

SUBMISSIONS ON BEHALF OF THE BAR OF ENGLAND AND WALES

OFFICIAL SECRETS AND THE CASE OF SHAYLER

1. The case of *Shayler* (2002) 2 WLR 754 is plainly very important. Although Mr Shayler lost his appeal, the speeches of Lords Bingham, Hope and Hutton stress the crucial importance in a democratic society of the right to freedom of expression. However, we believe that the case has been seriously misunderstood in some quarters as being authority for the proposition that there can be no public interest defence to any offence under the Official Secrets Act 1989 (“OSA”). This view is, in our submission, demonstrably wrong.
2. The OSA is a complex piece of legislation. For ease of reference we have copied its principal sections in an Appendix. It was extended to Hong Kong subject to specified exceptions, adaptations and modifications by the Official Secrets Act 1989 (Hong Kong) Order 1992 (S.I. 1992 No. 1301).] The Official Secrets Ordinance therefore replicates the provisions of OSA *mutatis mutandis*.
3. Both OSA and the Ordinance cover a variety of different activities by different categories of persons. The conditions for liability and the defences vary from one section to another. We set out below a list of categories which, even if not exhaustive, is indicative of the complexity of the legislation

Different categories of persons:

4. OSA distinguishes between a number of different categories of possible offender:

Current members of the security services and those notified that they are subject to the provisions of s1(1). They may commit offences under ss1(1) and 4

Current or past Crown servants or government contractors. They may commit offences under ss1(3) 2, 3, and 4.

Current Crown servants or government contractors. They may commit offences under s8

Persons who are not and never have been members of the security services, Crown servants or government contractors. They may commit offences under ss 5 and 6

Different Categories of activity

5. All the offence-creating sections apply to disclosures without lawful authority save that s8 applies to failures to safeguard information.

Different categories of material

6. OSA distinguishes between “information, document of other article”:

Relating to security or intelligence (s1)

Relating to defence (s2)

Relating to international relations (s3)

Relating to crime and special investigation powers (s4)

Relating to security, intelligence defence or international relations and communicated by the UK in confidence to another state or international organisation (s6)

Whether any actual or likely consequence of disclosure must be proved

7. Under s1 (1) the mere disclosure by a member of the security forces or by a person who has been “notified” of any information relating to security or intelligence which has come into his possession by virtue of his position as such is an offence. There is no need to prove any actual or likely consequence of that disclosure. The same is true of any disclosure made by a current or past Crown servant or government contractor of intercepted communications (e.g. the results of phone tapping) and of information obtained under certain types of warrant (see s4 (3)).

8. But in every other case a consequence of disclosure, actual or likely, must be proved. Under ss1 (3), 2(1), 3(1) and 5(3) the disclosure must be shown to have been “damaging” in the sense defined by the particular section. This term does not appear in section 4. But s4 (2) requires proof of one of three actual or likely specified consequences of the disclosure (commission of an offence, facilitating escape from custody or impeding detection apprehension or prosecution)

Different types of authorisation.

9. These are specified by s7 and vary according to whether the capacity of the defendant (whether he is, or was, a member of the security services, a government contractor etc)

Different elements of the offence and different defences available

10. As one would expect the strictest liability is imposed on members of the security and intelligence services and on those who have been notified. No mens rea is required. In order to escape conviction such a person must prove either that he did not know and had no reasonable cause to believe that the material related to security or intelligence (s1 (5)) or that he believed that he had authority to make the disclosure and had no reason to believe otherwise (s7 (4)).

11. Liability is less strict for a Crown servant or government contractor. He too may rely on the defences we have referred to under ss 1(5) and 7(4). In addition it is a defence to a charge under any of ss1 – 4 for him to prove either that he did not know and had no reasonable cause to believe that the disclosure would be damaging, or (in the case of a charge under s4) that it would have any of the effects referred to in s4 (2)

12. Section 5 applies to certain disclosures by those who never worked for government in any capacity. The threshold for conviction is higher than under any of ss1 – 4. As in each of those sections the disclosure must be “without lawful authority”. But s5 (2) requires an additional element which we set out in bold type

“Subject to subsections (3) and (4) below, the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority **knowing, or**

having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above.”

13. There is a requirement of mens rea both in this subsection and in s5 (3) which reads

“In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless -

a. the disclosure by him is damaging; and

b. he makes it knowing, or having reasonable cause to believe, that it would be damaging;

and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3 (1) above.”

14. Note that in cases to which this subsection applies it is for the prosecution to prove knowledge and/or reasonable cause to believe that a disclosure would be damaging; whereas in ss 1 – 4 these were matters to be disproved by the defendant.

15. Again in s6 (which applies to any person) s6 (2) creates a requirement of mens rea similar to that which applies under s5 (2).

16. In s8 the elements of the offence and the statutory defence are different to those in any of the earlier sections. The offence is failing to take reasonable care to prevent unauthorised disclosure. A statutory defence in s7 (2) is available if the defendant proves that he believed that he was acting in accordance with his official duty and that he had no reasonable cause to believe otherwise.

