Public Interest Disclosure Bill

[Bill 20 of 1995/96]

Research Paper 96/26

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Don Touhig, who won sixth place in the ballot for Private Members Bills on 23 November 1995, has introduced a Bill to protect people who raise concerns about serious fraud or malpractice against dismissal or victimisation. The Bill is due to have its Second Reading Debate on Friday 1 March 1996. This Paper describes the provisions of and the background to the Bill, and looks at related issues such as its application in the public sector and to the right of journalists to refuse to disclose their sources.

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Summary

- Don Touhig, who won sixth place in the ballot for Private Members' Bills in November 1995, has introduced a Bill to protect people who raise concerns about or blow the whistle on serious fraud or malpractice against reprisal

- The Bill defines a "public interest disclosure" as a disclosure of information obtained in the course of employment which a court, in a breach of confidentiality case, would consider justified in the public interest

- It defines a "protected disclosure" as a public interest disclosure made by someone who is not acting in bad faith or for personal gain, who reasonably believes the information to be accurate and who has tried to resolve the matter internally

- It allows people making protected disclosures to seek injunctions or claim compensation from the court if they suffer reprisal. If they are employees, they may choose to take their case to an industrial tribunal, in which case compensation would not be subject to the usual £11,300 limit and they would not need the usual two years' service

- It provides that people making protected disclosures cannot be found guilty of an offence under an enactment (such as the *Official Secrets Act 1989*) which prohibits disclosure of information

- The existing law of confidence allows a public interest defence against actions for breach of confidence and the case law is reflected in the Bill

- The *Trade Union Reform and Employment Rights Act 1993* has already introduced limited statutory protection for whistleblowers in health and safety cases

- The Bill also covers the public service where there are special considerations

- The *Official Secrets Act 1989* removed the disclosure of much official information from the scope of the criminal law but contains no public interest defence to the offences which remain. The Bill, in effect, provides a narrow public interest defence in protected disclosure cases

- The new Civil Service Code of Conduct covering disclosure takes account of recommendations from the Nolan Committee and requires Departments to nominate an officer charged with the duty of investigating staff concerns raised confidentially

- The Department of Health issued guidance on relations with the public and the media in 1993. This encourages employers to establish local procedures for handling staff concerns but allows disclosure to the media as a last resort, even though it may result in disciplinary action

- The Bill also protects journalists from having to disclose a source (who has made a public interest disclosure to them) "in the interests of justice" under section 10 of the *Contempt of Court Act 1981*

- There is legislation in the USA and in some Australian states protecting whistleblowers, but it mainly applies to the public sector

- A series of reports on disasters, including the Piper Alpha oil platform explosion and the Clapham rail crash, has suggested that they might have been averted had employees been more prepared to speak up about malpractice

I The Bill

A Background

Don Touhig, who won sixth place in the ballot for Private Members Bills on 23 November 1995, has introduced a Bill "to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; to protect the identity of sources of information in certain cases; and for connected purposes".[5] The Bill has all party support and was drawn up with the help of the **Campaign for Freedom of Information** and the organisation, **Public Concern at Work**, established in 1993 to assist employees who want to raise concerns about serious malpractice at their place of work, but fear victimisation if they do so. It follows Dr Tony Wright's *Whistleblower Protection Bill* which was introduced under the ten minute rule on 28 June 1995 but made no further progress.[6]

A consultation exercise was carried out after the introduction of that Bill and responses received from employers, unions and other interested organisations. Many of the employers who responded (including Forte, Cadbury Schweppes, Thorn EMI, BT and the TSB) supported the general principles of the Bill and its aim of encouraging greater openness in the workplace. They were concerned that the detail of the legislation should be such as to encourage internal disclosure, leaving wider disclosure very much as a last resort. Some of the unions (for example, the GMB and the MSF) thought that the limitations on the type of information which could be disclosed were too extensive and would leave some apparently meritorious whistleblowers without protection. Several changes were made to the Bill as a result of comments made during the consultation process and the present Bill stresses the requirement that internal channels should be used first if protection is to be afforded. One provision removed altogether was that preventing employers from insuring against the cost of compensating someone penalised for justifiable whistleblowing.

B The Bill's Provisions

The Bill would protect employees who blow the whistle on serious fraud and malpractice by:

- establishing a category of **"public interest disclosures"** which are disclosures of information obtained in the course of one's employment, profession, voluntary work, responsibilities as an office holder or a contractor or membership of an organisation and which tend to show evidence of significant malpractice. Examples of such malpractice are illegality, improper use of funds, abuse of authority, miscarriage of justice, maladministration or danger to health and safety. The information must also

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5 *Public Interest Disclosure Bill*, Bill 20 of 1995/96

6 Bill 152 of 1994/95

be such that in an action for breach of confidence the court had found or would be likely to find that its disclosure was justified in the public interest.
[Clause 1 and the Schedule]

- defining a "**protected disclosure**" as a public interest disclosure made by someone who:

  - is not acting in bad faith

  - believes on reasonable grounds that their information is accurate

  - is not acting principally for the purpose of obtaining payment or personal gain

  - has taken reasonable steps to raise the matter internally before making the disclosure. This requirement is only waived if the matter has already been raised internally and the individual penalised as a result.

