Public Interest Immunity

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This paper examines the development of the law concerning public interest immunity (PII) in recent years, and surveys relevant civil and criminal cases. It considers the use of public interest immunity in the context of the rules of disclosure of evidence in criminal trials, and sets out the conclusions of the report of the Scott Inquiry on this subject, along with the Government's response. Provisions in the Criminal Procedure and Investigations Bill [HL], which has completed its passage through the House of Lords and is about to have its Second Reading in the House of Commons, are designed to make statutory arrangements for disclosure, which will alter the current judge-made, common law rules on prosecution disclosure and provide for some disclosure by the defence. This paper replaces Library Research Paper 94/42, which does not reflect some of the recent developments in this area of the law.

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Summary

Public interest immunity (PII) is a rule of the law of evidence under which documents may be withheld from parties to legal proceedings when their disclosure would be injurious to the public interest. It was formerly known as the doctrine of "Crown privilege". Certificates or affidavits claiming public interest immunity have tended in recent years to be referred to in the press as "gagging orders", although this has been described as a "wicked but glib phrase".[1] Public interest immunity is a common law rule which has been developed by the courts over a number of years. It has tended to be considered principally in the context of civil proceedings and until very recently there had been relatively few cases in which its application in criminal proceedings had been subjected to detailed scrutiny by the courts. On a number of different occasions between 1992 and 1994 the courts have had cause to consider the use of certificates or affidavits asserting that particular items of evidence should be withheld from disclosure in criminal proceedings. Some aspects of the law and procedure governing the use of public interest immunity certificates or affidavits have been considered and developed as a result of the judgments in these cases. In the fifth edition of *Judicial Review of Administrative Action* edited now by Lord Woolf and Jeffrey Jowell Q.C., the authors refer, however, to the "undesirable confusion into which public interest immunity in criminal trial has been sunk" and hope that this will be removed as a result of Sir Richard Scott's Inquiry.[2] Since 1968 the case-law on the withholding of documents in the public interest has been harmonised in the separate British jurisdictions but the law governing the conduct of criminal proceedings and the rules of evidence are quite different in Scotland. This paper sets out the arrangements concerning the use of public interest immunity in civil and criminal proceedings in England and Wales, recent developments in the law and some discussion of the assertion by the Attorney-General, Sir Nicholas Lyell at the time of the collapse of the Matrix-Churchill trial that ministers were under a duty to sign public interest immunity certificates in relation to certain documents. Some of the observations of Sir Richard Scott on the use of public interest immunity certificates and his report's conclusions on this subject are set out[3] along with the Government's response to them. Following the publication of a consultation document on disclosure in May 1995[4] the Government has introduced the *Criminal Procedure and Investigations Bill* [HL] which is designed, amongst other things, to provide a statutory scheme which will replace the existing common law rules and administrative guidelines on disclosure in criminal proceedings in England and Wales including those concerned with the disclosure of "sensitive material". The Bill has almost completed its passage through the House of Lords.

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1 "Give Lyell a fair trial - *Times* 20.2.1996

2 *Judicial Review of Administrative Action* 5th edition 1995 pp84-85

3 Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions HC 115

4 *Disclosure* - Cm 2864

I Background

The procedure by which one party to civil proceedings in England and Wales obtains documents from the other is known as "discovery". The common law rule, which prevailed until the late 1940's, was that discovery of documents could not be ordered against the Crown in proceedings to which it was a party. This rule was abolished by Section 28 of the *Crown Proceedings Act 1947*, which enabled the courts to require the Crown to make discovery of documents, produce documents for inspection and answer interrogatories, subject to the following important exception:

> Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

Section 28(2) of the 1947 Act adds that:

> (2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

The rules concerning the withholding of documents in the public interest thus remained. In *Duncan v Cammell Laird and Co* [1942] AC 624 the House of Lords held that, regardless of whether or not the Crown was a party to the proceedings in a particular case, documents otherwise relevant and liable to production should not be produced if the public interest required that they should be withheld. A document could be withheld either because disclosure of its *contents* would be damaging to the public interest (because, for example, it would endanger public security or prejudice diplomatic documents) or because it belonged to a class of documents which the public interest required to be withheld from production, to safeguard "the proper functioning of the public service".

In a statement to the House of Lords on 6 June 1956 the then Lord Chancellor, Lord Kilmuir, set out his view of the rationale behind claims of what was then known as "Crown privilege":[5]

> The reason why the law sanctions the claiming of Crown privilege on the "class" ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to produce in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

In *Duncan v Cammell Laird and Co* the House of Lords also unanimously agreed that a court could never question a claim of Crown privilege made in the proper form regardless of the nature of the documents to which it referred. This applied both to the contents of documents and to classes of documents. Ministers of the Crown were to be the sole arbiters of the public interest and if objection to the production of a document were taken in the proper manner and form by a Minister after personal scrutiny, or by the permanent head of the department in the minister's absence, the certificate or affidavit stating that its production would be against the public interest had to be accepted by the court as conclusive.

While the decision on the particular facts of *Duncan v Cammell Laird* (which was a wartime case following the "Thetis" submarine disaster in which the documents sought included blueprints of the submarine) was not questioned, the legal principles and administrative practices which were sanctioned by the decision in the case attracted considerable criticism. Some of the undesirable potential consequences of the ruling were noted by Lord Pearce in *Conway v Rimmer* [1968] AC 910, as follows:

> Any department quite naturally and reasonably wishes, as any private business or any semi-State board must also wish, that its documents or correspondence should never be seen by any outside eye. If it can obtain this result by putting forward a general vague claim for protection on the ground of candour it can hardly be blamed for doing so. "It is not surprising" it has been said (Professor Wade, *Administrative Law* (2nd edn.) at p. 285) "that the Crown, having been given a blank cheque, yielded to the temptation to overdraw". Moreover the defect of such an argument is that

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[5] HL Deb vol 197 c.742-3 6.6.1956

> discrimination and relaxation of the claim could not be acknowledged by the Crown lest it jeopardise the claim of the whole class of documents and of other classes of document. No weighing of the injury done to particular litigants (and thereby to the public at large) by a resulting denial of justice can be made. The ministry puts forward the rigid general claim. The court accepts it. The litigant ruefully leaves the lists, a victim of an injustice, great or small. In some cases this injustice is a necessary evil for the public good, in others it is unnecessary. Yet the court has not weighed the balance or considered whether the public interest in the well-being or routine of the ministry or the public interest in the fair administration of justice should have prevailed in that particular case.

In *Conway v Rimmer* [1968] AC 910 the House of Lords used the power to depart from its own precedents, which it had granted to itself only in 1966, to override the broader statements in *Duncan v Cammell Laird*. It held that a minister's certificate claiming public interest immunity was not to be regarded as conclusive and that it was for the court to decide where the balance of public interest lies. In Scotland this step had been taken 12 years earlier in *Glasgow Corporation v Central Land Board* [1956 S.C. (H.L.)1] when the House of Lords held that the Scottish courts could go behind a minister's certificate and, after weighing private interests against public ones, decide for themselves whether or not a particular item of evidence should attract immunity on public interest grounds. The law in the two jurisdictions was harmonised after *Conway v Rimmer*, in which the leading judgment was given by Lord Reid. He observed that:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private. can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service, is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice.

In his book on *Administrative Law*[6] Sir William Wade refers to *Conway v Rimmer* as "the culmination of a classic story of undue indulgence by the courts to executive discretion, followed by executive abuse, leading ultimately to a radical reform achieved by the courts

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[6] 7th edition 1994 p.845-846

themselves".

Of the decision itself he goes on to say:

> "Thus did the House of Lords bring back a dangerous executive power into legal custody. Some of the earlier decisions, and the official concessions in administrative practice, will remain of importance. But the legal foundation of excessive "class" claims has been destroyed".[7]

In their book *Judicial Review of Administrative Action* Lord Woolf and Jeffrey Jowell give the following summary of the current position where a claim that a document should be withheld is made on the ground that disclosure of its *contents* would be injurious to the public interest:[8]

> Thus, in those rare instances when a Minister claims that it would be contrary to the public interest to reveal a document on the ground that revelation of its *contents* would prejudice the public interest in, for example, national security or diplomatic relations, a court should be very reluctant to go behind the Executive's judgment or even to inspect the document itself. In the absence of evidence of abuse of authority, or manifest error of law or fact, a certificate covering these areas may well be conclusive.

As has already been mentioned, a claim that certain documents should be withheld maybe made, not only on the grounds that disclosure of the contents of those documents would be damaging to the public interest, but also on the ground that the documents come within a class which has been considered by the courts to be exempt from the ordinary rules of discovery. In *Conway v Rimmer* Lord Reid gave the following account of the circumstances in which certain classes of document should not be disclosed and the rationale behind this:[9]

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-formed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the

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7 *Administrative Law*- Wade & Forsyth 7th edition 1994 p.851

8 *Judicial Review of Administrative Action* - de Smith, Woolf & Jowell 5th edition 1995 p.75-76

9 [1968] AC 910 at pp952-953

like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, int he language of Lord Simon in *Duncan's* case, whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service".

It appears to me that, if the Minister's reasons are such that a judge can properly weigh them, he must, on the other hand, consider what is the probable importance in the case before him of the documents or other evidence sought to be withheld. If he decides that on balance the documents probably ought to be produced, I think that it would generally be best that he should see them before ordering production and if he thinks that the Minister's reasons are not clearly expressed he will have to see the documents before ordering production. I can see nothing wrong in the judge seeing documents without their being shown to the parties. Lord Simon said (in *Duncan's* case) that "where the Crown is a party...this would amount to communicating with one party to the exclusion of the other." I do not agree. The parties see the Minister's reasons. Where a documents has not been prepared for the information of the judge, it seems to me a misuse of language to say the judge "communicates with" the holder of the documents by reading it. If on reading the document he still thinks that it ought to be produced he will order its production.

The courts' current view of class claims to public interest immunity is quite complex. It has been stated on several occasions that where disclosure is imperative in the interests of justice, claims that documents be withheld on the ground that their disclosure would inhibit candour of communication are unlikely to succeed. Well-supported claims for immunity on class grounds are likely to be respected, but no class of document is automatically immune from disclosure. In *Burmah Oil Co. v Bank of England*[10] Lord Wilberforce observed that even where a claim for immunity from production was based on a level of public interest of the highest importance, that fact by itself was not necessarily conclusive, and the public interest might on occasion prevail against it. This has been held to be the case even where the documents concerned are Cabinet documents,[11] although generally speaking it is likely that the more sensitive the class of document concerned, the greater the degree of respect which is likely to be shown by a court in assessing a claim that it should be withheld. In *Judicial review of Administrative Action*, Lord Woolf and Jeffrey Jowell note that discovery will normally be refused on class rather than contents grounds for documents containing information supplied in confidence by informers to the police or to other bodies concerned with the enforcement of the law or the maintenance of national security.[12] Even where a class

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[10] [1980] AC 1090 at p.1113

[11] *Burmah Oil Co. v Bank of England* [1980] AC 1090; *Air Canada v Secretary of State for Trade (No.2)*

[12] Fifth Edition 1995 p.79

claim is unsuccessful, a document may, of course, be withheld if the court agrees that the disclosure of its contents would be prejudicial to the public interest.

The position of documents and statements made in the course of police complaint investigations by or under the overall supervision of the Police Complaints Authority has been considered by the courts on a number of occasions in recent years. These documents had on various occasions been held by the Court of Appeal to belong to a class of document which should not be disclosed on public interest grounds, but in *R v Chief Constable of the West Midlands ex parte Wiley*[13] the House of Lords overruled these previous decisions concerning statements obtained during investigations under the 1984 Act. The House of Lords held that a class claim did not attach generally to all documents coming into existence in consequence of an investigation of a complaint against the police under the *Police and Criminal Evidence Act 1984* because in the absence of clear and compelling evidence that a class-based public interest immunity was necessary such an immunity was not justified. The court added that a contents claim might apply to documents that came into existence as a result of an investigation into a complaint of police misconduct.