17. The point is that there are a large number of closely defined offences, which vary as to subject matter, the categories of persons who may commit them, strictness of liability and available statutory defences. A decision of

the courts which relates to one section may be of little assistance – or even wholly irrelevant – in construing another.

Shayler. The Facts

18. The defendant was a member of the security service from November 1991 to October 1996. At the outset of his service he signed a declaration pursuant to the Official Secrets Act 1989, acknowledging the Confidential nature of documents and other information relating to security or intelligence that might come into his possession as a result of his position, and an acknowledgement that he was under a contractual obligation not to disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further declaration acknowledging that the provisions of the Act continued to apply to any information, documents or other articles relating to security or intelligence which might have come into his possession as a result of his previous employment. In 1997 the defendant disclosed a number of documents relating to security or intelligence matters to a national newspaper. Shortly thereafter he left the country. In August 2000 he returned to the United Kingdom and was charged with disclosing documents or information without lawful authority, contrary to OSA s1 and s4. When charged he told police that he did not admit to making any disclosures which were contrary to the criminal law, that any disclosures made by him were made in the public and national interests and that in his defence he would rely on his right of freedom of expression as guaranteed by the common law, the Human Rights Act 1998 and article 10 of the Convention.

19. In the course of a preparatory hearing under Criminal Procedure and Investigations Act 1996 s29, the trial judge ruled that the defence of duress or necessity of circumstances was not open to the defendant, having by implication been excluded by the 1989 Act, nor could he argue, at common law or as a result of the coming into force of the Human Rights Act 1998, that his disclosures were necessary in the public interest to avert damage to life or limb or serious damage to property.

20. The Court of Appeal dismissed the defendant's appeal and ruled that the defence of duress or necessity of circumstances was available to a person who committed an otherwise criminal act to avoid an imminent danger to life or serious injury to himself or to

individuals for whom he reasonably regarded himself as being responsible, but that the defence was not available to the defendant since there was no sufficient nexus between his disclosures and possible injury to members of the public, that having regard to national security the restrictions placed on past and present members of the security service were not a contravention of their right to freedom of expression, and that the judge had been entitled to make the ruling he did.

21. The Court of Appeal certified 3 questions of law:

"1. Whether the offence of disclosing information relating to security or intelligence without lawful authority contrary to section 1(1) of the Official Secrets Act 1989 was committed if, or was subject to the defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property, or to expose serious and pervasive illegality or iniquity in the obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.

"2. Whether the offence of disclosing information obtained under warrants issued under the Interception of Communications Act 1985 contrary to section 4(1) of the Official Secrets Act 1989 was committed if, or was subject to a defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property or to expose serious and pervasive illegality or iniquity in the obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.

"3. Whether an 'extended' defence based on the doctrine of necessity was available under the Official Secrets Act 1989, and if so, what its limits were."

22. It should be noted that of these 3 questions only the third could apply to the whole of the OSS. The first could apply only to s1(1) and the second only to offences under s4 where the material disclosed was obtained under a warrant pursuant to ICA 1985. As we have already pointed out in both these cases the liability is especially strict.

Decision of the House of Lords. Summary based on the WLR headnote.

23. The House of Lords held, dismissing the appeal

(1) that since the defendant's case was complex and likely to lead to a long trial the criteria in s29 of the 1996 Act were satisfied and the judge was entitled to conduct a preparatory hearing in order to expedite the proceedings before the jury and assist in the management of the trial; but that the judge's power at a preparatory hearing was limited by s31(3)(b) to questions of law "relating to the case", and that limitation was to be strictly observed; that the facts of the defendant's case did not raise any questions relating to the defences of necessity or duress of circumstances, and that therefore neither the judge nor the Court of Appeal should have made any ruling on those defences; and that, accordingly, it was unnecessary to consider or express any view on them

(2) That (per Lord Bingham of Cornhill, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote) ss 1(1)(a) and 4(1) and (3)(a) of the OSA, when given their plain and natural meaning and read in the context of the Act as a whole, made it clear that Parliament did not intend that a defendant prosecuted under those sections should be acquitted if he showed that it was, or that he believed that it was, in the public or national interest to make the disclosure in question, or if the jury concluded that it might have been, or that the defendant might have believed it to be, in the public or national interest to make the disclosure; that the sections did not require the prosecution to prove that the disclosure was damaging or was not in the public interest; and that, accordingly, the defendant was not entitled to argue as a defence that the unauthorised disclosures he had made were made in the public interest or that he thought that they were

(3) That the ban imposed by the 1989 Act on the disclosure of information by members and former members of the security service was not absolute but was confined to disclosure without lawful authority; that there were procedures available under the Act to enable them to make official complaints about malpractices in the service or to seek official authorisation before disclosing information or documents; that if authorisation was refused it was open to a member or former member to apply for judicial review of that refusal, and, since such an application would involve an alleged violation of a human right, the court would be entitled to conduct a more rigorous and intrusive review than was normally permissible under its judicial

review jurisdiction; that the safeguards built into the Act, if properly applied, were sufficient to ensure that unlawfulness and irregularity could be reported to those who could take effective action, that the power to withhold authorisation was not abused and that proper disclosures were not stifled; that, therefore, in view of the special position of members of the security and intelligence services, and the highly confidential nature of information which came into their possession, the interference with their right to freedom of expression prescribed by the 1989 Act was not greater than was required to achieve the legitimate object of acting in the interests of national security; and that, accordingly, OSA ss1 and 4 Act came within the qualification in article 10(2) as a justified interference with the right to freedom of expression guaranteed by article 10 and were not incompatible with the Human Rights Act.