  In addition, an internal disclosure about serious misconduct or malpractice would be protected as long as the individual was not acting in bad faith. The other requirements listed above would not apply. Any subsequent external disclosures would still need to meet the full range of tests. Disclosure to a legal adviser is fully protected in all circumstances (but that adviser would not be able to disclose the information without the consent of his client).
  [Clause 2]

- giving **remedies** to people making, or proposing to make, protected disclosures by providing that they

  - cannot be penalised (eg by dismissal, being made redundant or other forms of adverse treatment) [Clause 3]

  - cannot be found guilty of an offence under an enactment which prohibits disclosure of information (eg the *Official Secrets Act 1989*) [Clause 3]

  - can bring an action in court for compensation or an injunction if they are penalised. Compensation should "have regard to all the circumstances of the case" including any injury, loss, damage or distress to the plaintiff and the conduct of both plaintiff and defendant. [Clause 4]

  - can, if an employee, seek compensation for unfair dismissal from an industrial tribunal even if they have been employed for less than two years with their employer or are over retirement age. In addition, the usual limit of £11,300 on unfair dismissal compensation awards will

not apply. Any compensation will be calculated in the same way as that for people taking their case to court. If the tribunal orders re-engagement or re-instatement, and the employer does not comply, a special award can be made. [Clause 5]

- can seek interim relief to prevent dismissal taking place before a tribunal hearing [Clause 5]

- can seek compensation from an industrial tribunal for any penalty other than dismissal (eg victimisation, discrimination, adverse treatment). Such compensation will be calculated in the same way as that for those who suffer detriment for raising health and safety concerns (see Part III below). [Clause 5]

- placing the burden of proof on **public bodies** to show that it is not in the public interest to disclose information they hold. [Clause 6]. "Public bodies" are defined to include not only government departments, agencies and local authorities but also quangos and any body "at least half of whose revenues derive directly" from money provided by Parliament or charges authorised by Act of Parliament. [Clause 9]. This is a reversal of the burden of proof. In the case of private sector organisations it would be up to the individual to show that it was in the public interest that information should be disclosed.

- preventing **out of court settlements** from imposing confidentiality clauses in respect of information which has been shown to be protected under the legislation. [Clause 7]

- providing that journalists or publishers to whom a public interest disclosure has been made cannot be required to **disclose their sources** in the interests of justice under section 10 of the *Contempt of Court Act 1981*. Disclosure can still be required if it is in the interests of national security or the prevention of disorder or crime. [Clause 8]

- ensuring that the Bill's protection covers **Crown employees**. [Clause 10]. The right to claim unfair dismissal does not apply to Crown employees in respect of whom a Ministerial certificate has been issued stating that such an exception is necessary in the interests of national security.[7] However, the Bill's protection will apply in such cases, as it does in health and safety cases. [Clause 5(4)(e)]

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7 *Employment Protection (Consolidation) Act 1978*, s 138 (4)

II Existing Law

As a general rule, "whistleblowing" would be a breach of contract, for both public and private sector employees. Sometimes the duty of confidentiality is an express term of a contract of employment (so-called "gagging clauses") but **all** contracts of employment involve an **implied** "duty of fidelity" which requires honest, loyal and faithful service and forbids competition with the employer. It also means that an employee must not reveal the employer's trade secrets or other confidential information. This duty is not absolute and, in certain circumstances, an employee might be able to defend himself against an action for breach of confidentiality by arguing that he acted in the public interest. An *Incomes Data Services Brief* explains:

> "Whether this defence can be made out in any particular case will depend on the court's assessment of competing public interests, one in the preservation of confidence, the other in the public's 'right to know' of wrongdoing. The process was summarised by Lord Griffiths in *Attorney General v Guardian Newspapers Ltd & ors (no 2)* ('Spycatcher No 2'), when he stated that: 'This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of confidential material.' "[8]

Two examples of successful public interest defences are *Initial Services v Putterill & anor*[9] and *Lion Laboratories Ltd v Evans & ors*.[10] In the first, an employee disclosed to the *Daily Mail* information about a price-fixing arrangement his employer had reached with his competitors in the laundry sector. Not only should this agreement have been registered under the *Restrictive Trade Practices Act 1956* but the employer put out a misleading circular to the effect that the increases were necessitated by a new employment tax. In the second, two scientists who had worked at the laboratory disclosed to a national newspaper confidential information which raised serious doubts about the reliability of a breathalyser approved for use by the Home Office.