The judgment in the *Wiley* case left open the question whether or not public interest immunity could be claimed, on the basis of either a class or a contents claim, in respect of the report of the investigating officer into a complaint about police misconduct made under the 1984 Act. The question was answered in *Taylor v Chief Constable of Greater Manchester*[14] when the Court of Appeal held that these reports formed a class which was prima facie entitled to public interest immunity. The reason given for this was the need for investigating officers to feel free to report on professional colleagues or members of the public without being concerned that their opinions might become known to such persons (what might be called the traditional "candour of communication" argument). The Master of the Rolls, Sir Thomas Bingham, said he could readily accept that the prospect of disclosure in other than unusual circumstances would have an undesirable and inhibiting effect on investigating officers' reports. The Court of Appeal preferred to base the immunity in this type of case on class rather than contents grounds as they have done in cases involving documents containing information relating to informers and other information supplied in confidence to the police. It would appear, therefore, that the courts are still prepared on occasion to accept new classes of document which should normally attract public interest immunity or more specific categories of document which were formerly within more general classes, if they are satisfied that the need to create such a class has been adequately demonstrated.

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[13] [1994] 3 All ER 420

[14] *Times* 19.1.1995

II Procedure for claiming public interest immunity in civil proceedings

As already noted,[15] the procedure by which one party to civil proceedings in England and Wales obtains documents from the other is known as discovery. The rules concerning discovery in proceedings in the High Court and the civil division of the Court of Appeal are set out in Order 24 of the Rules of the Supreme Court. The Order requires the parties to make and file affidavits (sworn written statements) listing documents which are or have been in their possession, custody or power and which relate to any question in the cause or matter. Discovery may be made by the parties themselves under rule 2 of Order 24 or by order of the court, under rule 3 of the same Order. Rule 5 of Order 24 sets out the form of list and affidavit which must be presented and notes that:

> 5 (2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient claim of the grounds of privilege.

A claim that any document on the list should be withheld ("privileged from production") may be made on a number of grounds, one of which is that its production would be injurious to the public interest. This ground for withholding documents is set out in Order 24, rule 15, which provides that:

> 15. The foregoing provisions of this Order shall be without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

The procedure for claiming public interest immunity (or Crown privilege, as it was formerly known) is explained in *Halsbury's Laws of England* as follows:[16]

> 89. **Procedure on claim to Crown privilege**. The claim to Crown privilege must be made by the minister who is the political head of the department concerned or where it is not convenient or practicable for the political minister to act, because he may be out of reach or ill or the department is one where the effective head is the permanent official, it is reasonable for the claim to be made by the permanent head, such as the Chairman of the Customs and Excise Commissioners.

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[15] p.2

[16] Fourth Edition Vol 13 p.71

> The claim must be made in a proper form, whether in the form of an affidavit of the political minister or permanent head of the appropriate department or, as is the usual practice, in the ordinary run of cases, by a certificate signed by him personally. The court, however, can request his personal attendance, though this is a rare practice. The essential matter is that the decision to object should be taken by the political minister himself and that he should himself have seen and considered the documents and himself have formed the view that on grounds or public interest they ought not to be produced either because of their actual contents or because of the class to which they belong. He cannot, however, be cross-examined, though he may be given the opportunity to make or file a further certificate or affidavit setting out the claim with greater particularity.

When departments such as the Inland Revenue, or HM Customs and Excise, which are not headed by ministers, seek to claim public interest immunity, the head of that department will make an affidavit, as there will be no minister to sign a certificate.

III The use of public interest immunity in criminal proceedings - judicial opinions in earlier cases

Most of the case-law on public interest immunity has been concerned with civil proceedings and the rules and procedures relating to discovery. There are noticeably fewer cases on the use of public interest immunity in the context of the rules of disclosure in criminal proceedings and this is particularly true where the earlier authorities are concerned.

In *Duncan v Cammell Laird*[17] Viscount Simon said that:

> "The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same".

The statement made in the House of Lords in 1956 by the then Lord Chancellor, Lord Kilmuir, contained the following comments about the Government's policy on the use of "Crown privilege" to withhold documents in criminal cases:[18]

> We also propose that if medical documents, or indeed other documents are relevant to the defence in criminal proceedings, Crown privilege should not be claimed. At present many of these documents are made available only in the case of the more serious crimes, such as murder, manslaughter and rape.

The announcement of these concessions was made at a time when, as has been mentioned earlier, the courts had taken the view that a minister's certificate claiming "Crown privilege" was conclusive. The Lord Chancellor's remarks were, in effect, a statement about how ministers proposed to exercise their discretion with respect to claims that documents should be subject to Crown privilege. The Crown's right to withhold documents on these grounds was not then subject to control by the courts in any real sense.

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[17] [1942] AC 624 at p.633-34

[18] HL Deb Vol 197 c.745 6.6.1956

In *Conway v Rimmer,*[19] when the House of Lords broke away from the restrictive view of their powers in this area which had resulted from their earlier decision in *Duncan v Cammell, Laird & Co Ltd,*[20] Lord Reid made the following comments about the view of the Attorney-General of the day, who had suggested that documents might be disclosed in criminal proceedings but withheld in subsequent civil proceedings through the use of "Crown privilege":[21]

> The Attorney-General did not deny that, even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a later civil case. And he was quite candid about the reason for that. Crown privilege is claimed in the civil case not to protect document-its contents are already public property-but to protect the writer from civil liability should he be sued for libel or other tort. No doubt the Government have weighed the danger that knowledge of such protection might encourage malicious writers against the advantage that honest reporters shall not be subjected to vexatious actions, and have come to the conclusion that it is an advantage to the public service to afford this protection. But that seems very far removed from the original purpose of Crown privilege.

In *Neilson v Laugharne*[22], a case decided by the Court of Appeal in 1981, Lord Justice Oliver (as he then was) said:

> "If public policy prevents disclosure, it prevents it, in my judgment, in all circumstances except to establish innocence in criminal proceedings".

As recently as November 1990, in *R v Governor of Brixton Prison ex parte Osman,*[23] a judgment in the Queen's Bench Division of the High Court (the Divisional Court) in a case arising out of an application for habeas corpus, Lord Justice Mann noted that there did not seem to have been any definitive pronouncement in the earlier authorities about whether "Crown privilege" was applicable in criminal proceedings. He went on to consider whether or not its modern incarnation as public interest immunity applied to criminal proceedings and decided that it did, for the following reasons:[24]

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[19] [1968] AC 910
[20] [1942] AC 624
[21] [1968] AC 910 at pp942-3
[22] [1981] 1 QB 736 at p.753
[23] [1991] 1 WLR 281; (1991) 93 Cr App. R 202
[24] [1991] 1 WRR 281

The development of public interest immunity has been a development occurring in substance over the last 23 years. Prior to the development of that immunity there was a kindred subject called Crown privilege. There does not seem to have been any definitive pronouncement as to whether the doctrine of Crown privilege was applicable in criminal proceedings. In *Duncan v Cammell, Laird & Co. Ltd.* [1942] A.C. 624, 633-634, Viscount Simon L.C. said:

> "The judgment of the House in the present case is limited to civil actions and I the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same."

So far as I am aware, the matter rested there.

The seminal cases in regard to public interest immunity do not refer to criminal proceedings but, the principles are expressed in general terms. Asking myself why those general expositions should not apply to criminal proceedings, I can see no answer but that they do. It seems correct in principle that they should apply. The reasons for the development of the doctrine seem equally applicable to criminal as to civil proceedings. I acknowledge that the application of the public immunity doctrine in criminal proceedings will involve a different balancing exercise to that in civil proceedings. I shall come in one moment to the concept of the balancing exercise. Suffice it to say for the moment that a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed.

It may be that what I have just said explains the paucity of authority. It may be that prosecutions are not initiated where material is not to be exposed, or it may be that the force of the balance is recognised by prosecuting authorities and the immunity is never claimed. I know not. We have been referred to a few instances at trial where rulings have been made upon public interest immunity, but apart from indicating that the point has arisen I would attach no significance to those instances. I base myself upon the proposition that there is no discernible reason why the immunity should not apply in criminal proceedings.

In so stating. I derive comfort from *Reg. v. Robertson, Ex parte McAulay* (1983) 21 N.T.R. 11. That is a decision of the Supreme Court of the Northern Territory. It is, if I may say so, a decision expressed with care and in which all relevant authorities are deployed. O'Leary J., in a reserved judgment said, at p. 19:

> "What is in question here, then, is the nature and extent of public interest privilege or Crown privilege in criminal proceedings, and, in particular, what information obtained by police in the course of their investigation of a crime is protected from disclosure by virtue of that privilege. Public interest privilege, as applied to criminal proceedings, is part of the general public interest privilege as now defined in England in *Conway v. Rimmer* [1968] A.C. 910... and here in Australia in *Sankey v. Whitlam* [1978] 142 C.L.R. 1. . . , Though it was suggested by Viscount Simon L.C. in *Duncan v Cammell, Laird & Co.* [1942] A.C. 624, 633, 634 that

> the practice relating to Crown privilege as applied in criminal trials where an individual's life or liberty may be at stake is not necessarily the same as that in civil actions, that same approach does not seem to have been taken either by the House of Lords in *Conway v Rimmer* nor by the High Court of Australia in *Sankey v Whitlam:* indeed, both those cases seem to regard Crown privilege in criminal cases as being governed by the same principles as the general law, though acknowledging that in the case of criminal proceedings there is the important public interest that the administration of justice should not be frustrated by the withholding of documents that might assist an accused person to establish his innocence: see *Sankey v Whitlam,* supra, *per* Gibbs A.C.J. (142 C.L.R.) at 42."

I derive comfort from those observations. but I would have independently arrived at the conclusion which I have stated.

IV Disclosure by the prosecution in criminal trials - the general rules, including recent cases concerning public interest immunity

Like the rules concerning discovery in civil proceedings, the rules governing the disclosure of evidence in criminal cases are common-law rules established by the courts in cases decided over many years. In December 1981 the then Attorney-General, Sir Michael Havers, issued *Guidelines for the disclosure of unused material to the defence in cases to be tried on indictment*[25] but these did not override the common law rules concerning disclosure and indeed could not do so. As a result of a number of recent court decisions, the Attorney-General's 1981 guidelines have largely been superseded and are now only to be regarded as a starting point. The common law rules concerning disclosure and their development by the courts can only be overridden altogether by legislation. The Criminal Procedure and Investigations Bill, which will shortly be passed to the House of Commons following the completion of its passage through the House of Lords, is designed, amongst other things to replace the common law rules concerning disclosure with statutory provisions.

As far as the current common law arrangements are concerned, it has been accepted for many years that trials in the Crown Court can only proceed on the basis of full disclosure by the prosecution of all the evidence in its possession that is relevant to the case. In the past fifty years the prosecution duty of disclosure has been extended beyond the prosecution's own evidence to material, known as "unused material", that the prosecution does not intend to use but which may be of assistance to the defence. The prosecution duty to disclose "unused matter" to the defence was first set out in 1946 in the case of *R v Bryant and Dickson*[26] and extended in 1965 in *Dallison v Caffery*.[27]

In *R v Hennessey (Timothy)*[28] Lord Justice Lawton said that the courts must

> "keep in mind that those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence".

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[25] [1982] 74 CR App R302
[26] 31 CR App R 146
[27] [1965] 1 QB 348
[28] [1978] 68 Cr App R 419, 426

The Attorney-General's "*Guidelines for the disclosure of 'unused material' to the defence in cases to be tried on indictment* stated that there was a discretion not to make disclosure, at least until Counsel had considered and advised on the matter, in a number of different circumstances, one of which was that:[29]

> (v) The statement is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:- *(a)* It deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known. *(b)* It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger. *(c)* It is by, or discloses the identity of a witness who might be in danger of assault or intimidation if his identity became known. *(d)* It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime. *(e)* It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier- *e.g.* a bank official. *(f)* It relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him. *(g)* It contains details of private delicacy to the marker and/or might create risk of domestic strife.

The guidelines gave the following additional advice on "sensitive material":[30]

> 7. If there is doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to Counsel for advice either before or after committal.
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> 8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt upon his guilt or upon some material part of the evidence on which the Crown is relying) there must either be full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in paragraph 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for some reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material but also the name and address of the maker.

