to regulate or restrain the publication of information, or to require persons who disseminate information to the public to reveal the sources of that information." Its membership is set out in the Annex.

2. The Official Secrets Bill falls squarely within our terms of reference. As we have been able to form a unanimous view on it, which the Executive Committee of JUSTICE has endorsed, we have prepared this interim report before we continue with the rest of our work. The Bill does narrow the categories of information to be protected by criminal penalties from the catch-all provisions of section 2 of the Official Secrets Act; but we have three major criticisms of it: *any* disclosure of information in some categories is conclusively presumed to be damaging; disclosure of information already in the public domain, as by disclosure in other countries, remains criminal; and there is no possibility to argue as a defence to criminal penalties that the public interest in a particular disclosure should be balanced against any harm caused.

General Principles

3. Freedom of expression is often expressed as the liberty of individuals to say what they think, and restrictions are assumed to affect only those who are not allowed to speak. But the freedom is not just, or even primarily, that of individual self-expression. The free circulation of information and ideas is of fundamental importance to societies of many kinds for many reasons. Even in an authoritarian society free circulation of some information can be of value, and secrecy harmful. Publicity can be useful in any society in deterring corruption, waste and inefficiency. In a democracy the process of deciding public policy questions depends not just on exchanges of opinions, but on informed argument. The general value of the free circulation of information in a society is abstract and long-term; but that value should be asserted and given weight, especially when it

is to be balanced against the concrete and immediate consequences of particular disclosures of information. There is a value in the free communication of information generally even, perhaps sometimes especially, when we do not welcome particular disclosures. However, every right or freedom must have its limits, else it will collide with other rights or freedoms. Freedom of expression is no exception to this obvious fact: it, too, must therefore have some limits. What may become controversial is where precisely those limits are to be drawn, and why. On that question, there could be quite a wide range of opinion. How is one then to decide which of those opinions is right?

4. The answer is supplied by international law. Several international treaties deal with "the right to freedom of expression" and its limits, and some of these treaties have been authoritatively interpreted.

5. In particular, the United Kingdom has been bound by the European Convention on Human Rights since 1953. It helpted to draft it, and in 1950 was the first State to ratify it. Article 10(1) of that Convention defines this right as follows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

6. Article 10(2) then defines the limits of the right as follows: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

7. The European Court of Human Rights in Strasbourg is the highest tribunal charged with the task of interpreting and applying this Convention. In two leading cases (*Handyside* and *The Sunday Times*, both involving the laws of the United Kingdom) this Court has laid down the following principles about the right to freedom of expression and its limits. The test of whether a restriction is "necessary in a democratic society" is "whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued, [and] whether the reasons given by the national authorities to justify it are relevant and sufficient under Article 10(2)". (*Handyside* paras. 48-50, *Sunday Times* para. 62)

8. Both the European Convention and the judgments of the European Court are binding on the United Kingdom, and this country has so far always taken action to comply with rulings that British law has violated the Convention. In approaching our work, we shall therefore take the general principle which these judgments establish as our starting point, and try to apply them to the matter we have been asked to consider - in the present case to the Official Secrets Bill 1988.

The Bill

9. The single purpose of this Bill is to restrict, through the criminal law, the general right to freedom of expression. Accordingly, each of its provisions must be scrutinised to see whether -
(1) it serves a "legitimate aim"; and
(2) it seeks to meet "a pressing social need"; and
(3) it is "proportional" to that need.

Let us then apply these tests, successively, to some of the general provisions, and to the particular restrictions on freedom of expression, contained in this Bill.

"Damage" to various aspects of the public interest

10. Much of the Bill depends crucially on this word, but it fails to satisfy our tests. Unqualified "damage" alone (which could, in a given case, be slight) does not in our view reflect such a "pressing social need" as to justify interference with a right so fundamental as that to freedom of expression. At the very least, what should be required is "serious" damage - as indeed the Franks Committee recommended (in the form of "serious harm") as long ago as 1972.

11. Next, in some cases the Bill says that damage must be conclusively presumed - that is, the prosecution need not prove any, and the jury need not be satisfied that there was any. In effect, in a particular case, there might be none, and yet the law will insist that there was. Clearly, such a presumption cannot satisfy the test of a "pressing social need".