However, the Courts have taken a fairly firm line on this and the principle of confidentiality is accorded great weight.[11] An employer would be able to dismiss a whistleblower for breach of contract and it is unlikely that an industrial tribunal would find such a dismissal unfair. Two examples of unsuccessful unfair dismissal claims are *Thornley v Aircraft Research Association Ltd*[12] and *Byford v Film Finances Ltd*.[13] In the former, T had grave concerns over a project he was working on and, after purporting to bring these concerns to his employer's

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8 *IDS Brief*, 544, July 1995, "Whistleblowing"

9 [1967] 3 All ER 145

10 [1985] QB 526

11 See, for example, *Industrial Relations Law Bulletin* 483, Oct. 1993: "Guidance Note: Confidentiality and Disclosure of Information: Employees' Rights and Duties".

12 EAT 669/76

13 EAT 804/86

attention, published the results of research he had been carrying out by writing to a national newspaper. T was dismissed and the Employment Appeal Tribunal upheld the industrial tribunal's ruling that the dismissal was fair. In *Byford*, B considered it likely that the directors of the company were carrying out illegal activities in connection with share transfers. She leaked the information to minority shareholders and was eventually dismissed. The EAT upheld the industrial tribunal's ruling that the dismissal was fair. It is unlikely that the Bill would make any difference to these decisions because the whistleblowers had not used the proper channels. Even if an unfair dismissal claim were to succeed under present rules, compensation would be limited to £11,300[14] and only those with continuous service of two years with their employer would be able to apply.[15] This contrasts with the legislation protecting employees against sex and race discrimination. People can apply to an industrial tribunal for compensation however short their service, and, since 1993 and 1994 respectively, there has been no limit on the amount of compensation which can be awarded.[16]

Another much quoted case is the *Granada* case.[17] The British Steel Corporation sought disclosure of a "mole" who had approached Granada with allegations of poor management and bad practices within the Corporation. The House of Lords found in favour of BSC, Lord Wilberforce remarking that "the most that it is said the papers reveal is mismanagement and government intervention." In general, case law is more likely to support whistleblowers who have tried to raise concerns through internal channels and proper regulators and less likely to support those who use the media. This approach is reflected in the Bill.

III Existing Statutory Protection

There are some specific statutory protections for whistleblowers in the areas of health and safety, asserting statutory employment rights and sex and race discrimination.

Section 28 and Schedule 5 of the *Trade Union Reform and Employment Rights Act 1993* [TURER], which came into force on 30 August 1993, already provide a certain amount of protection to whistleblowers in the sphere of health and safety. They give all employees, regardless of length of service, hours of work or age, the right not to be dismissed, selected for redundancy or subjected to any other detriment for:

> (a) carrying out or proposing to carry out any health and safety activities for which they are designated by their employer;

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14 *Employment Protection Consolidation Act 1978*, section 75 and the *Employment Protection (Increase of Limits) Order 1995* SI No. 1953

15 *EPCA*, section 64

16 *The Sex Discrimination and Equal Pay (Remedies) Regulations 1993* SI No 2798, and the *Race Relations (Remedies) Act 1994*

17 [1981] AC 1097

(b) performing or proposing to perform any functions that they have as official or employer-acknowledged health and safety representatives or committee members;

(c) bringing to their employer's attention, by reasonable means and in the absence of a representative or committee who could do so on their behalf, a reasonable health or safety concern;

(d) in the event of danger which they reasonably believed to be serious and imminent and which they could not reasonably be expected to avert, leaving or proposing to leave the workplace or any dangerous part of it, or (while the danger persisted) refusing to return; and

(e) in circumstances of danger which they reasonably believed to be serious and imminent, taking or proposing to take appropriate steps to protect themselves or other persons from the danger.[18]

Employees who suffer detriment (short of dismissal) as a result of the above actions can take a complaint to an industrial tribunal. If the complaint is upheld, the tribunal must award such compensation as it considers "just and equitable in all the circumstances, having regard to the infringement complained of and to any loss" the employee has suffered as a result. There is no limit to the amount of compensation payable under this provision. If the employee is dismissed, the tribunal may grant a number of remedies, namely reinstatement, re-engagement, compensation and a declaration. Compensation will, as usual, consist of a basic and a compensatory award. However, health and safety representatives and committee members acting in accordance with (a) or (b) above are entitled to enhanced remedies. For example, if reinstatement or re-engagement is ordered but the employer does not comply, a special award of 156 weeks' pay or £20,600, whichever is the greater, can be made.