24. Lord Bingham delivered the leading speech. He stressed at para. 12 that the OSS “makes important distinctions leading to differences of treatment” referring to different classes of discloser, different kinds of information, different statutory defences and the requirement of damage in some but not all of the offence creating sections. He repeatedly emphasised the special position of the security and intelligence services. At para.18 he said

“As already demonstrated, a member or former member of the security and intelligence services is treated differently under the Act from other persons, and information and documents relating to security and intelligence are treated differently from information and documents relating to other matters. Importantly, the section does not require the prosecution to prove that any disclosure made by a member or former member of the security and intelligence services was damaging to the interests of that service or the public service generally.

25. Again at paras. 25 and 26 he said

“25. There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, Attorney General v

Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 118c, 213-214, 259a, 265f; Attorney General v Blake [2001] 1 AC 268, 287d-f. In the Guardian Newspapers Ltd (No 2) case, at p 269e-g, Lord Griffiths expressed the accepted rule very pithily:

"The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature.

26 The need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion has been recognised by the European Commission and the Court in relation to complaints made under article 10 and other articles under the Convention: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 100-103; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 48; *Leander v Sweden* (1987) 9 EHRR 433, para 59; *Hadjianastassiou v Greece* (1992) 16 EHRR 219, paras 45-47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, 83-84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40. The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question."

26. The crux of the case was the need to strike a proper balance the security and freedom. In the speech of Lord Bingham at para. 21 there is a most vivid passage on the importance of freedom of expression:

"21 The fundamental right of free expression has been recognised at common law for very many years: see, among many other statements to similar effect, *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1269b, 1320g; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 178e, 218d, 220c, 226a, 283e; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 126e; *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290-291. The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present

context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.

22 Despite the high value placed by the common law on freedom of expression, it was not until incorporation of the European Convention into our domestic law by the Human Rights Act 1998 that this fundamental right was underpinned by statute. Article 10(1) of the Convention, so far as relevant, provides:

"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."

Section 12 of the 1998 Act reflects the central importance which attaches to the right to freedom of expression. The European Court of Human Rights for its part has not wavered in asserting the fundamental nature of this right. In paragraph 52 of its judgment in *Vogt v Germany* (1995) 21 EHRR 205 the court said:

"The court reiterates the basic principles laid down in its judgments concerning article 10:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter

of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

It is unnecessary to multiply citations to the same effect. Thus for purposes of the present proceedings the starting point must be that the appellant is entitled if he wishes to disclose information and documents in his possession unless the law imposes a valid restraint upon his doing so."

27. Their Lordships analysed at great length whether the restrictions which sections 1 and 4 imposed on the right of members of the security and intelligence services to freedom of expression under Article 10 of the Convention were necessary and proportionate. At the end of para. 26 (to which we have already referred) Lord Bingham put it this way:

"The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. The OSA 1989, as it applies to the appellant, must be considered in that context."

28. In deciding to dismiss the appeal, their Lordships attached the highest significance to the means which were available to such persons to make lawful disclosures where they were concerned that that the public interest required it. Lord Bingham dealt with these matters at paras. 27 – 31

"27 The OSA 1989 imposes a ban on disclosure of information or documents relating to security or intelligence by a former member of the service. But it is not an absolute ban. It is a ban on disclosure without lawful authority. It is in effect a ban subject to two conditions. First of all, the former member may, under section 7(3)(a), make disclosure to a Crown servant for the purposes of his functions as such.

(1) The former member may make disclosure to the staff counsellor, whose appointment was announced in the House of Commons in November 1987 (Hansard (HC Debates) 2 November 1987, written answers col512), before enactment of the OSA 1989 and in obvious response to the grievances ventilated by Mr Peter Wright in *Spycatcher*. The staff counsellor, a high ranking former civil servant, is available to be consulted: "by any member of the security and intelligence services who has anxieties relating to the work of his or her service which it has not been possible to allay through the ordinary processes of management staff relations." In February 1989 the role of the staff counsellor was further explained: see the judgment of the Court of Appeal [2001] 1 WLR 2206, para 39.

(2) If the former member has concerns about the lawfulness of what the service has done or is doing, he may disclose his concerns to (among others) the Attorney General, the Director of Public Prosecutions or the Commissioner of Metropolitan Police. These officers are subject to a clear duty, in the public interest, to uphold the law, investigate alleged infractions and prosecute where offences appear to have been committed, irrespective of any party affiliation or service loyalty.