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[29] (1982) 74 Cr App R 302
[30] (1982) 74 Cr App R 302

9. Any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in paragraph 6 should be disclosed to the defence until *(a)* the investigating officer had been asked whether he has any objections, and *(b)* it has been the subject of advice by Counsel and that advice has been considered by the Prosecuting Solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to Counsel, the Director of Public Prosecutions should be consulted.

11. In all cases Counsel should be fully informed as to what unused material has already been disclosed. If some has been withheld in pursuance of paragraph 10, he should be informed of any police views, his Instructions should deal-both generally and in particular-with the question of "balance" and he should be asked to advise in writing.

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with Counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example:

(i) if the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested; and subsequently, if so desired to arrange for his attendance at Court.

(ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite common practice with witnesses such as bank officials.

(iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(iv) Disclosure of all or part of a sensitive statement or document may be possible on a Counsel-to-Counsel basis although it must be recognised that Counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

> (v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission with section 10 of the *Criminal Justice Act 1967*, assuming that they accept the correctness of the fact.
>
> 15. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further evidence. Should such a situation arise or seem likely to arise then, if time permits, Prosecuting Solicitors are advised to consult the Director of Public Prosecutions.

These guidelines were issued to inform prosecuting authorities and others of the Law Officers' view of the way in which prosecutors should use their discretion in deciding whether or not unused material should be disclosed to the defence. As has already been mentioned, they did not form part of the common law as such, nor were they issued under statutory authority. Their status was that of administrative guidance, albeit highly persuasive. They have largely been superseded by a number of recent cases and in particular by the Court of Appeal's judgment in *R v Ward*,[31] the case in which the Court quashed the convictions imposed on Judith Ward for murder and causing explosions in an IRA bombing campaign in the 1970s.

The definition of "unused material" was widened by a ruling in 1990 by the judge in the "Guinness trial", Mr Justice Henry, who held that the defence was generally entitled to matter "that has, or might have, some bearing on the offences charged".[32] Then in the landmark ruling in 1992 in *R v Ward*[33] the Court of Appeal further extended the prosecution's duty of disclosure and held that it was for the court, rather than the prosecution, to judge whether matter may properly be withheld from the defence on the ground of public interest immunity. The Court made the following comment about Lord Justice Mann's observations in the *Osman* case:[34]

> It is of course implicit in Mann LJ's judgment, and in the earlier authorities to which he referred, that the ultimate decision as to whether evidence, which was otherwise disclosable, should be withheld from disclosure on the grounds of public interest immunity was one to be made by the court. Certainly this is our view.

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[31] [1993] 2 All ER 577

[32] *R v Saunders et al*, unreported 29.9.1990 CCC (transcript no. T881630)

[33] [1993] 1 WLR 619

[34] [1993] 1 WLR 619 at p.647

In *R v Ward* the Court of Appeal also said:

> (v) It is true that public interest immunity provides an exception to the general duty of disclosure. For present purposes it is not necessary to attempt to analyse the requirements of public interest immunity. But in argument the question arose whether, if in a criminal case the prosecution wished to claim public interest immunity for documents helpful to the defence, the prosecution is in law obliged to give notice to the defence of the asserted right to withhold the documents so that, if necessary, the court can be asked to rule on the legitimacy of the prosecution's asserted claim. Mr Mansfield's position was simple and readily comprehensible. He submitted that there was such a duty, and that it admitted of no qualification or exception. Moreover, he contended that it would be incompatible with a defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own cause on the asserted claim to immunity. Unfortunately, and despite repeated questions by the court, the Crown's position on this vital issue remained opaque to the end. We are fully persuaded by Mr Mansfield's reasoning on this point. It seems to us that he was right to remind us that when the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.

In *R v Davis, Johnson and Rowe*[35] the Court of Appeal qualified this approach in some respects, and went on to set out a new procedure to be followed when public interest immunity is asserted in respect of unused material. This is summarised in the headnote to the case as follows:[36]

> The prosecution has the duty generally to disclose voluntarily all unused material to the defence solicitor if it has some bearing on the offences charged and the surrounding circumstances of the case. Where public interest immunity or sensitivity is relied on to justify non-disclosure the prosecution should, whenever possible, give notice to the defence that application is being made for a ruling by the court, indicating at least the category of the material held and the defence should have the opportunity to make representations to the court. Where disclosure of the category of the material would in effect reveal that which the prosecution claimed should not in the public interest be revealed, the prosecution should notify the defence that an application is to be made to the court, but the category need not be specified and the application should be made ex parte. Where the

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35 [1993] 1 WLR 613

36 [1993] 1 WLR 613-614

court considers that the normal inter partes procedure ought to have been followed, it will so order, but otherwise it will rule on the ex parte application. In a highly exceptional case, where to reveal even the fact that an ex parte application is to be made could stultify the application, the prosecution should apply ex parte without notice to the defence, and where the court considers that notice of the application should have been given to the defence or that the normal inter partes procedure should have been adopted, it will so order. A ruling in favour of non-disclosure before the hearing of the case is not necessarily final; the court should continue to monitor the issue of disclosure throughout the hearing and, on a change of view, should notify the prosecution, who would then have to determine whether to disclose or offer no further evidence (post, pp. 617B-E, E-H, 618D-F).

In giving this guidance the Court of Appeal emphasised that open justice requires maximum disclosure and, whenever possible, the opportunity for the defence to make representations on the basis of the fullest information. The Court of Appeal has subsequently emphasised this by stating that "ex parte applications are contrary to the general principle of open justice in criminal trials" and were only sanctioned in *R v Davis, Johnson and Row* to enable the Court of discharge its function in testing a claim that public interest immunity or sensitivity justifies non-disclosure of material in the possession of the Crown.[37] It was reported in the *Law Society's Gazette* of October 4 1995 that an application to the European Court of Human Rights had been made on behalf of some of the appellants in *R v. Davis, Johnson and Rowe* and others on the grounds that the ex parte procedure used in dealing with the public interest immunity claims in their cases was a violation of Article 6 of the European Convention on Human Rights, which is concerned with the requirements of a fair trial.

The rulings in the *Guinness* trial and the *Ward* case were seen by many commentators and indeed by the Royal Commission on Criminal Justice[38] as having caused considerable problems for the police and prosecuting authorities, both in terms of the volume of material which was required to be handed over to the defence and the time which needed to be spent in assessing that material and considering whether claims should be made to the court for any items to be withheld on public interest grounds. The Royal Commission considered that the procedure laid down in *R v Davis, Johnson and Rowe* for the disclosure of material that may attract public interest immunity struck "a satisfactory balance between the public interest in protecting such material and the legitimate need of the defence in some cases to see it or be aware of its existence".[39] The Royal Commission did not, however, consider the position to be satisfactory where sensitivity was not in issue and went on to make a number of recommendations about prosecution disclosure in general and more controversially, defence disclosure. As has already been mentioned, the Government published a consultation paper on disclosure in May 1995[40] and has introduced a Bill in the House of Lords which is

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37 *R v Keane* [1994] 2 All ER 478

38 *Report of the Royal Commission on Criminal Justice* Cm 2263 July 1993 p.92-95

39 Cm 2263 p.95 para. 47

40 Cm 2864

designed to implement its proposals.

There have been further rulings by the Court of Appeal on public interest immunity in criminal cases since the judgments in *R v. Ward* and *R v. Davis, Johnson and Rowe*. In *R v. Keane*[41] the Court made the following comments about how it was to be determined whether and to what extent material which the Crown wished to withhold might be of assistance to the defence:[42]

> First, it is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold. As to what documents are 'material' we would adopt the test suggested by Jowitt J in R v *Melvin and Dingle* (20 December 1993, unreported). The learned judge said:
>
> > 'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).'
>
> As was pointed out later in that judgment, it is open to the defence to indicate to the prosecution a defence or an issue they propose to raise as to which material in the possession of the prosecution may be of assistance, and if that is done the prosecution may need to reconsider what should be disclosed.
>
> We also wish, in passing, to indorse the observations of the learned judge in that case as to the scope of the Crown's duty. It would be an abdication of that duty for the prosecution, out of an over-abundance of caution, simply to dump all its unused material into the court's lap and leave it to the judge to sort through it all regardless of its materiality to the issues present or potential. The prosecution must identify the documents and information which are material according to the criteria set out above. Having identified what is material, the prosecution should disclose it unless they wish to maintain that public interest immunity or other sensitivity justifies withholding some or all of it. Only that part which is both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. If in an exceptional case the prosecution are in doubt about the materiality of some documents or information, the court may be asked to rule on that issue.
>
> Secondly, when the court is seized of the material, the judge has to perform the balancing exercise by having regard on the one hand to the weight of the public interest in non-disclosure. On the other hand, he must consider the importance of the documents to the issues of interest to the defence, present and potential, so far as they have been disclosed to him or he can foresee them. Accordingly, the more full and specific the indication

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41 [1994] 2 All ER 478

42 [1994] 2 All ER 484-5

the defendant's lawyers give of the defence or issues they are likely to raise, the more accurately both prosecution and judge will be able to assess the value to the defence of the material.

In *R v. Brown*[43] the Court of Appeal said that

> "Subject to the particular points raised by this appeal we do not propose to discuss the particular classes of public interest immunity that may exist".[44]

The Court went on to say that:[45]

For present purposes it is sufficient to state four propositions which are now clearly established. First, it is for the court to rule on the question of immunity and that necessarily involves the court studying the material for which immunity is claimed. Secondly, the judge must always perform a balancing exercise, taking into account the public interest and the interests of the defendant. Thirdly, in *Reg. v. Keane [1994]* 1 W.L.R. 746 Lord Taylor of Gosforth C.J. explained how this balancing exercise is to be reconciled with a defendant's fundamental right to a fair trial, at pp. 751-752:

> "If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it."

Fourthly, even if the trial judge initially decided against disclosure, he is under a continuous duty, in the light of the way in which the trial develops, to keep that decision under review. Prosecuting counsel, as a minister of justice, must inform himself fully about the content of any disputed material so that he is in a position to invite the judge to reassess the situation if the previous denial of the material arguably becomes untenable in the light of developments in the trial: see Andrew Mitchell, "Disclosure-whose responsibility?" (1993) 137 S.J. 854.

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[43] [1994] 1 WLR 1599
[44] [1994] 1 WLR 1599 at p.1607
[45] [1994] 1 WLR 1599 at p.1607-8

As Sir Richard Scott has noted in his report[46] the judgment in the *Ward* case was not available at the time when ministers were considering questions of public interest immunity in relation to the Matrix Churchill trial. A Press Notice issued by the DTI on February 2 1996 lists the following examples of public interest immunity (PII) claims in criminal cases before Matrix Churchill:

1. Examples of PII claims in criminal cases before Matrix Churchill include:

- R v Saunders and others (the Guinness case) in 1989. Mr Justice Henry upheld a claim which the Court of Appeal including the Lord Chief Justice recently said had been "properly made".

- R v Pottle and Randle (1990). Mr Justice Macpherson held the class claim was prima facie good.

- R v Batley (1999). The claim was upheld and the judge ruled against disclosure.

- R v Deller Page and Rycott (1990). Again the claim was upheld and the judge ruled against disclosure.

In a Written Answer to a Question from John Morris on February 13 1996 the Attorney-General made the following remarks about the use made of public interest immunity certificates by the Crown Prosecution Service, the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland:[47]

Mr. John Morris: To ask the Attorney-General (1) on how many occasions, in each year since 1966, Ministers have signed public interest immunity certificates in criminal trials;

(2) on how many occasions, in each year since 1979, public interest has been claimed in the courts in criminal cases.

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[46] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* HC 115 Vol III p.1254 note 2

[47] HC Deb Vol 271 c.523(W) 13.2.1996

The Attorney-General: The information requested is not collected centrally either by Government or by individual prosecuting authorities. My answer is therefore confined to the three prosecuting authorities for which I have ministerial responsibility. On the basis of the best information currently available, the number of criminal cases in which public interest immunity certificates are known to have been used is as follows:

	CPS[1]	SFO[1]	DPP(N1)
1987	1	-	-
1988	-	-	-
1989	2	1	-
1990	1	1	-
1991	-	1	-
1992	2	-	1
1993	4	-	-
1994	3	1	-
1995	5	-	1

[1] The Crown Prosecution Service became operational in 1986 and the Serious Fraud Office in 1988.