12. The Bill would punish those who disclose information in any of six categories:
-"special investigations" including interception of communication;
-security and intelligence;
-information obtained in confidence from other governments or international organisations;
-law enforcement;
-international relations;
-defence.

13. For two of these categories, damage is conclusively presumed to be caused by *any* unauthorised disclosure: information relating to the process

of interception [of telecommunications or post] or obtained by that means, and similar information concerning 'actions' authorised under the Security Service Act 1988; and information relating to security or intelligence disclosed by a serving or former member of the security and intelligence services or by another 'notified' person.

14. The category of information about, or obtained by, "the interception of telephone calls, mail and other forms of communication" seems to be the least thought out of any of the categories to be protected by the Bill. The Bill provides even greater protection for such information than it does for information about security and intelligence, which in turn is given greater protection than defence information. Security and intelligence information is to be absolutely protected only when the accused is a serving or former member of the services. Unauthorised disclosure of such information by other persons is only punished if it is at least in a class likely to damage (though not "seriously") the work of the security or intelligence services. (Clause 1(4)) But no such distinction is to be made in prosecutions for disclosure of information relating to or obtained by the process of interception. If an unauthorised disclosure of such information were made to spies, terrorists, or criminals it might indeed seriously damage national security or assist terrorism or crime; but the proportionality of penalites to meet such a pressing social need should be decided in terms of the actual level of that damage, rather than simply by reference to the category to which the information happens to belong.

15. A similar category of absolutely protected information obtained by, or concerning, Security Service "action" has been added since the White Paper. We have many of the same reservations about this new category as those expressed above about information relating to the interception of communications. Without a similar White Paper explanation, we do not know whether the absolute ban on information obtained by Security Service action is to protect the privacy of those from whom it was obtained. We are somewhat surprised that this category of information, which was not described at all in the White Paper, is now defined in the Bill, and that damage is to be conclusively presumed from any disclosure of it.

16. Disclosure of information obtained in confidence from another government or international organisation is also considered to be effectively absolute in its damage; disclosure may be considered damaging "either by reason of the fact that it is confidential or by reason of its contents or nature." (Clause 3(3)) The test of damage for unauthorised disclosure of this category of information is so broad as to raise the question whether there is a legitimate aim for protection which is separate from the aim of preventing damage to international relations (with which we deal below). The apparent reason given for an additional category

(para. 28 White Paper) is the "wider disruptive effect" than the "direct consequence": "If it appears that this country is unwilling or unable to protect information given in confidence, it will not be entrusted with such information." The distinction is not immediately obvious. The explanation also seems to assume that other countries are as secretive as the United Kingdom in their law and practice, when it is increasingly the case that other countries have more limited criminal sanctions to protect official information (in practice if not in law) and that many of them, such as the USA, Canada, Australia and France, have adopted laws providing for enforceable public access to governments records, including some relating to international relations. To add information from international organisations to this category means that most information from the European Community is protected simply by virtue of an "in confidence" label, at a time when Community procedures are becoming more open as 1992 approaches. Even if the aim of this category is a legitimate one, it seems to fall far short of a pressing social need, and it would be quite disproportionate to impose criminal penalties to achieve it.

17. The Bill indirectly acknowledges by disapproval the possibility that other countries and international organisations may not be as secretive as the United Kingdom, and that they may not have equivalents to this legislation. Clause 6 makes it an offence to disclose British information relating to security and intelligence, defence, or international relations if it has been disclosed without lawful authority in another country, even though the disclosure was not necessarily criminal there.

18. An unauthorised disclosure of defence information is to be punishable if it would be likely to prejudice (though not "seriously") the capability of the armed forces to carry out their tasks, to jeopardise (again, not "seriously") the interests of the United Kingdom abroad, or seriously to obstruct the promotion or protection by the United Kingdom of those interests. It would also be punishable to disclose defence information likely to lead to loss of life of members of the forces, serious damage to forces equipment or installations, or danger to the safety of British citizens abroad. All these tests of damage are treated together in clause 2 of the Bill, though some of them are more likely to justify criminal penalties than others. The test of "prejudice" is equivalent to the classification of "Confidential" described by the Franks Committee in 1972. The Government's 1979 Protection of Official Information Bill would only have imposed criminal penalties for disclosures of defence information classified as "Secret", defined as information the disclosure of which would cause "serious injury to the interests of the nation". Part of the test of damage for an unauthorised disclosure of defence information has thus been made less strict than in the Government's own 1979 Bill. We accept, of course, that the protection of information relating to national defence is a legitimate aim, but we question whether the prevention of "prejudice" to defence (however slight) amounts to a "pressing social need". We certainly accept that the safety of British citizens abroad is a legitimate aim, and perhaps that prison is proportionate to preventing likely danger to such safety.