This amendment to the law was necessary to implement properly Article 8(4) of the *EC Health and Safety Framework Directive*.[19] It can now be found as sections 22A-22C and 57A of the *Employment Protection (Consolidation) Act 1978* [EPCA]. Cases already heard under these new provisions suggest that they protect people raising potential dangers to themselves or their colleagues in their own place of work, but not those who raise issues of wider concern to the general public.[20] Examples of successful claims include a heavy goods vehicle driver on a three month trial who was dismissed when he complained about a serious defect in the vehicle he was driving;[21] a van driver dismissed when he refused to drive a van with

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18 Dept. of Employment Press Release, 1 July 1993 : "David Hunt promises early implementation as Act receives Royal Assent"

19 89/391/EEC

20 *IDS Brief* 544, op cit

21 *Winters v Main Aspects Ltd t/a West Mid Transport Services*, COIT 2930/232

a hole in the floor;[22] and a 16 year old girl dismissed when she refused to take rubbish bags, unaccompanied, to an unlighted garage at about 10 pm.[23]

TURER also introduced a new protection against dismissal for asserting a statutory employment right. This provision is contained in section 29 of the Act, which inserted a new section 60A in the EPCA, and it also came into effect on 30 August 1993. It means that anyone dismissed or selected for redundancy because he is trying to enforce his right to such things as a written statement of his terms and conditions or an itemised pay statement can be compensated by an industrial tribunal.

Section 2(1) of the *Race Relations Act 1976* and section 4(1) of the *Sex Discrimination Act 1975* protect employees who raise concerns about discrimination in the workplace against victimisation on that account.

IV Pros and Cons

The general arguments in favour of protecting whistleblowers, and hence encouraging whistleblowing, are:

- disasters, such as the sinking of the *Herald of Free Enterprise* in 1987 or the explosion of the *Piper Alpha* oil platform in 1988, might have been avoided if employees had dared to express their concerns or these concerns had been taken more seriously

- it is in the enlightened self-interest of organisations that their employees should feel free to raise concerns so that they can be dealt with before disaster occurs and the organisation's reputation is damaged

- knowledge of potential disclosure would be a deterrent to malpractice

- it would provide redress for public spirited people who suffer discrimination or victimisation as a result of attempts to blow the whistle. Many cases have been reported in the press and on television where people have allegedly been dismissed or made redundant as a result of whistle blowing and suffered financial loss and emotional stress as a result.[24]

- it reduces the need to establish regulatory authorities as employees act as watchdogs

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22 *Rawlings v Barraclough t/a Independent Delivery Service*, COIT 2967/239

23 *Clark v Falkirk Sunbed Solarium & Ladies Health Club Ltd*, Case No. S/5057/94

24 See, eg, Channel 4's *Cutting Edge* programme, 29 January 1996; *Guardian,* 3 October 1995, "Colonial Mutual 'traitor' to sue after firm makes him redundant"; *Guardian*, 18 May 1994, "Official who blew the whistle 'made to quit'"; *Times*, 8 January 1994, "Whistle-blower sacked unfairly"

The general arguments against are:

- the duty of confidentiality is important in protecting commercially sensitive information

- the duty of confidentiality is also important in protecting personal information which may be of interest to the public, but which is not against the public interest

- incorrect or misleading information may be disclosed, so unfairly damaging the reputation of the employer

- it might encourage "sneaking" and "whingeing" and troublemakers with a grudge against an organisation

- whilst protection for those who raise concerns internally or even with official regulators is uncontroversial, protection for those who go to the media is less so

The Bill seeks to meet these arguments by:

- the requirement that only information whose disclosure a court would find justified in the public interest is protected in external cases. In other words, the existing law on confidentiality is not affected by the Bill

- the absence of protection for external disclosures where the discloser does not have reasonable grounds for believing the information to be accurate

- the absence of protection for people acting in bad faith

- the provision that external disclosure is only protected if internal channels have failed

From another point of view, commentators might feel that the Bill does not go far enough in the protection it offers. The Court's view of what is in the public interest might well be much more limited than that of the whistleblower. The Bill would not, for example, protect someone who was expressing a political or ethical point of view: perhaps the hospital consultant complaining that lack of resources was putting patients' lives at risk. Employers and employees would be unlikely to know what a court would consider to be in the public interest. Many who responded to the consultation exercise on the *Whistleblower Protection Bill* suggested that there should be a Code of Practice accompanying the legislation, and even a "Protected Information Disclosure Agency" to give guidance and to assist in enforcement. The *Whistleblower Protection Bill* protected people who failed to raise a matter internally if it was reasonable to assume that doing so would be ineffective or the urgency of the matter required immediate disclosure. This Bill only protects such people if someone has actually been penalised already for trying to raise the same matter internally.