The number of cases in which public interest immunity is claimed without ministerial certificate-for example, in relation to informants which is the regular practice-is not recorded centrally.

V Voluntary disclosure

Some commentators have observed that in a number of civil cases, documents which would seem to have been subject to public interest immunity on the grounds that they belonged to a class which was normally considered immune, have nonetheless been disclosed to the other party involved in the proceedings.[48] In *R v Chief Constable of the West Midlands ex parte Wiley* which was, of course, a civil case, Lord Templeman made a number of general comments setting out differences between civil and criminal proceedings and suggesting that more use might be made of voluntary disclosure. His observations did not form part of the decision in the Wiley case, but they generated considerable interest. He said:[49]

> Whenever disclosure in litigation is under consideration, the first question is whether a document is sufficiently relevant and material to require disclosure in the interests of justice. In civil proceedings a document need only be disclosed if disclosure is necessary 'for disposing fairly of the cause or matter or for saving costs': see RSC Ord 24, r 8. In criminal proceedings a document need only be disclosed if it is relevant and material for the establishment of the guilt or innocence of the accused.
>
> In civil proceedings, the relevance and materiality of a document depend on the issues between the parties established by written pleadings. In criminal proceedings there is as yet no provision for written pleadings. Prosecution authorities know which documents are relevant to the prosecution but they cannot know for certain which documents will be relevant to the defence. In recent cases the Court of Appeal has quashed convictions because of the failure on the part of the police to disclose documents which, subsequently to the convictions, were held to be relevant and material to the establishment of the guilt or innocence of the accused. In order to avoid criticism and a miscarriage of justice one way or the other, the police authorities now feel obliged to disclose documents of doubtful relevance and materiality. In civil proceedings also, pleadings may be amended, and the issues which finally arise at the trial may not be perceived or understood at the pleading stage. The result in both criminal and civil proceedings is that masses of documents of no or doubtful relevance or materiality are made available and are presented to judge and jury. The indiscriminate and undisciplined preparation and presentation of documents for trial increase the length and cost of the trial and sometimes enable a litigant to snatch an undeserved victory under a cloak of confusion and obscurity which baffles judge and jury.

The technique is well illustrated by the facts in *R v Governor of Brixton Prison, ex p Osman (No 1)* [1992] 1 All ER 108, [1992] 1 WLR 281 where discovery was sought in order to delay extradition, embarrass the extradition authorities and persuade them to change their mind about deportation. In R v *Preston* [1993] 4 All ER 638, [1993] 3 WLR 891 an unfounded claim to

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[48] "Public Interest Immunity after Matrix Churchill" - Adam Tomkins[1993] Public Law 650; "Matrix Churchill and Public Interest Immunity" - Gabriele Ganz (1993) 56 MLR 564

[49] [1994] 3 All ER 424

the disclosure of authorised telephone intercepts was made at the trial in the light of a defence disclosed in detail for the first time at the trial and bearing all the hallmarks of a defence tailored to exploit the impossibility of producing the intercepts.

If a document is not relevant and material it need not be disclosed and public interest immunity will not arise. In case of doubt as to relevance and materiality the directions of the court can be obtained before trial; a pre-trial conference can help to define the issues and the scope of discovery. If a document is relevant and material then it must be disclosed unless it is confidential and unless a breach of confidentiality will cause harm to the public interest which outweighs the harm to the interests of justice caused by non-disclosure. It has been said that the holder of a confidential document for which public interest immunity may be claimed is under a duty to assert the claim, leaving the court to decide whether the claim is well founded. For my part I consider that when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm. If the holder is in doubt he may refer the matter to the court. If the holder decides that a document should not be disclosed then that decision can be upheld or set aside by the judge. A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate.

Lord Templeman considered that:

If public interest immunity is approached by every litigant on the basis that a relevant and material document must be disclosed unless the disclosure will cause substantial harm to the public interest, the distinction between a class claim and a contents claim loses much of its significance. As a general rule the harm to the public interest of the disclosure of the whole or part of a document dealing with defence or national security or diplomatic secrets will be self evident and will preclude disclosure. On the other hand it is difficult to see how the disclosure of documents generated by the activities of the Police Complaints Authority can cause any harm. We are told that the activities of the Police Complaints Authority may produce documents dealing with I sensitive police material relating to ... policy and operational matters'. It is unlikely that such matters will be relevant or material to civil or criminal proceedings but in a proper case a claim to public interest immunity could be asserted for the whole or part of a document in order to preserve those secrets which, if disclosed, would hamper the police in the investigation and prevention of crime. We were also told that public interest immunity might be claimed for the contents of the report of the investigating officer dealing with the complaint against the police. The report itself, as distinct from the documents generated by the inquiry, will not usually be relevant or material or admissible in criminal or civil proceedings. if a report or part of the report is relevant, material and admissible for the purposes of litigation I do not see any sufficient reason for casting the cloak of secrecy over the report.

In some circumstances, the prosecution may wish to disclose material which, on the face of it, is subject to public interest immunity. Some critics of the Government's general position concerning public interest immunity certificates have questioned the purpose of ministers issuing certificates in respect of documents on the grounds that they come within a particular class which is subject to public interest immunity in cases where they have no real objection to the contents of the particular documents being disclosed.[50]

The circumstances in which the prosecution may voluntarily disclose material which, on the face of it, is subject to public interest immunity are described in *Archbold* as follows:

> Voluntary disclosure by the prosecution of material which is *Prima facie* immune is permissible, but only with the express written approval of the Treasury Solicitor: R. *v. Horseferry Road Magistrates' Court, ex p. Bennett (No. 2)* [1994] 1 All E.R. 289, D.C. In seeking such approval, the Crown Prosecution Service should submit to the Treasury Solicitor copies of the matter proposed to be disclosed, identify the class of public interest immunity to which the matter belongs (although see *ante, §* 4-277, as to the continued justification of "class claims"), and indicate its materiality to the particular proceedings in which disclosure is proposed. Before giving his approval, the Treasury Solicitor should consult any other relevant government department and satisfy himself that the balance in his view falls clearly *in favour* of disclosing the matter. The Treasury Solicitor is also required to maintain a permanent record of all approvals given for voluntary disclosure.
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> *Ex p. Bennett* preserves the statement in *Makanjuola v. Commissioner of Police for the Metropolis* [1992] 3 All E. R. 617, C. A. (Civ. Div.), that "public interest immunity is not a trump card vouchsafed to certain privileged players. to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in litigation." It also prevents the Crown Prosecution Service from being solely responsible for safeguarding public interest immunity in respect of matter which may often be helpful to the prosecution, and which there might be a strong temptation to disclose. On the other hand, it undermines the suggestion therein that the prosecution are not obliged to assert public interest immunity where, on any weighing of the public interest in withholding the matter against the public interest in disclosure, there is a clear balance in favour of the latter.
>
> Furthermore, the decision sits uneasily with cases where it has been held that "it is not for the Crown but for the court to determine whether the document should be produced": per Lord Scarman in *Air Canada v. Secretary of State for Trade* [1983] 2 A. C. 394, 446, and the clear position at common law that it is the courts who decide upon non-disclosure of matter in respect of which public interest immunity is asserted.

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[50] See eg. "Public Interest Two - What's the point of claiming immunity?" - *Guardian* 30.10.1995

VI The duty to assert public interest immunity and the Matrix Churchill case:

Since the Matrix-Churchill trial there has been much discussion about whether ministers were or are under a duty to issue public interest immunity certificates in all cases, and to leave the question of disclosure to be determined by the courts, or whether they have some discretion over the matter, having first to determine whether the material in question may be of assistance to the defence and then to consider:

(i) whether or not the documents concerned are of a class which requires a certificate, or

(ii) whether a certificate should be issued because of their contents, or

(iii) whether, over and above these considerations, the circumstances of the case are in some way exceptional.

In *Rogers v. Secretary of State for the Home Department*,[51] a case concerning applications for licences from the Gaming Board and the case in which the House of Lords took the view that "Crown privilege" was not an appropriate name for what has since been known as "public interest immunity", Lord Reid said:[52]

> The ground put forward has been said to be Crown privilege. I think that that expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence. A Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable. But in my view it must always be open to any person interested to raise the question and there may be cases where the trial judge should himself raise the question if no one else has done so. In the present case the question of public interest was raised by both the Attorney-General and the board. In my judgment both were entitled to raise the matter. Indeed I think that in the circumstances it was the duty of the board to do as they have done.

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[51] [1972] 2 ALL ER 1057

[52] [1972] 2 All ER 1057 at p.1060

Lord Pearson said:[53]

> The expression 'Crown privilege' is not accurate, although sometimes convenient. The Crown has no privilege in the matter. The appropriate Minister has the function of deciding, with the assistance of the Attorney-General, whether or not the public interest on the administrative or executive side requires that he should object to the disclosure of the document or information, but a negative decision cannot properly be described as a waiver of a privilege.

In the same case Lord Simon of Glaisdale said that "Crown privilege":

> "is not a privilege which may be waived - by the Crown... or by anyone else".[54]

In *Air Canada v. Secretary of State for Trade (No. 2)*[55] a House of Lords decision in a case involving objections to increased landing charges at Heathrow Airport, Lord Fraser of Tullybelton said:

> "Public interest immunity is not a privilege which may be waived by the Crown or by any party"[56]

In the same case, Lord Scarman said:[57]

> The Crown, when it puts forward a public interest immunity objection, is not claiming a privilege but discharging a duty. The duty arises whether the document assists or damages the Crown's case or if, as in a case to which the Crown is not a party, it neither helps nor injures the Crown. It is not for the Crown but for the court to determine whether the document should be produced.

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53 [1972] 2 All ER 1057 at p.1066
54 [1972] 2 All ER 1057 at p.1066
55 [1983] 1 All ER 910
56 [1983] 1 All ER 910 at p.917
57 [1983] 1 All ER 910 at p.925

In *Makanjuola v. Commissioner of Police of the Metropolis*[58] a case decided by the Court of Appeal in 1989 involving witness statements taken during the investigation of a complaint against the police, Lord Justice Bingham said:[59]

> This is not to say that circumstances may not arise in the course of a trial which may lead a judge properly to rule that a document previously immune in the public interest should in the public interest be disclosed. Even the name of an informer may be revealed if it is necessary to establish a prisoner's innocence: *Marks v Beyfus* (1890) 25 QBD 494 at 498 per Lord Esher MR. But such occasions will be exceptional and the fluctuating fortunes of parties in litigious combat will rarely justify a judge in disturbing an immunity firmly rooted in the public interest.
>
> I would, however, add this. Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration ofjustice, there is a clear balance in favour of the latter. But it does, I think, mean: (i) that public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties; (2) that, where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court; and (3) that, where a document is, or is held to be, in an immune class, it may not be used for any purpose whatever in the proceedings to which the immunity applies, and certainly cannot (for instance) be used for the purposes of cross-examination.

The then Master of the Rolls, Lord Donaldson, agreed with this statement in his own judgment in the same case. The decision in *Makanjuola v Commissioner of Police of the Metropolis*[60] was overruled in 1994 in *R v Chief Constable of the West Midlands ex parte Wiley*. In the latter case, Lord Woolf observed that statements concerning the duty to assert in the *Makanjuola* were *obiter*, that is they were not part of the principle of the decision set down in the case (the *ratio decidendi*). Under the law of precedent, statements which are obiter are not binding on a court in a subsequent case, although they may be of persuasive value. In *Wiley*, Lord Templeman went on to make the following observations (which, it has

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[58] [1992] 3 All ER 617
[59] [1992] 3 All ER 617 at p.623
[60] [1992] 3 All ER 617

been noted, are also obiter) about the duty to assert and voluntary disclosure:[61]

> It has been said that the holder of a confidential document for which public interest immunity may be claimed is under a duty to assert the claim, leaving the court to decide whether the claim is well founded. For my part I consider that when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm. If the holder is in doubt he may refer the matter to the court. If the holder decides that a document should not be disclosed then that decision can be upheld or set aside by the judge. A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate.