19. The test of damage for the disclosure of information concerning international relations is whether it would be likely to jeopardise or seriously obstruct the promotion or protection of UK interests abroad or endanger the safety of British citizens abroad. (Clause 3(2)) This can only be considered as equivalent to the 1979 test if "seriously obstruct" is the same as to cause "serious injury". To promote or protect UK interests abroad is a legitimate aim (but not, in our view, one to be pursued at the expense of any other equally legitimate aims); it may even, in some of its many manifestations, amount to a "pressing social need". But we question whether a serious criminal penalty is proportionate to the protection of this legitimate aim against activity which is merely likely to jeopardise it.

20. Another test of damage for disclosure of information is whether it results in the commission of an offence, facilitates an escape or other acts prejudicial to legal custody, impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders. The prevention of crime and terrorism are certainly legitimate aims, and, unfortunately, now amount to "pressing social needs". If this means that the prosecution has to prove causation, then we agree.

Public Interest

21. The European Court of Human Rights has made it very plain that the free circulation of information is one of the highest values in an open society like ours. It is difficult to balance such a value, which is general and long-term, against a specific damage alleged to have been caused by the unauthorised disclosure of particular information. This is particularly difficult in terms of a criminal charge if the statute does not permit any such *general* interest to be weighed against a *particular* damage. Nevertheless, the existence of such general benefit should be made explicit in any statutory definition of the various kinds of damage which are to be prevented by criminal penalties.

No Confidence in Iniquity

22. In addition to this general benefit, there may be a particular benefit to society in the unauthorised disclosure of information, even if it can be shown to cause damage. Such a case is not entirely hypothetical, even in the United Kingdom, and the best evidence of a civil servant's dilemma over such disclosure is expressed in a report on *Legal Entitlements and Administrative Practices* (HMSO 1979). The Civil Service Department established a committee in the aftermath of a report from the Parliamentary Commissioner for Administration condemning civil servants who had

deliberately underpaid benefits to ex-servicemen and misled them as to their rights. The report contains the advice from the Lord Advocate's Department that in Scotland "there would be 'fraudulent silence' if an official had previously given information which he subsequently discovered to be incorrect and failed to communicate the true situation if that failure would result in the person remaining ignorant of a right to claim." The Director of Public Prosecutions reported that such silence could also amount to a conspiracy to defraud in English law, and the Committee reported that:

> "In constitutional terms, the Minister is responsible for the actions of his departmental staff who act on his behalf and whose authority is delegated to them by him. This, however, does not absolve the individual civil servant from his obligation to act within the law in carrying out his duties; if he breaks the law he cannot seek to excuse himself in terms of the constitutional responsibility of his Minister."

23. The Bill reinforces the dilemma of a civil servant forced to choose between making an unauthorised disclosure which could cause damage, either factually demonstrable damage or conclusively presumed damage (*any* intercepted communication or Security Service action, *any* security or intelligence information communicated by service members, or *any* information received in confidence from other governments), or remaining a silent party to a criminal offence. Provision should be made in the Bill for such hard cases, and we suggest that it should be at least that of the "public interest" element required (as in *Attorney General* v. *Jonathan Cape*) to deny an entitlement to a civil injunction for a breach of confidence regarding government information. Such a defence is expressed in the rule of the civil law of confidence that there is no confidence in iniquity, expressed as: "You cannot make me the confidant of a crime or a fraud and be entitled to close my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist." (*Gartside* v. *Outram*, 1856) The Bill as it stands could be used to enforce just such a confidence. Provision for a public interest defence would be consistent as well as fair: it would be anomalous if a civil servant or other person were to be fined or imprisoned for an unauthorised disclosure if the government could not - under the present law - obtain a civil injunction against disclosure of the same information.