V Public Concern at Work

Public Concern at Work provides free legal advice and assistance to employees who are concerned about serious malpractice which threatens the public interest. It is a charity established in October 1993 in the wake of a series of inquiries into disasters and scandals which revealed that employee concerns were either not raised or not heeded. A list of such reports is contained in the Appendix to this paper. Public Concern at Work's objects are: "to promote good practice and compliance with the law in the public, private and voluntary sectors". It does this by focusing on "the accountability of those in charge and the responsibility of those at work". Its strategy is to:

- provide free and confidential help to employees and others concerned about serious malpractice and public dangers in the workplace

- encourage employers to set up procedures for employees to raise serious concerns about dangers and malpractice

- seek to ensure that employees can use those mechanisms without fear of victimisation and in the knowledge that their concerns will be addressed

- publicise good practice in all sectors

- conduct research into issues of public and corporate governance; and

- encourage people to play their part in preventing and avoiding serious danger and harm to the public good.[25]

Because the charity is a legal advice centre, employees can consult its lawyers without breaching any term in their employment contract or any duty of confidence or loyalty owed to the employer.[26] In their first year of operation, they received 620 requests for legal advice. 51% related to the private sector; 38% to the public sector and 11% to the voluntary sector. 386 of the cases were classified as public concerns (ie allegations of serious malpractice which threatened the public or amounted to a serious breach of the law.) Of these, 49% involved financial malpractice, 22% workplace safety and 17% public safety.

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25 Public Concern at Work, *First Annual Report 1994*

26 Public Concern at Work, *Raising concerns at work*

VI Government Policy

So far, the Government has not expressed a view on the Bill. In his response to the consultation on the *Whistleblower Protection Bill*, Roger Freeman, Minister for Public Service, said: "Most of your Bill falls in the areas of Ministerial colleagues' responsibilities and it would not be right for me to comment in detail, but speaking for the Civil Service I am committed to ensuring that we have arrangements that both resolve genuine concerns and sustain the mutual confidence and confidentiality that should exist between all employers and employed."[27]

VII Labour Party Policy

During the 1995 Labour Party Conference, Harriet Harman, then front bench spokeswoman on employment, gave the *Whistleblower Protection Bill* the party's backing at a fringe meeting. She also told *IRS Employment Trends* that should the Private Members' Bill be unsuccessful, a future Labour government would bring in the necessary legislation, together with its proposed freedom of information bill.[28]

VIII Public Bodies

There are additional issues involved where public service employees are concerned. The Law Lords have stated that there is a continuing public interest that the workings of government should be open to scrutiny and criticism. In the *Spycatcher* case, Lord Goff of Chievely stressed that whereas in an ordinary private case of confidentiality it is not incumbent upon the party seeking to preserve confidence to show that it is in the public interest that publication shold not occur, it is a requirement in the case of government secrets, that the government should positively show that the public interest lies in publication being prevented. The reason for this additional requirement is that in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. On the other hand, civil servants are subject to the *Official Secrets Act* as well as to the civil law.[29] They are also "servants of the Crown" and "owe a duty of loyal service to the Crown as their employer". The *Code of Practice on Access to Government Information,* published in March 1994, "supports the Government's policy under the Citizen's Charter of extending access to official information, and responding to reasonable requests for information, except where disclosure would not be in the public interest". Part II of the Code lists, under fifteen headings, the categories of information exempt from the disclosure requirement. They range

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27 Letter to Tony Wright, MP, 29 August 1995

28 *IRS Employment Trends*, November 1995, "Whistleblowers gain rapid acceptance after Nolan"

29 See, for example, the discussion in Sandra Fredman and Gillian S Morris: "*The State as Employer: Labour Law in the Public Services*" (1989), pp 224-232 on 'Freedom of Expression'.

from "defence, security and international relations" to "publication and prematurity in relation to publication".

A. Official Secrets Act

The *Official Secrets Act 1989* repealed and replaced the "catch-all" section 2 of the *Official Secrets Act 1911*. It was enacted following long standing concern over the catch-all nature of section 2 of the 1911 Act and the refusal of juries to convict in a small number of cases where a literal application of the law should have ensured the conviction of the accused. In addition there was momentum for change towards more open government. The 1989 Act is of general application but has special significance for Crown servants and government contractors who are more likely to be in possession of official information.

The 1989 Act removed the disclosure of much official information from the scope of the criminal law. It introduced six categories of official information the disclosure of which is now subject to criminal sanction. These categories are:

- security and intelligence
- defence
- international relations
- information obtained in confidence from other States or from international organisations
- information likely to result in the commission of an offence or likely to impede the prevention or detection of offences
- special investigations under statutory warrant (eg interception of communications)

In the first five of these categories the prosecution must prove specific tests of harm for cases involving unauthorised disclosure. In the case of those who are not Crown servants or government contractors the prosecution also has to prove that the defendant knew or had good reason to know that the specific harm was likely to have been caused. However disclosures by members of the security and intelligence services and others connected with those services will always be treated as harmful.

In the case of special investigations under statutory warrant the prosecution must prove that the offence related to the disclosure of information about or obtained by action under a relevant statutory warrant authorised by the Secretary of State.

It is no longer an offence merely to receive information covered by the 1989 Act.