(3) If a former member has concerns about misbehaviour, irregularity, maladministration, waste of resources or incompetence in the service he may disclose these to the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet or the Joint Intelligence Committee. He may also make disclosure to the secretariat, provided (as the House was told) by the Home Office, of the parliamentary Intelligence and Security Committee. He may further make disclosure, by virtue of article 3 of and Schedule 2 to the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200) to the staff of the Comptroller and Auditor General, the National Audit Office and the Parliamentary Commissioner for Administration.

28 Since one count of the indictment against the appellant is laid under section 4(1) and (3) of the OSA 1989, considerable attention was directed by the judge and the Court of Appeal to the role of the commissioners appointed under section 8(1) of the Interception of Communications Act 1985, section 4(1) of the Security Service Act 1989 and section 8(1) of the Intelligence Services Act 1994. The appellant submits, correctly, that none of these commissioners is a minister or a civil servant, that their functions defined by the three statutes do not include general oversight of the three security services, and that the secretariat serving the commissioners is, or was, of modest size. But under each of the three Acts, the commissioner was given power to require documents and information to be supplied to him by any Crown servant or member of the relevant services for the purposes of his functions (section 8(3) of the 1985 Act, section 4(4) of the 1989 Act, section 8(4) of the 1994 Act), and if it were intimated to the commissioner, in terms so general as to involve no disclosure, that serious abuse of the power to intercept communications or enter premises to obtain information was taking or had taken place, it seems unlikely that the commissioner would not exercise his power to obtain information or at least refer the warning to the Home Secretary or (as the case might be) the Foreign Secretary.

29 One would hope that, if disclosure were made to one or other of the persons listed above, effective action would be taken to ensure that abuses were remedied and offenders punished. But the possibility must exist that such action would not be taken when it should be taken or that, despite the taking of effective action to remedy past abuses and punish past delinquencies, there would remain facts which should in the public interest be revealed to a wider audience. This is

where, under the OSA 1989 the second condition comes into play: the former member may seek official authorisation to make disclosure to a wider audience.

30 As already indicated, it is open to a former member of the service to seek authorisation from his former superior or the head of the service, who may no doubt seek authority from the secretary to the cabinet or a minister. Whoever is called upon to consider the grant of authorisation must consider with care the particular information or document which the former member seeks to disclose and weigh the merits of that request bearing in mind (and if necessary taking advice on) the object or objects which the statutory ban on disclosure seeks to achieve and the harm (if any) which would be done by the disclosure in question. If the information or document in question were liable to disclose the identity of agents or compromise the security of informers, one would not expect authorisation to be given. If, on the other hand, the document or information revealed matters which, however, scandalous or embarrassing, would not damage any security or intelligence interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate. Consideration of a request for authorisation should never be a routine or mechanical process: it should be undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate.

31 One would, again, hope that requests for authorisation to disclose would be granted where no adequate justification existed for denying it and that authorisation would be refused only where such justification existed. But the possibility would of course exist that authority might be refused where no adequate justification existed for refusal, or at any rate where the former member firmly believed that no adequate justification existed. In this situation the former member is entitled to seek judicial review of the decision to refuse, a course which the OSA 1989 does not seek to inhibit. In considering an application for judicial review of a decision to refuse authorisation to disclose, the court must apply (albeit from a judicial standpoint, and on the evidence before it) the same tests as are described in the last paragraph. It also will bear in mind the importance attached to the Convention right of free expression. It also will bear in mind the need for any restriction to be necessary to achieve one or more of the ends specified in article 10(2), to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end.”

29. His Lordship then considered the appellant’s submission that judicial review was an inadequate safeguard since courts are reluctant to intervene in matters relating to national security and intelligence. In rejecting this submission he stressed at paras. 33 - 35 that in such a case judges would now be empowered to conduct a “more rigorous and intrusive review than was once thought permissible” since Convention rights were in issue. Then at para. 35 he referred to “one further safeguard” namely that the consent of

the AG is required for prosecution. Such consent would not be given unless there were a reasonable prospect of conviction and the prosecution was in the public interest. He concluded at para. 36