Lord Woolf, who delivered the most detailed judgment in *Wiley*, said he suspected that the words of Lord Justice Bingham in the *Makanjuola* case, which had been used to support the view that public interest immunity could not be waived and that there was a duty to assert it, had subsequently been applied in a manner which went beyond what had been intended. He said he would not regard those words as being of general application without hearing fuller argument on the subject, and added that:[62]

> It is to be noted that the *Makanjuola* case was not one involving a department of state. If a Secretary of State on behalf of his department as opposed to any ordinary litigant concludes that any public interest in documents being withheld from production is outweighed by the public interest in the documents being available for purposes of litigation, it is difficult to conceive that unless the documents do not relate to an area for which the Secretary of State was responsible, the court would feel it appropriate to come to any different conclusion from that of the Secretary of State. The position would be the same if the Attorney-General was of the opinion that the documents should be disclosed. It should be remembered that the principle which was established in *Conway v Rimmer* is that it is the courts which should have the final responsibility for deciding when both a contents and a class claim to immunity should be upheld. The principle was not that it was for the courts to impose immunity where, after due consideration, no immunity was claimed by the appropriate authority. What was inherent in the reasoning of the House in that case was that because of the conflict which could exist between the two aspects of the public interest involved, the courts, which have final responsibility for upholding the rule of law, must equally have final responsibility for deciding what evidence should be available to the courts of law in order to enable them to do justice. As far as contents of documents are concerned, I cannot conceive that their Lordships in *Conway v Rimmer* would have anticipated that their decision could be used, except in the most exceptional circumstances, so that a department of state was prevented by the courts from disclosing documents which it considered it was appropriate to disclose. As to class claims, it is interesting to note that Lord Reid in his speech in *Conway* v *Rimmer*

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61 [1994] 3 All ER 420 at p.424

62 [1994] 3 All ER 420 at p.438

> referred to the announcement of the then Lord Chancellor in the House of Lords in June 1956 that in future reports of witnesses to accidents, medical reports and other documents which were previously the subject of a claim to privilege on a class basis would in future be disclosed. Again, recently the government itself has been reviewing what documents can be disclosed in the furtherance of open government and as a result of that review, documents are now being made available which in the past have been the subject of claims to immunity. Compare the present policy in regard to minutes of meetings between the Chancellor of Exchequer and the Governor of the Bank of England with the decision of this House in *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700, [1980] AC 1090, I doubt whether the courts would ever interfere with governmental decisions of this nature.

The cases in which reference has been made to a duty to assert public interest immunity have generally been civil rather than criminal cases. As has already been mentioned, there are fewer precedents concerning the use of public interest immunity in criminal proceedings and most of these are fairly recent, although the courts have long respected the general need for confidentiality in respect of certain types of information such as information concerning police informers and police surveillance.

Archbold's *Criminal Pleading, Evidence and Practice*,[63] the criminal practitioners' textbook cites both the *Air Canada* and *Makanjuola* cases as relevant authorities in relation to the use of public interest immunity in criminal proceedings. *Archbold* also suggests that Lord Justice Bingham's observations in *Makanjuola* set out above have survived the overturning of that case by the House of Lords in *R v. Chief Constable of the West Midlands Police ex p. Wiley*[64] As has already been mentioned, a number of other commentators have suggested that the decision of the House of Lords in the Wiley case represents the demise of the duty to assert.[65] In any event the *Wiley* case was decided some time after the Matrix Churchill trial and was not, therefore, a precedent available to ministers, their legal advisers or the courts at the time of the trial.

In his statement to the House of Commons on November 10 1992 following the collapse of the Matrix Churchill trial the Attorney-General said:[66]

> Finally, it has been alleged that Ministers, by signing public interest immunity certificates, gave orders that departmental papers should be kept from defence lawyers in an attempt at a cover-up. That is a complete

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63 1995 re-issue Volume 1 para. 12-28

64 [1994] 3 WLR 433

65 [see p. note]

66 HC Deb Vol c.743 10.11.1992

misunderstanding of the law in that area and thus a distortion of the truth. It is the law, expressly enunciated by the courts, that Ministers have a duty to claim public interest immunity either in respect of specific documents or recognised classes of document the production of which would in principle be contrary to the public interest. This duty cannot be waived.

Once a proper claim has been made, it is for the court to look at the papers if it thinks fit, to balance the competing public interests and to determine whether the interests of justice in the particular case require disclosure of some or all of the documents in issue. Such a claim must be made irrespective of whether it is embarrassing to the Government either to reveal or to withhold. In this case, it was at the express invitation of prosecuting counsel that the judge looked at all the material before he made his ruling.

In a Written Answer on December 15 1993 the Attorney-General elaborated on this as follows:[67]

Sir Thomas Arnold: To ask the Attorney-General if he will outline the procedures governing the use of public interest immunity certificates.

The Attorney-General: Public interest immunity is a rule of evidence developed by the courts which is designed to prevent documents being disclosed in criminal or civil litigation if harm would result to the operation of the public service. It applies equally to all parties to litigation, irrespective of whether production would help or hinder their case. A claim for public interest immunity cannot be waived and in the case of the Crown is usually made by way of ministerial certificate. Such a certificate is not conclusive. Each claim is considered by the court which may, and in a criminal case must, inspect the documents. The court considers first whether the claim is in principle a valid one and, if so, must then go on to consider whether the interests of justice in the particular case require that the public interest in maintaining confidentiality be overridden. The decision whether or not to override the public interest in maintaining confidentiality is for the court to make; it is not for the party claiming immunity.

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[67] HC Deb Vol c.636-7 15.12.1993

In the immediate aftermath of the Matrix Churchill trial some commentators questioned the Attorney-General's claim that ministers had a duty to claim public interest immunity[68] while others have taken the view that, under the law as it stood at the time of the Matrix Churchill trial, the Attorney-General was right in asserting that ministers had a duty to claim immunity.[69]

Adam Tomkins writing in *Public Law* in 1993 argued that in so far as the answer to this question could be found in reported cases at all the cases tended to support the Government's position, "regrettable as this may be", although there remained a wide discretion in terms of the grounds on which such immunity could be claimed.[70] He went on to say that:[71]

> Whatever the correct interpretation of these cases is, however, important questions remain wholly unanswered. If ministers are under a duty to claim PII, when does this duty arise? Who decides when it applies? The Attorney-General? The Lord Chancellor? The head of the relevant department? Why, legally, is it a duty rather than a discretion? If ministers are under a duty, do prosecuting counsel also have an obligation to argue that PII demands that otherwise relevant documents must be withheld? After the House of Lords' historic ruling in *Re M*, could ministers even be in contempt of court if they overlooked a claim for PII? Is it consistent with usual political practice for the claiming of PII to be regarded as mandatory rather than discretionary-do governments not frequently release information which could potentially be the subject of a PII claim? The release in July 1993 of letters written by the Attorney-General Sir Nicholas Lyell M.P. to Mr. Michael Mates M.P. over the fugitive Asil Nadir is surely a case in point. If ministers are really under a duty to claim PII should they be allowed to release such in sensitive information in other circumstances simply because it appears to be politically expedient to do so?

Gabriele Ganz, writing in the *Modern Law Review* in July 1993, argued that the judicial comments relied upon the Attorney-General in support of his view, which were comments made in the course of civil proceedings, arose in a very different context from that of criminal proceedings such as the Matrix-Churchill trial. Commenting on the "paucity of authority" on the use of public interest immunity in criminal proceedings she went on to say that:[72]

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68 "Justice, Good Government & Public Interest Immunity" - A W Bradley [1992] *Public Law* 514; "Matrix-Churchill and Public Interest Immunity" - G. Ganz (1993) 56 MLR 564

69 "Public Interest Immunity in Criminal Cases" - ATH Smith (1993) 52 CLJ 1; "Public Interest Immunity after Matrix-Churchill" [1993] - Adam Tomkins [1993] *Public Law* 650; "Public Interest Immunity and Ministers' Responsibilities" - T.R.S. Allan [1993] *Criminal Law Review* 660

70 [1993] *Public Law* 650 at p.662-665

71 [1993] *Public Law* 650 at p.665

72 [1993] 56 MLR 564 at p.566

Whatever the legal position is with regard to public interest immunity being claimed in criminal cases, there are a number of recent examples where public interest immunity has *not* been claimed in such cases. In *M v Home Office*, where there was an application to commit the Home Secretary (Mr Baker) for contempt, public interest immunity was not claimed for notes of a meeting between Mr Baker and officials because 'the view was taken in this case that the greater public interest lay in the court having a full account of the facts. Again, in the prosecution of Mr Ponting for disclosing information about the sinking of the Belgrano, the highly secret document known as the 'Crown Jewels' was admitted in evidence which involved the court having to go 'in camera' and the jury being vetted." When this was put to Mr Heseltine in the debate on Arms Exports to Iraq, he replied that he agreed to make the 'Crown Jewels' available to a Select Committee. Similarly, in the prosecution of Michael Randle and Pat Pottle for helping George Blake to escape from prison, further Special Branch documents were put before the court which had not hitherto been acknowledged and for which no immunity was claimed. These documents helped the prosecution case. There is, therefore, some evidence that documents covered by public interest immunity have been made available in criminal cases, particularly where they help the prosecution. These examples also tarnish the correct assertion that 'such a claim must be made irrespective of whether it is embarrassing to the Government either to reveal or to withhold.

Ms. Ganz went on to say that:

In reality, it is the Government which has the last word, at least when it is a party to the case or where a criminal prosecution is involved. When the court orders disclosure of documents as in the case arising from the death of Blair Peach in which his mother was suing the police for assault, a settlement for £75,000 damages was considered preferable to the documents being read out in court. In criminal cases, the Attorney-General can always enter a *nolle prosequi* and the shadow Attorney-General asked the Attorney-General whether with hindsight this might not have been the proper course to take in this case. For, ultimately, the most disturbing aspect of the public interest immunity certificates in the *Matrix Churchill* case is that the defendants might have been convicted if the judge had ruled against disclosure. Though Mr Heseltine denied that he was expected to be involved in the conduct of the trial when signing the certificate, both he and Mr Rifkind were at pains to point out that the prosecution was abandoned only because of the evidence of Alan Clark and not because the documents were disclosed. This may be literally true as a matter of timing, but there can be no doubt that the documents disclose highly embarrassing Government complicity in secretly relaxing the guidelines for exports to Iraq. It is the use of public interest immunity to hide this embarrassment which is the worst aspect of the affair.

In an article entitled "Public Interest Immunity - A matter of Prime Judicial Responsibility" published in the *Modern Law Review* in September 1994, AAS Zuckerman took the view that the courts, by approving the proposition that secrecy was in the interest of good government, had contributed to the difficulties which were raised by the Matrix Churchill case. He said:[73]

> In condemning ministers, critics have overlooked the role played by the courts in this regard. The courts have made it the law of the land that the responsibility for deciding whether evidence should be given in legal proceedings lies with judges and not with ministers. The role of ministers, it has been held, is confined to informing the courts, by means of public interest immunity certificates, of the adverse consequences which may result from the disclosure of documents or information for which ministers are responsible. It is not for ministers to decide whether evidence should be disclosed in legal proceedings, nor do they possess the information necessary for such a decision.
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> Of course, in making a claim for immunity ministers must exercise judgment and discretion in determining whether it is indeed the case that suppression would be beneficial for the public interest within areas of government business for which they are responsible. They are, after all, supposed to have at their disposal the expertise for forming a judgment in this matter. Accordingly, ministers might be legitimately criticised if they reach conclusions which are unwarranted as a matter of fact or of policy. For example, a claim that the public interest would be served by withholding from accident victims information about their treatment in NHS hospitals would appear unfounded. So would a claim that people would be more willing to report car accidents if their reports were withheld from the courts. However, it does not follow from this that ministers must confine their consideration to causal connections between disclosure and injury to some public interest. Government ministers do not operate in a vacuum, nor can they consider every matter under their jurisdiction from scratch, as if there were no existing practices. Ministers make decisions against the background of existing procedures and follow conventions that have been evolved over time and that have on occasion been tested in the courts. When an administrative practice has been subjected to judicial scrutiny and been found valid, ministers are entitled, and on occasion even bound, to follow it in future situations.
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> In the field of public interest immunity, ministerial practices and judicial policies feed upon each other. Both, however, have to use statute as their starting point and take on board entrenched conventions of public administration. The law concerning public interest immunity has evolved against the background of the notorious catch-all provision of s 2 of the Official Secrets Act 1911. Although this provision has now been abolished and replaced by the more guarded and liberal provisions of the Official Secrets Act 1989, the administrative philosophy continues to embrace the tenet that secrecy is in the interest of good government. This philosophy has received judicial approval on countless occasions, as many of the cases mentioned in this article demonstrate.