24. The Home Secretary has said: "At present there is no defence of public interest. Under these proposals, where there is a harm test the defendant could argue that the disclosure caused good *not* harm to the public interest. It would be for the jury to decide. What a defendant could not argue is that his disclosure did cause this degree of harm but, because it did some good then the harm didn't matter." We do not agree with the second part of that statement. In our opinion an accused should at least be

allowed to argue that in the circumstances the benefit to the public from a particular unauthorised disclosure outweighed any harm caused by it. The Bill would make any possible disclosure of some classes of information (such as telephone tapping) damaging, and no defendant would ever be allowed to argue to a jury that a disclosure of such information, even if it disclosed crimes committed by public servants, was of any benefit to balance against the damage. Juries are to be allowed to consider the damage caused by unauthorised disclosures of some other classes of information, and we think that the law should at least allow for the possibility that there was some public interest in a disclosure to balance against damage such as jeopardising the promotion of United Kingdom interests abroad.

25. Such a defence for Crown servants should only be necessary as a last resort, and should only be available for unauthorised disclosures after exhaustion of other possible remedies. (It was suggested in *Initial Services* v. *Putterill* that such a qualification applies to the public interest defence in the civil law of confidence). In the 1988 Private Member's Bill introduced by Richard Shepherd MP a similar defence for an unauthorised disclosure of protected information was only available to Crown servants who had "taken reasonable steps to comply with any established procedures for drawing ... misconduct to the attention of the appropriate authorities without effect." To allow a jury to balance the public interest in a disclosure against any damage would only be a possible defence against criminal liability, and no defence at all against administrative penalties or losing a job; exhausting other remedies might itself trigger disciplinary action. The only routes of appeal for civil servants generally now are through the ordinary chain of command; the exceptions are for members of the Security Services in the form of the recently-created office now held by Sir Philip Woodfield, and the established system for reporting of financial impropriety by accounting officers to the Comptroller and Auditor General. We propose that a similar office should be created for Crown servants generally, and that the exhaustion of appeals to such an office should be a serious consideration when a civil servant defends a damaging disclosure by arguing that it was in the public interest.

Civil Service Procedures

26. The professional ethic of a public service obliges it to be uncompromisingly hostile to mischievous leaks by civil servants, whether of protected or unprotected information. Moreover it is necessary for the Government to be able to invoke criminal sanctions where a leak takes place of protected information which would do serious damage to the national interest. (Disciplinary sanctions would apply in other cases.) But we are bound to ask whether it should be taken for granted, as the Government appear to envisage, that criminal sanctions should be automatically

invoked for every unauthorised disclosure of information in the protected categories. The duty of confidentiality is not the only duty of ministers and public servants and there need to be more adequate arrangements to permit their other duties, both legal and conventional, to be taken into account. For instance, a potential problem arises for a civil servant who becomes aware of what appears to be a serious impropriety within Government related to a protected category of information, such as a wilful and serious deception of Parliament by a Minister or the perpetration of some unlawful act by a department.

27. Where such an impropriety concerns a financial matter, a clear and satisfactory machinery is already in place. It is the duty of the Accounting Officer of a Department to ensure that Parliament's authority is not infringed when expenditures are made and it is the duty of his staff to keep him accurately informed. If a Minister orders that a payment should be made which the Accounting Officer regards as illegal or improper, the Accounting Officer has a duty to warn the Minister; if still ordered to make the payment he must do so, but immediately inform the Comptroller and Auditor General, who informs the Public Accounts Committee. The Minister could then be required to justify his action. As a consequence illegal payments are hardly ever made.

28. No such machinery exists in relation to types of impropriety other than for financial matters and for the Security Services. A civil servant who believes that a major deception is being perpetrated may make representations to the Head of his Department and if still not satisfied to the Head of the Civil Service, but the fact that all this is entirely within the Government machine and that no explicit duties exist detracts from the ability of this procedure to provide satisfaction. It is not inconceivable that a government might judge the national interest to be best served by perpetuating an action even though it is illegal or iniquitous.