“36 The special position of those employed in the security and intelligence services, and the special nature of the work they carry out, impose duties and responsibilities on them within the meaning of article 10(2): *Engel v The Netherlands* (No 1) 1 EHRR 647, para 100; *Hadjianastassiou v Greece* 16 EHRR 219, para 46. These justify what Lord Griffiths called a brightline rule against disclosure of information of documents relating to security or intelligence obtained in the course of their duties by members or former members of those services. (While Lord Griffiths was willing to accept the theoretical possibility of a public interest defence, he made no allowance for judicial review: *Attorney General v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109, 269g). If, within this limited category of case, a defendant is prosecuted for making an unauthorised disclosure it is necessary to relieve the prosecutor of the need to prove damage (beyond the damage inherent in disclosure by a former member of these services) and to deny the defendant a defence based on the public interest; otherwise the detailed facts concerning the disclosure and the arguments for and against making it would be canvassed before the court and the cure would be even worse than the disease. But it is plain that a sweeping, blanket ban, permitting of no exceptions, would be inconsistent with the general right guaranteed by article 10(1) and would not survive the rigorous and particular scrutiny required to give effect to article 10(2). The crux of this case is whether the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled. In my opinion the procedures discussed above, properly applied, provide sufficient and effective safeguards. It is, however, necessary that a member or former member of a relevant service should avail himself of the procedures available to him under the Act. A former member of a relevant service, prosecuted for making an unauthorised disclosure, cannot defend himself by contending that if he had made disclosure under section 7(3)(a) no notice or action would have been taken or that if he had sought authorisation under section 7(3)(b) it would have been refused. If a person who has given a binding undertaking of confidentiality seeks to be relieved, even in part, from that undertaking he must seek authorisation and, if so advised, challenge any refusal of authorisation. If that refusal is upheld by the courts, it must, however reluctantly, be accepted. I am satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the Convention; no question of reading those sections conformably with the Convention or making a declaration of incompatibility therefore arises. On these crucial issues I am in agreement with both the judge and the Court of Appeal. They are issues on which the House can form its own opinion. But they are also issues on which Parliament has expressed a clear democratic judgment.”

30. Thus, once again his Lordship emphasised the special position of members of the 2 services. He referred to “this limited category of case” and stressed that members of the 2 services had given binding undertakings of confidentiality.

31. The decision of the House to dismiss the appeal was unanimous. Lords Hope and Hutton delivered quite lengthy speeches. Lord Hope, whilst agreeing with Lord Bingham was plainly troubled. He expressed concern that the White Paper which preceded OSA had not referred to Article 10 rights (at para. 41). He went on to say that academic writers were generally agreed that there was an “apparent lack of harmony” between s1(1) and Article 10. At para 45 he said:

“45 Against this background I would approach the question which lies at the heart of this case from a position of considerable doubt as to whether the problems which it raises have really been faced up to by the legislature. I would place the onus firmly on those who seek to rely on article 10(2) to show that sections 1(1) and 4(1) are compatible with the Convention right.”

32. At paras. 64 - 66 he observed that

“I do not think that a person who has read the relevant provisions of these statutes and the orders made under them can be said to have been left in any doubt as to wide range of persons to whom an authorised disclosure may be made for the purposes of their respective functions without having first obtained an official authorisation. Section 2(2)(b) of the Security Service Act 1989 imposes a duty on the Director General of the Security Service to secure that disclosures are made for the discharge of the service's functions. In *Esbester v United Kingdom* 18 EHRR CD 72, 74 the Commission rejected an argument that the fact that the guidelines relating to the Director General's supervision of information obtained by the security service were unpublished meant that they were not sufficiently accessible to the individual.

65 In this connection it should be noted that Mr Shayler signed a declaration on leaving the service in which he acknowledged that his attention had been drawn to the Official Secrets Acts and the consequences that might follow any breach, and that he understood he was liable to be prosecuted if he disclosed either orally or in writing any information or material which had come into his possession as a result of his employment as a Crown servant on terms requiring it to be held in confidence unless he had previously obtained the official sanction in writing of the service by which he was appointed. He also acknowledged that to obtain such sanction “two copies of the manuscript of any article, book, play, film, speech or broadcast, intended for publication, which contains such information or material shall be submitted to the Director General”. In fact, the class of person from

whom official authorisation may be obtained in terms of section 7(5) of the Official Secrets Act 1989 is very wide.

66 Whether making use of the opportunities of disclosure to Crown servants would have been a practical and effective means of addressing the points which Mr Shayler wished to raise is another matter. The alternative, which requires the seeking of an official authorisation duly given by a Crown servant, is not further explained in the Act. It too requires more careful examination. I shall have to return to these points once I have set the scene for their examination more precisely.”

33. After reviewing the principle of proportionality he said at paras. 69 – 72:

“69 The problem is that, if they are to be compatible with the Convention right, the nature of the restrictions must be sensitive to the facts of each case if they are to satisfy the second and third requirements of proportionality. The restrictions must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary.

70 As I see it, the scheme of the Act is vulnerable to criticism on the ground that it lacks the necessary degree of sensitivity. There must, as I have said, be some doubt as to whether a whistle-blower who believes that he has good grounds for asserting that abuses are being perpetrated by the security or intelligence services will be able to persuade those to whom he can make disclosures to take his allegations seriously, to persevere with them and to effect the changes which, if there is substance in them, are necessary. The integrity and energy of Crown servants, as defined in section 12(1) of the Official Secrets Act 1989, of the commissioners and members of the Intelligence and Security Committee is not in question. But one must be realistic, as the Court of Appeal recognised. Institutions tend to protect their own and to resist criticism from wherever it may come. Where this occurs it may require the injection of a breath of fresh air from outside before institutional defects are recognised and rectified. On the other hand, the sensitivity and effectiveness of this system has not been tested, as Mr Shayler chose not to make use of any of these opportunities.