The Act contains no public interest defence despite a number of attempts to introduce one as the Bill proceeded through Parliament.[30] The Ponting trial in 1985 had been seen by some commentators as paving the way for some form of public interest defence following Mr

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[30] see, for example, HC Deb 2 February 1989, c441ff and HC Deb 22 February 1989, c1039ff

Ponting's acquittal by the jury. However the Government took the view that the harm tests gave a clear indication to the courts of disclosures that would not be in the public interest. It also took the view that an overarching public interest defence would allow any amount of damage on the grounds that the information disclosed gave reasonable cause to believe that there had been some neglect of public duty - in other words, the damage would be done and it would only be afterwards that the reasonableness of the individual's belief could be assessed.[31] Prosecutions are, however, always a matter of discretion and it is possible that despite the absence of an overarching public interest defence an individual would not be prosecuted under the 1989 Act for a disclosure made in breach of that Act but in circumstances that revealed an obvious public interest in making that disclosure.

Clause 3(b) of the current Bill seeks to protect an individual who made a disclosure in contravention of the 1989 Act which tended to show "significant misconduct or malpractice" of such kind as suggested in Schedule 1 to the Bill. This would in effect introduce a public interest defence to individuals charged under the 1989 Act. An individual seeking to rely on this defence would have to comply with other provisions of the Bill which set out the circumstances in which such a defence could be claimed (see Part I above). The *Notes on Clauses* to the current Bill produced by Public Concern at Work state that "the burden of demonstrating an overriding public interest in relation to a disclosure to which the Official Secrets Act applies will be much greater than that for other confidential information".[32] This is not something that appears on the face of the Bill but the statement appears to be based on an assessment of the strong duty of confidentiality owed by civil servants and of the likely approach of the courts in balancing that duty with the public interest.

B. Civil Service

Civil Servants have a duty of confidentiality over and above the requirements of the *Official Secrets Act 1989* (see above). The Armstrong memorandum on the Duties and Responsibilities of Civil Servants in relation to ministers was first issued after Clive Ponting was acquitted of breaking s.2 of the *Official Secrets Act 1911* in leaking information on the Belgrano affair to Tam Dalyell. It stated "any such unauthorised disclosures whether for political or for personal motives, or for pecuniary gain, and quite apart from liability to prosecution under the *Official Secrets Act,* result in the Civil Servant forfeiting the trust that is put in him or her as an employee and making him or her liable to disciplinary action including the possibility of dismissal, or civil law proceedings".[33]

The Armstrong memorandum has now been superseded by the Civil Service Code of Conduct with effect from 1 January 1996.[34] The Civil Service code does highlight the question of disciplinary action but rephrases the Armstrong memorandum's concerns about confidentiality:

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31 Further discussion of these matters is contained in Library Reference Sheet 88/7 on the *Official Secrets Bill* and in Library Research Note 437 on *The Official Secrets Bill 1988-89: The Commons Debates*

32 p6

33 para. 8 of 4.1, Annex A, Civil Service Management Code, February 1993

34 The Code has been incorporated into the Civil Service Management Code

9. Civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. They should comply with restrictions on their political activities. The conduct of civil servants should be such that Ministers and potential future Ministers can be sure that confidence can be freely given, and that the Civil Service will conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the policies of the duly constituted Government.

10. Civil servants should not without authority disclose official information which has been communicated in confidence within Government, or received in confidence from others. Nothing in the Code should be taken as overriding existing statutory or common law obligations to keep confidential, or to disclose, certain information. They should not seek to frustrate or influence the policies, decisions or actions of Government by the unauthorised, improper or premature disclosure outside the Government of any information to which they have had access as civil servants.

Disclosures by civil servants which are not subject to the criminal law under the *Official Secrets Act 1989* may nevertheless be the subject of a civil action for breach of confidence. Rules of Conduct and Discipline contained in the Civil Service Management Code note as follows:

> "Civil Servants must not misuse information which they acquire in the course of their official duties or disclose information which is held in confidence within Government."[35]

The First Division Association of Civil Servants and the Institution of Professionals, Managers and Specialists campaigned for some years for a code of ethics which would allow civil servants to appeal to a Civil Service Ethics Tribunal consisting of three Privy Counsellors drawn from across the political parties.[36] The Government first announced that an appeal to the Civil Service Commissioners would be introduced in January 1995 when responding to the Treasury and Civil Service Committee report on the Civil Service[37] which had recommended a code of ethics.[38]

The Nolan Committee[39] recommended amendments to the draft Code of Conduct so that

- it covered circumstances in which a civil servant, while not personally involved, was aware of wrongdoing or maladministration taking place

- all successful appeals to the Civil Service Commissioners, whether the Government has heeded the recommendation or not, should be reported to Parliament

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35 para. 4.1.3 (a) Civil Service Management Code. Note that the Code sets out general principles and rules which departments may supplement, but departmental rules must fully reflect the central framework set out in the Code on conduct and discipline