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[73] [1994] 57 MLR 703 at p.723

VII The Scott Report's conclusions on public interest immunity

In his report Sir Richard observes that the proposed PII class claims were presented to ministers by their legal advisers on the basis that such claims were normal, commonly made and underwritten by judicial authority.[74] He does not share this view and notes that:[75]

> None of the submissions to the respective Ministers made the Ministers aware that in criminal trials PII class claims for Category B documents were certainly unusual and had not been underwritten by any judicial *dicta.* The Ministers were not made aware that neither of the decided cases to which reference was made, namely, Conway v Rimmer and Makanjuola was a criminal case.

He goes on to say that:[76]

> **G18.94** In my opinion, the view of the law on which the making of the PII class claims in the Matrix Churchill case was based was unsound. There was no clear prior judicial authority approving the making of PII class claims in criminal trials in order to keep from disclosure material documents which might be of assistance of the defence. I do not regard ex parte Osman as constituting such authority. A *habeas corpus* application is not a criminal trial.

Sir Richard does not, however, regard the charges, that ministers who signed the PII certificates were seeking to deprive defendants in a criminal trial of the means by which to clear themselves of the charges, as being well founded:[77]

> **G18.106** Finally, I must refer to the charges, made and repeated in the media, that the Ministers who signed the PII Certificates were seeking to deprive defendants in a criminal trial of the means by which to clear themselves of the charges. Mr Heseltine must, in any event. be exonerated from these charges, but I do not regard the charges as fairly levelled against the other Ministers. None was advised of the point that the practice they were being asked to follow had been prescribed in civil cases and had no authoritative precedent in a criminal trial. I regard some of the justification that was offered to me by Ministers in support of the need for the Category B PII class claims to be made as prompted by a natural *ex post facto* desire to justify what had been done rather than by an accurate reflection of what was in the Ministers' minds at the time. But in relation to a legal issue of some complexity the Ministers were entitled to rely on advice from their lawyers and cannot be blamed for following it. Moreover, all of them knew that the last word was with the Court. The charges to which I have referred are not, in my opinion, well founded.

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74 HC 115 Vol III para. 18.93
75 HC 115 Vol III para. 18.93
76 HC 115 Vol III para. 18.94
77 HC 115 Vol III para. 18.106

Sir Richard considered the law on public interest immunity in criminal trials, its application in the Matrix Churchill case and academic comment on the Attorney-General's view in considerable detail.

He noted that:

> "There is no doubt, and never has been, that PII claims of an appropriate character can be made in criminal trials. Documents and evidence relating to informants is the classic example in point".[78]

He went on to observe that "the main foundation in the case-law for the view that the public interest immunity principles applicable to civil cases are applicable also to criminal cases may be found in the judgment of Lord Justice Mann in the Divisional Court in *R v. Governor of Brixton Prison ex parte Osman*".[79] Having reviewed that case and the background to it in some detail, he said that:[80]

> **G18.84** The Divisional Court decision in Osman stands as an authority for allowing PII class claims in habeas corpus applications. It is not an authority for allowing PII class claims in criminal trials. The passage in Lord Justice Mann's judgment in which he refers to the PII principles expressed in the seminal civil cases as being "equally applicable to criminal as to civil proceedings" was. so far as criminal trials are concerned. obiter and does not justify ignoring the difference between a *habeas corpus* application to avoid extradition on criminal charges and the criminal trial itself or ignoring the fact that the judgment was an *ex tempore* one. It has often been observed that it is highly dangerous to treat principles expressed in *ex tempore* judgments as applicable outside the factual situation with which the Court was dealing in the case in question. The warning is particularly apt to the attempt to present Lord Justice Mann's judgment in Osman as justifying the conclusion that the principles applicable to PII class claims in civil cases are equally applicable to Pll class claims in criminal trials.

Sir Richard considered that the view that a minister is ever under a legal duty to claim public interest immunity in order to protect documents from disclosure to the defence, even where the minister considers that the public interest requires such disclosure, was "based on a fundamental misconception of the principles of PII law". He gave the following grounds for his view:[81]

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78 HC 115 Volume III para. G 18.80
79 HC 115 Volume III para. G 18.70
80 HC 115 Vol III para. G 18.84
81 HC 115 Vol III para. G 18.54-18.60

G18.54 The proposition that a Minister is ever under a legal duty to claim PII in order to protect documents from disclosure to the defence notwithstanding that in the Minister's view the public interest requires their disclosure to the defence is, in my opinion, based on a fundamental misconception of the principles of PII law. To the extent that the proposition is sought to be supported by reference to Lord Justice Bingham's judgment in Makanjuola, it is based in my opinion, on a misreading of that judgment.

G18.55 First, a claim for the production in litigation of Government documents always assumes that the documents fall within the criteria of relevance requisite for their production. These criteria, established by case law, require wider discovery in criminal cases than in civil cases. If documents do not fall within the requisite criteria, the holder of the documents, be it Government department or private individual, and whether the case is a criminal one or a civil one, has no obligation to produce the documents. The question of PII, if the documents are Government documents, should not arise. The proposition, as stated, becomes, however, less clear cut in practice. Whether documents do or do not fall within the criteria of relevance that would normally require their production to the defence is not always easy to answer. In many cases there will be a grey area into which will fall documents whose relevance is arguable. The less explicit the defence have been in revealing the proposed lines of defence. the wider will be the grey area. In such cases if the documents fall within a class or classes that Government would prefer in the public interest not to disclose unless obliged to do so, the practice has, I believe, grown for Government to seek to protect the documents by making a claim to public interest immunity. The PII claim in respect of these documents thus precedes a determination of the question whether or not the documents would, but for PII have to be disclosed. The notion that PII claims are in practice only made in respect of relevant documents is fallacious. Logically that should be so. In practice it may not be so.

G18.56 Second, if a Government department holds documents that fall within the recognised criteria of relevance to a case being litigated, the department nowadays is prima facie amenable to the same obligation to produce the documents as is any citizen.

G18.5 7 Third, however, the Government has heavy responsibilities to be discharged and powers to be exercised for the common good. The nature and weight of these responsibilities and powers has long been recognised by the common law as justifying, in certain circumstances. special consideration and protection being given to Government documents. It has been recognised that the contents of Government documents are sometimes of such a nature that disclosure might carry the risk of consequent damage to the public interest. It has been recognised that there are some classes of documents of such a nature that disclosure of them. whatever their contents, might carry that risk. Where government is of the opinion that disclosure of its documents to a litigating party would, or might be damaging to the public interest, the common law has permitted the appropriate Minister (or sometimes a high ranking official) to make a claim for protection of the documents in question from disclosure in the litigation. The ordinary obligations of production and disclosure do not then apply.

G18.58 Fourth, it was thought to be established law at the time Conway v Rimmer was decided in 1967, that an objection properly taken by a Minister to the production of Government documents on the ground that production would be contrary to the public interest should be treated by the Court as conclusive. It had been so held by the House of Lords in Duncan v Cammell Laird in 1942. It had been held also. however, that the Minister making the claim for PII (or "Crown privilege" as it was then called) had to direct his mind to the question of the damage to the public interest that disclosure of the documents might cause. Viscount Simon L.C., with whose speech all the six other members of the House agreed, said this:

> "The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced. either because of their actual contents or because of the class of documents e.g departmental minutes, to which they belong."

and, later in his judgment

> "It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or government in parliamentary discussion or in public criticism, or might necessitate the attendance as witness or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would be damnified for example where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service".

The proposition that a Minister who did not think that the public interest required the documents to be withheld from the defendant, let alone a Minister who thought that the public interest required the disclosure of the documents, was nonetheless obliged to make a claim for PII in respect of the documents, has no place in the principles of PII/Crown privilege as enunciated by Viscount Simon.

G18.59 Fifth, the important change in the law brought about by Conway v Rimmer went no further than the rejection of the proposition that the view of the public interest formed by the Minister claiming PII was to be taken by the Court to be conclusive. The House of Lords held that the Court, not the Minister, was the final arbiter of what the public interest required. The speeches did not suggest any sea change in the Ministerial function itself save, in appropriate cases, to subject to judicial scrutiny and. if necessary, disagreement, the Minister's assertion that disclosure of the documents to the defendant would be contrary to the public interest.

G18.60 Finally, the frequently cited passage from Lord Justice Bingham's judgment in Makanjuola nowhere states or implies that a Minister is under a duty to claim PII for documents that he does not think the public interest requires to be withheld from the defendant. The duty to claim PII arises if the Minister is of the opinion that the disclosure of the documents to the defendant would be damaging to the public interest. Ministers are well able to decide whether Government documents of a confidential or secret nature should be disclosed for the purposes of some greater public interest. Ministers from time to time place such documents, or authorise them to be placed, before Select Committees of Parliament. Ministers sometimes. in special circumstances, allow the contents of such documents to be revealed to journalists or political commentators. A vast number of such documents were released to my Inquiry for the purposes of the investigation I was required to carry out. In each case the Minister or Ministers concerned take a view as to whether, notwithstanding, the character of the documents. the wider public interest requires them to be produced or disclosed to some particular recipient. It has not been and could not be suggested that there is anything unlawful in Government deciding that, for whatever purpose, confidential or secret documents need not be withheld. Government, whose duty it is to promote the public interest, is entitled, if it thinks the public interest requires it, to authorise the disclosure of its documents. Lord Justice Bingham's judgment bars a Minister, who has formed the opinion that disclosure of documents to a defendant would be contrary to the public interest, from choosing to disclose some of the documents but to withhold others. He cannot "pick and choose". He is bound, Lord Justice Bingham held, to claim PII in respect of all documents whose disclosure to the defendant would, in his view, be contrary to the public interest.

Sir Richard went on to examine the *Ponting* prosecution as an example of a case in which a minister, without the prior sanction of the court, allowed documents for which a PII class claim could have been made to be disclosed in court proceedings. He noted that in the *Ponting* prosecution:[82]

G18.62 At a conference held at the Director of Public Prosecutions' office on 7 December 1984, attended by, among others, the Director, Counsel for the prosecution and officials from the Law Officers' Department and Mr Hastie-Smith from the Ministry of Defence, Mr Hastie-Smith gave the MOD's views on the sensitivity of the documents that had been requested. The note of the meeting prepared by one of the officials from the Law Officers' Department records that:

> "So far as... 'The Crown Jewels' was concerned, the MOD could not permit disclosure as it stood but undertook to produce a version suitable for disclosure edited down to 'confidential' or 'unclassified'. MOD were otherwise content to disclose the other documents.... "

I note, in passing, that the documents the MOD were "content to disclose" appear to have included a number of communications between officials and between officials and Ministers of a type which, in the Matrix Churchill case, produced a knee jerk reaction for a PII class claim to be made.

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[82] HC 115 Vol III para. G 18.62

In his chapter of recommendations, Sir Richard Scott makes the following observations, quoting from the judgment of Lord Woolf in the *Wiley* case:[83]

K6.3 Lord Woolf, in his judgment, cited from the written case that had been submitted on behalf of the Police Complaints Authority in support of the proposition that PII should be held to apply to the material produced in the course of investigations by the police of complaints. The written submission had said this:

> "That public interest immunity applies in this context does not mean that the public interest considerations identified above will always be held to outweigh any competing public interest consideration. There will be public interests (for example, the acquittal of the innocent and the conviction of the guilty in a criminal trial) which outweigh the public interest considerations in non-disclosure."