29. We believe that the existence of more explicit duties and the creation of a channel to a Parliamentary Ombudsman as the ultimate step would effectively eliminate the likelihood of impropriety (as similar arrangements have done with financial impropriety) and also of the kind of moral dilemma which might impel some civil servants to leak. It should not be the function of the Ombudsman to disclose publicly the details of the impropriety as such; but in the event that the Government did not heed a warning the Ombudsman should have the duty to inform the Speaker of the House - or perhaps the Chairman of an appropriate Select Committee - that an impropriety existed. Investigation might then be undertaken by the appropriate Parliamentarians, if necessary Privy Counsellors. Thus rectification of the impropriety need not necessarily involve the public disclosure of highly sensitive information.

30. From the point of view of good and accountable government it is better to have arrangements which will reduce the probability of leaks rather than to rely exclusively on a punitive procedure through the Courts after a leak, where some form of public interest defence is bound to be invoked in practice, whether or not this will be provided for on the face of the legislation.

APPENDIX B

SUBMISSION TO THE CALCUTT COMMITTEE ON PRIVACY AND RELATED MATTERS

1. Your Committee has been set up '...to consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the Press, and improve recourse against the Press for the individual citizen, taking account of existing remedies, including the law on defamation and breach of confidence; and to make recommendations.' You have asked for proposals to be submitted in writing by 31st August 1988.

2. The Justice Committee on Freedom of Expression and the Law was established a year ago, and has met monthly to consider legal issues relating to freedom of expression. Its membership is in Appendix A. In December 1988 we published an interim report on the Official Secrets Bill. We now have a specific proposal to submit to your Committee as another interim report. Because of the time limit for submission of proposals to your Committe there has not been an opportunity for the Executive of Justice to consider our proposal, and it thus only represents the views of our Committee. It addresses but one aspect of privacy, and other aspects may be the subject of further proposals to your Committee from Justice and of further comment in our final report.

3. Our proposal is that the Law Commission's draft Bill on the law of confidence be enacted. This proposal is not submitted as a complete solution to the problems of privacy and the press, and it should be considered along with other measures to balance the interests of personal privacy and freedom of expression. But it is specific and readily achievable, it is the product of a long and careful study by the Law Commission for England and Wales, it has been the subject of an announced Government intention to legislate since 1985, and it would comply with the European Convention on Human Rights.

4. The law of confidence was referred to the Law Commission by the Lord Chancellor in March 1973 on the recommendation of the Younger Committee on Privacy in its 1972 Report.[1] The Commission's Report in 1981 included a draft Bill which, in our opinion, strikes the right balance between confidentiality and freedom of information.[2] The Bill deals with many aspects of confidentiality other than personal privacy, and should be enacted as a balanced collection of measures. The provision which is of particular relevance to personal privacy is that concerned with the treatment of information obtained by surreptitious surveillance.

5. That provision was included in part because of the statement by Vice-Chancellor Megarry in the case of *Malone* v. *Metropolitan Police Commissioner (No. 2)*[3] in 1979 that a person who uses a telephone must accept the risk of being overheard by tapping. The Commission commented that they did 'not think in a civilised society a law-abiding citizen using the telephone should have to expect that it may be tapped.'[4] The Vice-Chancellor's comment was an application of a more general interpretation of the law of confidence that an obligation of confidentiality only applies if it is voluntarily undertaken expressly or by implication. Because of this interpretation Mr Malone's claim that the interception of his telephone calls was a breach of confidentiality failed. Thus, information obtained by an interception of a telephone conversation was no more the subject of an obligation of confidentiality than information obtained by surreptitious surveillance using devices such as cameras with telephoto lenses. The interim injunction against publication of telephone interceptions in *Francome* v. *Mirror Group Newspaper*[5] in 1984 did not significantly change this principle. The next year the Government announced their intention to introduce legislation based on the Law Commission's proposals.

6. It is reasonably well-known that in the *Malone*[6] case in 1984 the European Court of Human Rights ruled unanimously that British law on the interception of communications violated the right to private life guaranteed by Article 8 of the European Convention on Human Rights, and that the Government responded by enacting the Interception of Communications Act 1985. It is not so well-known that the Law Commission's proposals on the law of confidence were before the Court, and that the Home Secretary in 1985 gave an undertaking to introduce legislation based on them as well. The proposals were before the Court in the form of written observations in the *Malone* case submitted on behalf of the Post Office Engineering Union by Justice and Interights.