71 The official authorisation system provides the final opportunity. It too has not been tested by Mr Shayler. But it must be effective, if the restrictions are not to be regarded as arbitrary and as having impaired the fundamental right to an extent that is more than necessary. Here too there must be some doubt as to its adequacy. I do not regard the fact that the Act does not define the process of official authorisation beyond referring in section 7(5) to the persons by or on behalf of whom it is to be given as a serious defect. The European Court of Justice has held that article 17 of the Staff Regulations, which requires an official of the Commission of the European Communities to obtain prior permission for the publication of material dealing with the work of the Commission, is compatible with the right of freedom of expression in article 10: *Connolly v*

Commission of the European Communities (Case C-274/99) (not yet reported) 6 March 2001. Members and former members of the security and intelligence services are unlikely to be in doubt as to whom they should turn for this purpose, and common sense suggests that no further formalities require to be laid down: see paragraphs 64-65 above. The defect lies in the fact that the Act does not identify the criteria that officials should bear in mind when taking decisions as to whether or not a disclosure should be authorised.

72 But the scheme of the Act does not stand alone. Any decision to decline an official authorisation will be subject to judicial review. The European Court of Human Rights has recognised, in the context of a complaint of lack of impartiality in breach of the article 6(1) Convention right, the value which is to be attached to a process of review by a judicial body that has full jurisdiction and provides the guarantees of that article: *Bryan v United Kingdom* (1995) 21 EHRR 342, 360-361, paras 44 and 46; *Kingsley v United Kingdom* *The Times*, 9 January 2001; *Porter v Magill* [2002] 2 WLR 37, 80a-f. I would apply that reasoning to the present case. An effective system of judicial review can provide the guarantees that appear to be lacking in the statute.”

34. He went to analyse the scope of judicial review and said at paras 78 – 79:

“78 In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 543, para 138 the European Court said that the threshold of review had been placed so high in that case by the High Court and the Court of Appeal that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order claims pursued by the Ministry of Defence policy which placed a limitation on homosexuals in the army. It is now clear that, if the approach which was explained and approved in *Daly* [2001] 2 AC 532 is adopted, the more precise method of analysis which is provided by the test of proportionality will be a much more effective safeguard.

79 So I would hold that, where a refusal of official authorisation under section 7(3)(b) to disclose information is in issue, the court should address the following questions. (1) What, with respect to that information, was the justification for the interference with the Convention right? (2) If the justification was that this was in the interests of national security, was there a pressing social need for that information not to be disclosed? And (3) if there was such a need, was the interference with the Convention right which was involved in withholding authorisation for the disclosure of that information no more than was necessary. This structured approach to judicial control of the question whether official authorisation should or should not be given will enable the court to give proper weight to the public interest considerations in favour of disclosure, while taking into account at the same time the informed view of the primary decision maker. By adopting this approach the court will be giving effect to its duty under section

6(1) of the Human Rights Act 1998 to act in a way that is compatible with the Convention rights: see paragraph 58 above.”

At paragraph 85 he said:

“I think therefore that there is in the end a strong case for insisting upon a system which provides for the matter to be addressed by requiring that official authorisation be obtained by former members of the security and intelligence services, if necessary after judicial review of any refusal on grounds of proportionality, before any disclosures are made by them other than to Crown servants of information, documents or other articles to which sections 1(1) and 4(1) of the Act apply.

He concluded that for the reasons given by Lord Bingham and those that he had given the appeal should be dismissed.

35. Lord Hutton agreed with Lord Bingham. He posed the problem to be addressed at para. 90

“90 I commence the consideration of these submissions and the submissions of the Crown by observing, as did Bingham LJ in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 213 (the *Spycatcher Case*), that they represent a clash between two competing aspects of the public interest. On the one hand there is the assertion by the appellant of the public interest in freedom of speech and the exercise of that freedom by those who give information to the press so that the press may publish it and comment on it for the public benefit. On the other hand there is the reliance by the Crown on the public interest in the maintenance of the secrecy of the work of the security service so that it can operate effectively to protect national security. Both interests are valid and important and it is for the courts to resolve the clash of interests and to decide how the balance is to be struck.”