It seems to follow from this passage that PII to protect the material from disclosure would not have been claimed in a criminal trial. If that is right, the approach provides a contrast with that displayed in regard to the PII claims made in the Matrix Churchill trial.

K6.4 After referring to a number of the leading cases and, in particular, Makanjuola, Lord Woolf said this:

> "If a Secretary of State on behalf of his department as opposed to any ordinary litigant concludes that any public interest in documents being withheld from production is outweighed by the public interest in the documents being available for purposes of litigation, it is difficult to conceive that unless the documents do not relate to an area for which the Secretary, of State was responsible, the court would feel it appropriate to come to any different conclusion from that of the Secretary of State. The position would be the same if the Attorney-General was of the opinion that the documents should be disclosed. It should be remembered that the principle which was established in Conway v Rimmer is that it is the courts which should have the final responsibility for deciding when both a contents and a class claim to immunity should be upheld. The principle was not that it was for the courts to impose immunity where, after due consideration, no immunity was claimed by the appropriate authority. What was inherent in the reasoning of the House in that case was that because of the conflict which could exist between the two aspects of the public interest involved, the courts, which have final responsibility for upholding the rule of law, must equally have final responsibility for deciding what evidence should be available to the courts of law in order to enable them to do justice. As far as contents of documents are concerned, I cannot conceive that their Lordships in Conway v Rimmer would have anticipated that their decision could be used, except in the most exceptional circumstances, so that a department of state was prevented by the courts from disclosing documents which it considered it was appropriate to disclose."

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[83] HC 115 Vol IV para. K 6.3-K.6.4

> In my respectful opinion, the cited passage from Lord Woolf's judgment corrects and should prevent for the future an unjustified extended use being made of Lord Justice Bingham's remarks in Makanjuola regarding the duty to claim PII.

As has already been noted, the authors of Archbold's *Criminal Pleading, Evidence and Practice* take the view that the remarks of Lord Justice Bingham in the *Makanjuola* case about the assertion of public interest immunity being the observance of a duty are unaffected by the decision in *Wiley*.[84]

In Sir Richard's view, class claims for public interest immunity have no place in a criminal trial[85] and if claims based on the contents of particular documents cannot be justified, public interest immunity should not be claimed simply because the documents come within a particular category or class. Sir Richard noted the view expressed by the former legal adviser to the Security and Intelligence Services, Mr David Bickford, who told Sir Richard's Inquiry that he had formed the opinion that "non-disclosable sensitive material was best protected by way of a contents claim. The class claim merely confused the issue".[86]

Sir Richard added that:[87]

> **K6.17** It may be worth pointing out a further important difference between criminal trials and civil cases. In a civil case (including a habeas corpus application of the ex parte Osman variety), if an order for disclosure is made, the case will continue, with the material in question disclosed to the party who has sought disclosure. In a criminal case, on the other hand, an order for disclosure will not necessarily lead to the disclosure of the material. The prosecuting authority will have the option of discontinuing the prosecution in order to safeguard the material from disclosure. In taking such a decision, a true balance must be struck, not by the judge but by those with the conduct of the prosecution. They must weigh the public interest factors underlying the PII claim against the public interest in continuing the prosecution. No doubt in a difficult case the Attorney General would become involved. The point I wish to emphasise is that whereas in a civil case between private litigants the government, the police or other authority, seeking to resist disclosure have, once the PII claim has been rejected, no means of avoiding disclosure, in criminal cases the means of avoiding disclosure is always in the hands of the prosecuting authority. In a civil case in which government was itself a party it could. I suppose, avoid disclosure by abandoning the case (if plaintiff) or submitting to judgment (if defendant).

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84 *Criminal Pleading, Evidence and Practice* 1995 re-issue Volume 1 para. 12-28

85 HC 115 Vol III para. G 18.86; HC 115 Vol IV para. K 6.6 and K 6.16

86 HC 115 Vol III para. G 18.39 - more detailed comment is at para. G 18.102

87 HC 115 Vol IV para K 6.17

Sir Richard took the view that legislative intervention in the law on public interest immunity in civil and criminal trials was not necessary or, at present desirable.[88] He suggested the following approach to claims of public interest immunity in criminal trials:[89]

K6.18 For the reasons given above, the approach to PII claims in criminal trials should be as follows:

(i) If documents are not within the criteria of relevance established by R v Keane and R v Brown (Winston), they need not be disclosed.

(ii) PII claims on a class basis should not in future be made. PII contents claims should not be made in respect of documents which it is apparent are documents which might be of assistance to the defence.

(iii) Before making a PII claim on a contents basis, consideration should be given to the use of redactions. The PII claim can then be confined to the redacted parts of the documents.

(iv) PII claims on a contents basis should not be made unless in the opinion of the Minister, or person putting forward the claim, "...disclosure will cause substantial harm" (per Lord Templeman in ex parte Wiley).

(v) A PII claim should not be made if the responsible Minister forms the opinion that notwithstanding the sensitivity of the documents the public interest requires that the documents should be disclosed.

(vi) Save where the circumstances render it impracticable, a Minister who is asked to sign a Pll certificate should always be given adequate time to reflect upon the weight of the public interest factors alleged to require that the documents in question be not disclosed and on the relevance, so far as it is known, of the documents to the defence. It is undesirable that any Minister should be placed in the position, in which, for example, Mr Garel-Jones was placed, of having to reach a decision overnight as to whether PII should be claimed.

(vii) If a disclosure issue in respect of documents the subject of a PII claim is referred to the judge, the judge should, unless the parties are in agreement on the point, be invited to rule, first, whether the documents are within the criteria of materiality so as to be disclosable.

(viii) If the documents are within the criteria of relevance established by R v Keane and R v Brown (Winston), the judge should be asked to decide whether the documents might be of assistance to the defence. If a document satisfies this test, the document ought not to be withheld from a defendant on Pll grounds. There is no true balance to be struck. The weight of public interest factors underlying the Pll claim is immaterial.

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[88] HC 115 Vol IV para. K 6.1
[89] HC 115 Vol IV para. 6.18

> However, existing authority, with its apparent endorsement of the "balancing exercise" while at the same time requiring the disclosure of any document which "may prove the defendant's innocence or avoid a miscarriage of justice", suffers, in my opinion, from some degree of ambiguity. It would be important, in my opinion, if disclosure of a material document is to be withheld, that the defendant should know whether the decision was based on the judge's conclusion that the document would not be of any assistance to the defence or on the judge's conclusion that, despite meeting that test, the weight of public interest factors precludes disclosure. The latter conclusion would, in my opinion, be wrong in principle and contrary to authority.
>
> (ix) For the purposes of any argument on the assistance that a document might give the defence, the defendant should specify the line or lines of defence which, in the defendant's contention, give the document its requisite materiality.
>
> (x) If the documents, although relevant and *prima facie* disclosable, do not appear to be documents that might assist the defence, the judge may conclude that in view of the public interest factors underlying the PII claim, the documents need not be disclosed.

As far as paragraph (ix) of these recommendations is concerned, provisions relating to defence disclosure are included in the Criminal Procedure and Investigations Bill, which has just completed its passage through the House of Lords and is about to have its Second Reading in the House of Commons.

Sir Richard concluded his remarks about public interest immunity in his chapter of recommendations by saying:[90]

> **K6.24** If, which I hope will not be the case, PII class claims continue to be made in criminal cases, the Certificate should address in terms the question why the documents, notwithstanding their materiality to the issues in the case and the absence of any content that would justify a PII contents claim, should, in the contention of the Minister, be withheld from the defence. It is important, on the same pessimistic hypothesis, that class claims be examined rigorously and critically before they are put forward. The apprehension that a class might be eroded if class claims are not put forward in criminal cases does not seem to me a sufficient reason for continuing the practice of making class claims in criminal cases. In any event, every class claim must be judged on its merits by the Minister putting forward the claim.
>
> **K6.25** Moreover, if PII class claims are to continue to be made in criminal cases, the time is, in my opinion, opportune for a collective re-appraisal by Ministers of the underlying basis for the class claims put forward by the PII Certificates in the Matrix Churchill case and in the Ordtec case. It is difficult to understand why

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[90] HC 115 Vol IV para. 6.24-6.25

documents containing information the disclosure of which would be injurious to national security should not be left to be protected, where appropriate, on a contents basis. Class claims are not necessary. As to the "policy" class of documents, is it justifiable for the Government to seek to protect these documents from disclosure on the ground that the protection of the class is "necessary for the proper functioning of the public service" or on the ground that the candour with which advice is given to Ministers would otherwise be inhibited? I find it difficult to accept that these are satisfactory grounds for a class claim in the first place. And I find particularly bizarre and unacceptable that in respect of documents that are *prima facie* disclosable and whose contents do not justify any PII contents claim, the Government can properly put forward a PII class objection to their disclosure to a defendant seeking to establish his innocence in a criminal trial.

A Press Notice issued by the Attorney-General's chambers on February 15 1996, the day the Scott report was published, summarises the Government's response on public interest immunity. It makes the following points about the principles of public interest immunity in criminal trials:

The Scott Report says that the principles of PII do not apply to criminal trials in the same way as to civil cases, and that the PII class claims made in the Matrix Churchill trial were unjustified.

Again, this is in direct conflict with the accepted view. The Government's understanding was and is that PII applies in the same way in criminal cases as in civil cases. That is true of both contents and class claims. There is a public interest in non-disclosure of a document within a PII class (e.g. information about informants), irrespective of its particular contents. That interest is the same whatever the nature of the proceedings. It is to be balanced against the public interest in disclosure, taking account of the importance of the document to the case. The balance is more likely to favour disclosure in a criminal case, but the principles of PII are the same.

That understanding is likewise supported by specific advice from highly experienced independent counsel, including Sir John Laws and Mr Michael Kalisher QC (whose advice was in line with that given by Lord Woolf when he was Treasury counsel in 1978).

Such advice has been confirmed and reinforced by a consistent series of cases in the Divisional Court and the Court of Appeal, including judgments of Lord Justice Mann, Lord Justice Simon Brown and Lord Taylor (the Lord Chief Justice) . Relevant decisions include Ex Parte Osman (1991), R v Ward (1992), Ex parte Bennett (1993), R v Keane (1994) and R v Saunders (1995). Moreover the applicability of the normal principles of PII in criminal proceedings, including the making of PII class claims, was accepted by the Court of Appeal in the recent Ordtec appeal. In each case it has been accepted that a balance has to be struck between the competing public interests.

PII class claims as well as contents claims have been accepted by the courts as being properly made in criminal proceedings. In practice, most PII claims in criminal proceedings relate to non-governmental material, such as police reports or information about police informants. It is an everyday occurrence for such claims to be made and

upheld.

On the subject of the duty to sign public interest immunity certificates the summary states:

The Report expresses the view that ministers were under no duty to claim PII for documents if they considered that the overall public interest favoured disclosure.

This is in direct conflict with the accepted view. The general understanding of the law at the time was that, where a document fell within a PII class, the minister's duty was to assert the public interest in non-disclosure of that document. It was then for the court, rather than the minister, to strike a balance between the public interest in non-disclosure and the public interest in disclosure in the interests of justice. (The only exception to the minister's duty to claim PII was where it was thought that on any view the court was bound to order disclosure.)

That understanding of the law reflected specific advice from highly experienced independent counsel, including Sir John Laws (former Treasury Counsel, now a High Court Judge) and Mr Michael Kalisher QC (former Chairman of the Criminal Bar Association). It was confirmed by later advice from Mr Stephen Richards and Mr William Charles (present Common Law and Chancery Treasury Counsel) and was endorsed by Sir Simon Brown (former Treasury Counsel, now a Lord Justice of Appeal) in a lecture and article in 1994. It was also supported by the Judge in the Matrix Churchill trial and by three of the defence counsel writing in The Times after the trial.

Such advice was supported in turn by authoritative statements of the law in the decided cases, by judges of the highest eminence. They included Lord Reid in Conway v Rimmer (1968), Lord Salmon in R v Lewes Justices, ex Parte Home Secretary (1973), Lord Wilberforce in Burmah Oil v Bank of England (1980), Lord Scarman in Air Canada v Secretary of State for Trade (1983), and Lord Donaldson and Lord Justice Bingham (now Master of the Rolls) in Makanjuola v Commissioner of Police for the Metropolis (1989).