36 IPMS/FDA Draft Civil Service Code of Ethics 21 November 1994

37 HC 27 1993/94

38 The Civil Service : Taking Forward Continuity and Change, Cm 2748

39 First Report of the Committee on Standards in Public Life, Cm 2850

- all departments and agencies should nominate one or more officials entrusted with the duty of investigating staff concerns raised confidentially[40]

- there should be regular surveys of the knowledge and understanding that staff have of ethical standards applicable to them

The Government accepted the majority of these recommendations in its response to Nolan.[41] It promised to bring forward amendments to the Civil Service Management Code to require agencies and departments to nominate an official to investigate staff concerns raised confidentially.[42]

These arrangements have now been put in place, as set out in Annex C to the Government response:

> 7.7.5 Paragraph 11 of the Civil Service Code provides for internal reviews of crises of conscience and other matters:
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> > **"Where a civil servant believes he or she is being required to act in a way which is illegal, improper, unethical, in breach of constitutional convention or a professional code, which may involve possible maladministration, or which is otherwise inconsistent with this Code, he or she should report the matter in accordance with procedures laid down in departmental guidance or rules of conduct. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with departmental procedures if he or she becomes aware of other breaches of this Code or is otherwise required to act in a way which, for him or her, raises a fundamental issue of conscience."**
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> 7.7.6 Departments and agencies must establish clearly-defined formal procedures for handling such complaints. While many complaints will be raised through the management line, there should also be a nominated official or officials who can be approached in confidence in the first instance. The internal resolution procedures will normally involve the Permanent Head of Department or Agency Chief Executive. Departments and agencies should ensure that staff feel confident to voice complaints, and are not penalised for raising concerns in accordance with the procedures. Clear guidance on the procedures should be available to all staff.

Staff would not be required to use the confidential channel proposed.

The Government also agreed to amend the Civil Service code to cover circumstances where civil servants were aware of wrongdoing or maladministration, but preferred the terms of 'evidence of criminal or unlawful activity'. The Government response stated that 'there might

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40 paras. 5-54 of chapter 3 Cm 2850

41 Response to the First Report from the Committee on Standards in Public Life Cm 2931 July 1995

42 Response to Recommendation 25

be room for confusion about what these words covered and whether or not they embraced the full range of principles addressed by the Code'.[43]

The Government refused however to accept the recommendation that all successful appeals to the Commissioners be reported to Parliament:

> In the Government's view it is important to protect the confidential nature of the relationship between Ministers and civil servants, including the confidentiality of policy advice and internal discussion. There will be no restrictions on access to such advice by the Civil Service Commissioners where it is necessary for them to see it in order to investigate a concern. Laying the Commissioners' report on a case before Parliament when the Government has declined to accept a recommendation will support Parliamentary accountability. The position is comparable to reports under section 10(3) of the Parliamentary Commissioner Act 1967, where the Commissioner has identified injustice arising from maladministration which it appears to him will not be remedied. The Government accepts, however, that the Civil Service Commissioners should be able to report the outcome of cases in a wider range of circumstances, including those where a satisfactory outcome has been achieved. It may be possible to report such cases in summary form, in a way which conveys any best practice lessons but does not disclose the identity of those involved in the case. The Government is prepared to leave the nature and extent of reporting to the Commissioners, and trusts that it will be widely accepted that they should discharge their responsibilities in a way which upholds the political impartiality of the service and does not undermine the trust and confidence which forms the basis of the working relationship between Ministers and civil servants.[44]

Finally, the Government accepted that the recommendations on regular surveys should be implemented flexibly and no arrangements would be prescribed from the centre.[45]

A civil servant must therefore follow the procedures set out in the code:

> 11. Where a civil servant believes he or she is being required to act in a way which:
>
> - is illegal, improper, or unethical;
> - is in breach of constitutional convention or a professional code;
> - may involve possible maladministration; or
> - is otherwise inconsistent with this Code;

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43 p.9

44 Response to Recommendation 24

45 Response to Recommendation 28

> he or she should report the matter in accordance with procedures laid down in departmental guidance or rules of conduct. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with departmental procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.
>
> 12. Where a civil servant has reported a matter covered in paragraph 11 in accordance with procedures laid down in departmental guidance or rules of conduct and believes that the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Civil Service Commissioners.
>
> 13. Civil servants should not seek to frustrate the policies, decisions or actions of Government by declining to take, or abstaining from, action which flows from ministerial decisions. Where a matter cannot be resolved by the procedures set out in paragraphs 11 and 12 above, on a basis which the civil servant concerned is able to accept, he or she should either carry out his or her instructions, or resign from the Civil Service. Civil servants should continue to observe their duties of confidentiality after they have left Crown employment.