36. At para. 95 he stressed the special position of members of the security service:

“95 In the present case also there were special conditions attached to life in the security service and there were special duties and responsibilities incumbent on the appellant whereby, unlike the great majority of other citizens, he was prohibited by statute from disclosing information about his work or about the actions of others engaged in the same work. Moreover these duties and responsibilities were specifically acknowledged and accepted by the appellant ... Therefore in considering whether the restrictions contained in sections 1 and 4 of the 1989 Act were permissible under article 10(2) it is relevant to take into account that the appellant was subject to particular duties and responsibilities

arising from his membership of the security service. Such restrictions or penalties as are prescribed by law “

37. He held at para. 98 that the restrictions of freedom of expression imposed upon members of the security service by sections 1 and 4 of the Act were imposed for a legitimate aim at paras. 99 and 100 he considered whether there were necessary in a democratic society and said

“99 As regards the second requirement, the judgments of the European Court have also established that a restriction which is necessary in a democratic society must be one which is required by a pressing social need and is proportionate to the legitimate aim pursued. On these issues the appellant advanced two principal arguments. One argument was that whilst there are many matters relating to the work of the security service, which require to be kept secret in the interests of national security, there are other matters where there is no pressing need for secrecy and where the prohibition of disclosure and the sanction of criminal punishment are a disproportionate response. An example of such a matter would be where a political figure in the United Kingdom had been under surveillance for a period a considerable number of years ago. It was submitted that the disclosure of such information could not constitute any impairment of national security or hinder in any way the efficient working of the security service.

100 I am unable to accept this submission. It has been recognised in decisions in this jurisdiction that the disclosure of any part of the work or activities of the security service by a member or past member would have a detrimental effect upon the service and its members because it would impair the confidence of the members in each other and would also impair the confidence of those, whether informers or the intelligence services of other states, who would entrust secret information to the security service of the United Kingdom on the understanding and expectation that such information would never be revealed to the outside world. As Lord Nicholls of Birkenhead stated in *Attorney General v Blake* [2001] 1 AC 268, 287:

"It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense."

38. Having reviewed the European jurisprudence and the opportunities available to the Appellant to make lawful disclosures he said at para. 111:

“111 In the light of these principles stated by the European Court I consider that if the appellant were refused official authorisation to disclose information to the public and applied for judicial review of that decision, a judge of the High Court would be able to conduct an inquiry into the refusal in such a way that the hearing would ensure justice to the appellant and uphold his rights under article 6(1) whilst also guarding against the disclosure of information which would be harmful to national security. The intensity of the review, involving as it would do Convention rights, would be greater than a review conducted under the Wednesbury principle: see per Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] AC 532, 547d-g.”

39. At para. 117 he said that “sections 1 and 4 of the 1989 Act are not incompatible with Article 10” and dismissed the appeal.

40. Lord Hobhouse agreed with Lord Bingham. Lord Scott agreed with Lords Bingham, Hope and Hutton but reserved his position on the matters referred to in paras. 99 – 100 of Lord Hope’s opinion.

Applying *Shayler* in Hong Kong

41. The House of Lords merely decided that a public interest defence was not available to members of the security and intelligence services under ss 1(1) and 4(1) of the OSA. The House gave great weight to the special position of such persons and the obligation of confidentiality, which they had voluntarily undertaken. That obligation necessarily involved a restriction of the right to freedom of expression guaranteed by Article 10 of the European Convention. But there was no breach of their Convention rights because there were substantial safeguards for the right to freedom of expression in 2 respects. First there were procedures available under OSA to enable them to make official complaints about malpractices in the service. Secondly there were procedures available under OSA to enable them to seek official authorisation before disclosing information or documents. Such requests for authorisation should be considered bearing in mind the importance of the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate. If authorisation were refused it was open to the individual to apply for judicial review of the refusal, and, since such an application would involve an alleged violation of a human right, the court would be entitled to conduct a more rigorous and intrusive review than was normally permissible under its judicial review jurisdiction.

42. In interpreting the corresponding sections of the Ordinance, the Hong Kong Courts could properly follow *Shayler* only if satisfied that substantial safeguards very similar to those available in England existed in Hong Kong. We are aware that concern has been expressed that some at least of the safeguards do not exist under the Hong Kong system. This is not a matter about which we feel qualified to express a view.

43. We submit that *Shayler* cannot apply to persons who are not members of either service and who do not bear their special obligations. In any event in both the OSA and the Ordinance the conditions for criminal liability and the scope of available defences vary so widely from one section to another that it is difficult to apply the principles in *Shayler* by way of analogy. Those principles would appear to be wholly irrelevant when one is considering the activities of a private citizen who has never even worked for any government agency. It will be necessary to apply Lord Bingham's "acid test" – see para. 27 above

44. In all cases other than those involving members of the security and intelligence services the prosecution is required to prove damage. Moreover in some cases the prosecution must prove the defendant knew or had reasonable cause to believe that damage would occur, whilst in others he is entitled to acquittal if he disproves such knowledge or ground for suspicion. These questions inevitably involve a consideration of what was in the public interest and/or what the defendant himself believed to be in the public interest. In that sense some elements of a "public interest defence" may be said to be implicit in many provisions of the legislation.

45. There is nothing to prevent LegCo enacting a specific public interest defence if it so wishes.

Extension of Section 18 of the Ordinance to information acquired by "illegal access"

46. Section 18 closely mirrored s5 of OSA. Both sections apply to all persons. Both are confined to 2 categories of information: that which is protected against disclosure because it relates to security or intelligence, defence, international relations or crime and that which is acquired in confidence.