7. The observations included the Law Commission's proposals to change the law of confidence to impose an obligation of confidentiality for information obtained by a device made primarily for the purpose of surreptitiously carrying out surveillance, or for any other device capable of being used for such a purpose. The 'ordinary' surveillance device, such as a

[1] Cmnd 5012, para. 630, 631.
[2] Report No. 110, Cmnd 8388.
[3] Ch. 344.
[4] Para. 6.35.
[5] (1984) 2 All E.R. 408.
[6] 7 E.H.R.R. 14.

camera with a telephoto lens, was to be made subject to a 'reasonable expectation' test: acquisitions of information by such a device would impose an obligation of confidentiality only if 'a reasonable man in the position of the person from whom the information is acquired would have appreciated the risk'.

8. The Home Secretary announced the Government's intention to legislate in March 1985.

> The Law Commission has been considering this issue, and has made some extremely important proposals. In its report on breach of confidence in England and Wales, it suggested a very interesting approach. The Hon. and Learned Gentleman is right in that a civil remedy was suggested. The Commission recommends that people who obtain information by "improper means" - which includes the use of surveillance devices, as the Hon. Gentleman knows - would be subject to an obligation not to use or disclose that information. If they did so, they would be civilly liable to an action for breach of confidence. That approach has, I believe, the considerable advantage of concentrating on the real mischief - that is, the use to which information obtained by surveillance is put. It provides the victim with a direct means of redress. I am able to announce today that the Government intend to introduce legislation based on the Law Commission's proposals. This will offer people an important and wholly new safeguard in an area of legitimate concern.[7]

9. This measure would not affect the legality of the use of surveillance devices. As the Law Commission pointed out, its proposals were not a complete right to privacy: '[T]o give a remedy merely because information is acquired by one of these means would amount to the creation of a right to privacy - a right, for example, not to be photographed even if the photographs were later never published.'[8] The Justice Report on Privacy and the Law in 1970 recommended that legislation should be passed 'to make the use of electronic, optical or other artificial devices as a means of surreptitious surveillance a criminal offence except in certain clearly defined circumstances.' The Younger Committee made a similar recommendation, and added that there should be a tort of unlawful surveillance by device.[9]

10. It would be a distortion of the Law Commission's proposals for that particular provision to be enacted on its own. Equally important for the interests of the press and public is the Bill's provision regarding the consideration of the public interest in breach of confidence cases. The Commission proposed that if the person accused of a breach of confidence satisfied the court that the public interest was involved then 'it should be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information.'[10] The Commission considered that the 'public interest may arise in the disclosure or use of confidential information whether or not the information relates to iniquity or other forms of misconduct.'[11] This balance is necessary to protect both the right to private life and the right to freedom of expression guaranteed by Articles 8 and 10 of the European Convention on Human Rights.

11. Mr Steve Norris, then Conservative MP for Oxford East, introduced the Law Commission's Bill in October 1984 as a ten-minute rule Bill. Mr Norris said: 'It is an incredible indictment of the present law that, although I can bring an action for breach of confidence against the person to whom I told it, I cannot bring such an action against someone who deliberately and improperly intercepts my communication. The Bill will provide an immediate and effective remedy to those whose confidence has been breached in those circumstances.'[12] We agree with Mr Norris that if 'the Bill provides some protection against some of the worse excesses of invasion of privacy by the media that we have seen in the past three years, so much the better.' Those remarks were made nearly five years ago.

[7] Leon Brittan, House of Commons Official Report Vol. 75, col. 157, 12 March 1985; Viscount Whitelaw, House of Lords Official Report Vol. 463, col. 1293, 16 May 1985, and Vol. 464, col. 918, 6 June 1985.

[8] Para. 636.

[9] Cmnd 5012, para. 560–565.

[10] Para. 7.2(24)(v).

[11] Para. 7.2(24)(iii).

[12] House of Commons Official Report, Vol. 65, col. 572, 23 October 1984.

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