The decision of the House of Lords in Ex parts Wiley in 1994 signalled a major change of approach. It means that Ministers can now weigh the competing public interests for themselves and, if satisfied that disclosure is in the overall public interest, can make disclosure without troubling the court. But the court remains the ultimate decision maker and still has the duty to balance the competing public interests and to rule on disclosure in any case where the minister is not satisfied that disclosure should be made.

The legal advice given to Ministers at the time of the Matrix Churchill trial, including the advice given by the Attorney General to Mr Heseltine, was entirely in accordance with the law as it then stood. The PII certificates explained the public interest in non-disclosure. It was left to the court to decide where the balance of public interest lay. The judge read the documents. He accepted that the PII claims had been properly made and he decided which documents should be disclosed. The process worked in exactly the way in which it was intended to work.

The summary makes the following points about other issues raised by the report:

Were the PII class claims in Matrix Churchill and Ordtec properly made?

The Scott Report says that the 'advice to ministers' class claims were too wide and unjustified by precedent. But the certificates were formulated in terms very similar to those upheld by the courts in previous cases, and the reasoning in support of the class claims continues to be accepted by the courts in analogous cases.
The Scott Report also says that the "national security" class claims were inappropriate and that the public interest could be adequately protected by the making of contents claims alone. But claims in the form advanced in the Matrix Churchill and Ordtec proceedings have also been advanced, and upheld by the courts, on many occasions.

Concluding comments

It is not always clear whether the views expressed in the Report are intended to be views on what the law was at the material time or on what the law should be for the future.

Insofar as the views expressed with regard to the duty of Ministers to advance a claim for PII and the application of PII to criminal trials are intended to represent the law as it stood at the material time, they differ fundamentally from the accepted position as indicated above. Moreover whatever view one may now take of the law at the material time, it was entirely reasonable for those advising Ministers to act in accordance with the advice of Counsel.

In so far as the views relate to the future development of the law, they have implications for the disclosure of non-governmental material such as police reports and information about police informants, as well as for the disclosure of governmental documents.

The Government's response to the Scott report has been deposited in the Library.[91]

Articles and letters from a number of senior lawyers and the law lord Lord Lloyd of Berwick (who was party to the decision in the Wiley case) have supported the Attorney-General's view of the law on public interest immunity as it stood at the time of the Matrix Churchill trial, although the former law lord, Lord Scarman, disagreed with that view.[92]

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[91] DEP 3 2828

[92] Letter from Mr Robert Seabrook Q.C. and others - *Times* 17.2.1996; letter from Lord Scarman - *Daily Telegraph* 17.2.1996; letter from Lord Lloyd of Berwick - *Daily Telegraph* 19.2.1996 "Give Lyell a fair trial" - Lord Alexander of Weedon Q.C, *Times* 20.2.1996; further letter from Lord Scarman - *Daily Telegraph* 20.2.1996; letter from Mr Roy Arnlot Q.C. and Mr Julian Bevan Q.C - *Times* 21.2.1996; letter from the former chairman of the Police Complaints Authority, Sir Cecil Clothier Q.C. - *Times* 21.2.1996

VIII The Criminal Procedure and Investigations Bill [HL] [Bill 63 of 1995/96]

In the *Wiley* case, Lord Templeman referred to problems resulting from the volume of documents now required to be disclosed by the prosecution to the defence in criminal proceedings.[93] In answer to a series of Oral Questions on public interest immunity certificates the Lord Chancellor, Lord Mackay of Clashfern suggested that the growth in the number of documents under consideration for disclosure might explain the growth in the number of documents which might qualify for public interest immunity and hence the growth in the number of references to public interest immunity certificates in recent years.[94] The Report of the Royal Commission on Criminal Justice made a number of recommendations about changes in the arrangements for disclosure, including controversial proposals by the majority on the Commission for disclosure by the defence.[95] The Commission also recommended that the general framework for prosecution disclosure be laid down in primary legislation with detailed procedures set out in subordinate legislation or codes of practice, rather than the current combination of administrative guidelines and case-law. The Government agreed with the need to give a statutory basis to the rules on disclosure and set out its proposals in a consultation paper published in May 1995.[96] This has been followed by the introduction in the House of Lords of the *Criminal Procedure and Investigations Bill*, which had its Second Reading in the House of Lords on November 27 1995. During the Second Reading debate, the Home Office minister, Baroness Blatch, summarised the provisions concerning disclosure as follows:[97]

> Turning to the proposals, the disclosure scheme in Part I of the Bill would require the prosecutor to disclose to the accused unused material which the prosecutor thought might undermine the prosecution case. At the same time he would give the accused a schedule of unused material which was not sensitive. In response the accused would disclose the general nature of his case, the matters on which he took issue with the prosecution, and the reasons for that. Defence disclosure would be mandatory in the Crown Court, but voluntary in magistrates' courts, where most cases are straightforward. In response to defence disclosure, the prosecutor would disclose any additional unused material which might assist the defence that had been disclosed. If a dispute arose about whether there was any other material which might assist that defence, it would be resolved by the court. The Bill provides for the possibility of an inference being drawn if the accused does not comply with the defence disclosure requirements. As to sensitive material, the Bill retains the current procedure whereby the court rules on whether it is in the public interest to disclose such material. However, the prosecutor would not need to bring such material before the court unless he thought it undermined the prosecution case or unless it might reasonably assist the defence disclosed by the accused.

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93 [1994] 3 All ER 470 at p.423-4

94 HL Deb vol 566 c.11 17.7.1995

95 Cm 2263 pp97-100

96 *Disclosure* - Cm 2864

97 HL Deb Vol. 567 c464 27.11.95

Concern was expressed during the Second Reading debate, and by critics outside Parliament, about the power which the Bill's provisions would put in the hands of the prosecution to decide what material would undermine its own case or assist or be relevant to the defence's case. The Labour peer Baroness Mallalieu said:[98]

> The Minister will be aware that reservations have been expressed about those parts of the Bill not only by organisations such as Justice, but also by those who practice in this field and will be dealing day to day with the legislation which this House is discussing. I refer to the Law Society, the Bar Council and the Criminal Bar Association. I pause to point out that the briefing which I hope the Minister had an opportunity to read was contributed to by two of the most recent leading Treasury counsel at the Central Criminal Court; in other words, the primary prosecutors in this country. Their anxieties - I hope I express them correctly - are these. Any system which places the burden on the prosecution to decide the relevance to the defence of unused material, without proper safeguards, is both wrong in principle and a heavy though not impossible burden on the prosecution in practice.
>
> The Government decided for the first time in this Bill that there should be a statutory framework governing the principles of disclosure both by prosecution and defence. Opponents to that approach would argue that prosecution disclosure is properly provided by the rules of common law; in other words, by the decisions of the courts. But the Government decided otherwise.
>
> For the purposes of the Second Reading of this Bill I recognise that the Government have been under great pressure from the police, who felt that they were placed under great burdens, and also from the prosecuting authorities who have felt under great handicaps. Given that statutory provisions are to be made to apply, the aim of the Bill must now be to ensure that those provisions see that, so far as humans can, justice is done to both sides at the subsequent trial. The provisions have to ensure not just that those who are not guilty of crime shall have access to all the material which they need both to challenge the prosecution's case and to present their own defence, but also that those who are guilty of crime shall not be able to take advantage of what I shall call procedural trickery in order to avoid conviction. In order to achieve both those principles the Bill may well need some attention and some alteration.
>
> Perhaps I may turn relatively briefly to defence disclosure. I welcome the principle that the defence should disclose the outline of its case to the Crown once the defence knows the detail of the case it has to meet. First, it is likely to mean that cases are prepared better and earlier by the defence. Secondly, as has already been said by the Lord Chief Justice, it is not uncommon for openness to result in a prosecution being stopped or dropped by the Crown. Thirdly, clarification of the issues can and does sometimes lead to an additional or alternative charge being added so the case resolves into a plea of guilty rather than a contested trial. Fourthly, openness, I suppose, may prevent the defence from using an ambush defence where fabricated evidence cannot be investigated and exposed. I know that those kind of defences exist because the Home Secretary says that they do, but I am bound to say that in 30 years I have never come across one. Fishing expeditions have been referred to somewhat pejoratively, but if you have not committed a crime and you therefore know that someone else has, of course you want to look and see whether there is material which the Crown has which points the finger at who is responsible. What is the matter with that?
>
> Fifthly, defence disclosure will enable the jury to see at the outset what the issues in a trial are and what the case is about and therefore enable them more readily to come to the correct verdict. I hope that it will also stop, or at least reduce, the undesirable practices of the newspapers reporting only the prosecution opening and then the final result, giving the public who hear nothing of the defence a false picture of an unjustified acquittal.

The Bill has now completed its passage through the House of Lords and will shortly be

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[98] HL Deb Vol. 567 c482-483 27.11.95

debated on Second Reading in the House of Commons.

The Clauses in the Bill[99] concerned with primary and secondary disclosure by the prosecution,[100] subsequent applications by the accused to the court for disclosure[101] and the continuing duty of the prosecution to disclose material which might undermine the prosecution case[102] all provide that:

> "Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly".[103]

These Clauses also specifically exempt material intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, or material indicating that such a warrant has been issued or that material has been intercepted in obedience to it, from being disclosed. It is the only specific class of material specifically mentioned in this context under the provisions. Such material is also intended to be excluded from the code of practice concerning criminal investigations which the Clause 17 of the Bill is designed to enable the Home Secretary to make. Clause 18 of the Bill gives examples of provisions that may be included in such a code, including provisions relating to "sensitive material."

Clauses 11 and 12 of the Bill are concerned with reviews by magistrates' courts and the Crown Court of orders that it is not in the public interest to disclose material. Under Clause 11, where a person is being tried in a magistrates' court and the court makes an order that it is not in the public interest for material to be disclosed, it it intended that the accused person should be able to apply to the court for a review of the question whether it is still not in the public interest to disclose the material concerned. If the court decides that the material should be disclosed, it will be required to order that this be done and take reasonable steps to inform the prosecutor. The prosecutor will then have to act accordingly, having regard to the provisions of the Part of the Bill, or discontinue the case.

Under Clause 12, where a person is being tried in the Crown Court and the court makes an order that it is not in the public interest for material to be disclosed, the Bill provides that the court will be required to keep the question under review without the need for an application by the accused, although such an application will be permissible. If the court decides that the material concerned should be disclosed, it will order that this be done and take reasonable steps to inform the prosecutor. Once again the prosecutor will have to comply with this order, having regard to the provisions of this part of the Bill, or discontinue the case.

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[99] Bill 63 of 1995/96
[100] Clauses 3 and 7
[101] Clause 8
[102] Clause 9
[103] Clauses 3(6), 7(5), 8(5), 9(8)

A single Clause in the Bill as originally drafted[104] required both magistrates courts and the Crown Court to keep the question of disclosure of material which had been ordered to be withheld under review. An amendment agreed during the debate on the Bill's Third Reading in the Lords replaced the single Clause with the present two and was designed to exempt magistrates' courts from the duty to keep questions of non-disclosure in the public interest under review, in the absence of an application from the accused.[105]

The Bill also originally provided for both the prosecutor and the accused to be informed of a court's decision that material which it had previously ordered should be withheld on public interest grounds should instead be disclosed, but an amendment introduced by the Home Office minister Baroness Blatch during the Bill's committee stage in the House of Lords removed the reference to the accused. Baroness Blatch said that this was designed to avoid the risk that where a prosecutor initially made an ex parte application to withhold material in the public interest and the court later reviewed its decision and ordered disclosure, the prosecutor would be unable to abandon the proceedings, if this were thought necessary to protect the source of the material, without the accused knowing that an ex parte application had been made.[106] The Labour peer Lord Williams of Mostyn disagreed with the view that ex parte applications to courts were entirely satisfactory and expressed general disapproval of secrecy in judicial proceedings except in certain limited areas.[107]

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[104] Clause 11

[105] HL Deb Volume 569 c.886-891 19.2.1998

[106] HL Deb Volume 567 c.1499 18.12.1995

[107] HL Deb Volume 567 c.1500 18.12.1995

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