47. It is now proposed to extend s18 of the Ordinance to cover information obtained by person A “by virtue of” an offence committed by person “B”. The offence must fall into one of a number of categories: telephone tapping, hacking, theft robbery burglary or bribery. As we understand the proposed amendment B would be liable to conviction if he merely had reasonable cause to believe that the information had been illegally obtained.

48. We understand that the Hong Kong authorities have suggested that this is merely a technical amendment. We strongly disagree. It is a matter of principle. We consider that it is objectionable on a number of grounds.

49. It is unnecessary. B will in every case be liable to prosecution. Civil proceedings will be available against A.

50. We see no reason why A who has no obligation of confidence should be liable to prosecution. Nobody suggests that a similar extension of the Official Secrets legislation is necessary in the UK.

51. The new provision is likely to have a chilling effect on freedom of expression. Suppose a journalist acquires information relating to government policies which he honestly believes should be published in the public interest. He may be deterred from publication through fear of prosecution unless he can be absolutely sure that the government has sanctioned its disclosure. What Lord Bingham called the “powerful disinfectant” of publicity may be seriously diluted.

The suggested “lacuna” relating to Crown Servants and government contractors

52. Section 5 of the Official Secrets Act 1989 refers only to “Crown servants or government contractors” and, unlike sections 1 to 4, contains no reference to “former” Crown servants or contractors. It is suggested that this was an oversight by the draftsman, creating a *lacuna* which should be filled by an amendment to section 18(d) of the Official Secrets Ordinance.

53. We do not think that this was an oversight on the part of the draftsman. First, as the 1988 White Paper emphasised, the Official Secrets Act 1989 sought to distinguish clearly between the responsibilities and potential criminal liability of those employed by the government who owed direct duties of confidentiality and third parties such as journalists who did not.

Sections 1 to 4 deal with the former. Section 5 deals with the latter whose liability was made – as a matter of deliberate policy – less extensive and less strict.

54. Secondly it is not to be supposed that the omission of words in one section which appear in others must be an oversight by the draftsman. OSA was the result of years of hotly contested public debate and emerged in its final form only after a number of earlier attempts to reform the law had failed¹. Every section of the OSA has been very carefully formulated.

55. Thirdly the “lacuna / oversight” argument is greatly weakened since OSA s8 also applies only to current servants and contractors.

56. We have carried out some research into the legislative history of the Official Secrets Act 1989. There is a great deal of material, in particular in Hansard. We have not been able in the time available to read it all. But nothing we have come across thus far suggests that the drafting of section 5 was anything other than part of the deliberate structure of the Act.

57. We submit, relying on the dictum of Lord Hope that we have quoted in para. 31 above, that, since the proposed extension would restrict rights of freedom of expression the onus is firmly on those who argue that there was a lacuna or oversight to establish their point. This would involve 2 elements: proof that the difference in terminology could not have been a deliberate act by the UK Parliament and a convincing case that there now exists a pressing need in a democratic society which could justify the proposed amendment.

The proposed s16A.

58. The proposal is to introduce a new class of protected information document or other article which “relates to any affairs of the HKSAR which are under the basic law within the responsibility of the Central Authorities”. We are not convinced that there is any justification for this extension of the law. The argument that there is an analogy with information as to international relations is very difficult to sustain since Hong Kong is now part of a unitary state. Moreover we are concerned at the total failure to define the categories of protected material. Arguably it could include information relating to economic and commercial matters.

¹ Lord Bingham reviewed the history briefly at paras. 9 – 10 of Shayler

59. A restriction on freedom of expression which is so vaguely and inadequately defined cannot be said to be “prescribed by law”. (Compare para. 24 of *Shayler* where Lord Bingham commented that in OSA s1 the restriction was prescribed “with complete clarity”).

Burdens of proof upon the defence

60. OSA is replete with reverse burdens provisions whereby the burden of proving a fact or facts is placed on a defendant. This structure is faithfully replicated in the Ordinance and is not affected by any of the proposed amendments. However, the Human Rights Act has brought about a major change in English attitudes towards such provisions. They are now, as the House of Lords made clear in *Lambert*², open to challenge on the basis that they are incompatible with the presumption of innocence. In some recent English statutes we see the results of this new thinking. For example the Terrorism Act 2000 s 118 provides that in relation to certain reverse burden provisions the following shall apply

(1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.

(2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court -

(a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or

(b) may accept a fact as sufficient evidence unless a particular matter is proved.

(4) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection (3)(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond reasonable doubt.

² (2001) 3 WLR 206

61.S118 (5) then specifies the relevant provisions to which this regime is to apply. Thus a burden of proof is, in some cases, converted into an evidential burden. We respectfully suggest that all of the reverse burden provisions in the Ordinance should now be reconsidered with a view to introducing a similar amendment in relation to at least some of them. For example, it might well be decided that there should be no probative burden imposed on anyone who has never been a member of the security or intelligence services, a public servant or government contractor. We believe if the UK Parliament were now to re – examine the provisions of OSA it is very likely that such reforms would be made.