A civil servant whose concerns are not allayed by these procedures must therefore carry out ministerial instructions or resign. He would still be bound by the duty of confidentiality. The IPMS/FDA Code of Ethics had included a sentence "A civil servant should suffer no detriment from referring to the tribunal an issue arising in the course of his or her work, whether or not the complaint is upheld."

Clause 6 of the Bill reads 'in any action on which a public body claims that it is owed an obligation of confidentiality in respect of any information it shall be for that body to prove that it was in the public interest that the information should be confidential." This is a reversal of the burden of proof. In a private sector case, it would be for the individual to show that it was in the public interest that the information be disclosed. 'Public interest' is not defined but cases concerning the public interest defence would be relevant; for the civil servant the Spycatcher cases offer precedents: in the second Spycatcher case Lord Goff of Chievely stressed that "it is incumbent on the Crown, in order to restrain disclosure of Government secrets, not only to show that the information is confidential, but also to show that it is in the public interest that it should not be published."[46]

Clause 9 of the Bill defines a 'public body' as

> (a) a government department or agency or local authority or any body which is established by virtue of Her Majesty's prerogative or by an Act of Parliament or an Order in Council or an Order made under an Act of Parliament or which is established in any other way by a Minister of the Crown in his capacity as such or by a Public body, or

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[46] *Attorney General* v *Guardian Newspapers Ltd* others (no. 2) (Spycatcher no. 2) [1988] 3 All ER at p660

> (b) any body at least half of whose revenues derive directly from money provided by Parliament, a levy authorised by an enactment, a fee or charge of any other description so authorised or more than one of those sources; or
>
> (c) any body which is wholly or partly constituted by appointment made by Her Majesty or a Minister of the Crown or a public body;

The term would therefore seem to include both Non-Departmental Public Bodies and bodies which have been loosely described by the Nolan Committee as local public spending bodies: TECs, LECs, Grant Maintained schools, further and higher education bodies and housing associations. In addition the range of public sector bodies such as LEA schools, local authorities and NHS bodies seem to be within the definition. Finally there is the question of contractors carrying out activities previously the responsibilities of civil servants, as part of the Competing for Quality Initiative, or the privatisation of Agencies. Their inclusion within the definition of public body seems doubtful unless at least half of the contractors' revenues come directly from Government, yet employees of a private sector body contracted to perform public sector work may well be faced with the same ethical dilemmas as civil servants or public sector employees.

C. National Health Service

The question of whistle-blowing has been the subject of particular concern in the NHS, both because of the potentially serious consequences of poor practice, and because of the belief, held by some in the health service, that the introduction of the NHS "internal market" has led to a greater emphasis on secrecy. One case which attracted a great deal of publicity and comment was that of Graham Pink, a nurse who was dismissed in 1991 after he publicised his concerns over the standards of geriatric care in Stepping Hill Hospital. Mr Pink took his case to an industrial tribunal, and in 1993 his employer, Stockport Health Authority, agreed to award him £11,000 in order to save further legal costs, although it continued to dispute Mr Pink's claims.[47]

In October 1992, the Department of Health issued draft guidance for NHS staff on their relations with the public and the media, with the final version published in June 1993.[48] The guidance emphasises that the interests of patients must be paramount, and that all NHS employees have a duty to draw their managers' attention to anything which they believe may be putting patient welfare at risk. At the same time, NHS staff also have a duty of confidentiality to their patients and an implied duty of confidentiality to their employers, regardless of whether or not this is made explicit in their contract. (This duty of confidence to an employer is not absolute, however, as the defence can be made that disclosure was in the public interest.) In order to avoid the need for members of staff to publicise their concerns outside the NHS, employers are directed to establish local procedures, both formal and informal, for handling such concerns about health care issues. Emphasis is placed on the

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47 "NHS 'whistle-blower' wins £11,000 damages", *The Independent*, 15 June 1993 p.7

48 Department of Health circular EL(93)51, 8 June 1993

importance of fostering openness, so that staff feel free to raise their concerns without fear of reprisal.

Where these local procedures have been exhausted, and the member of staff concerned is still dissatisfied, then the guidance states that they must retain the right to consult their professional body or trade union, or a statutory body such as the General Medical Council. Their Member of Parliament could also be consulted in confidence. Finally, the guidance states that "as a last resort" the individual might consider disclosing their concerns to the media. However, "such action, if entered into unjustifiably, could result in disciplinary action and might unreasonably undermine public confidence in the Service". As local procedures will have been agreed with staff representatives in the first place, it is envisaged that "proper mechanisms will exist to ensure that staff concerns can be addressed and dealt with without reference to the media".

Although the press notice announcing the draft document stated that "the right of NHS staff to speak out on their concerns about health care would be confirmed as a recognised and acceptable part of NHS life"[49], representatives of NHS staff remain unconvinced. Christine Hancock of the Royal College of Nursing was quoted as describing the guidance as "toothless"[50] while a spokeswoman for the British Medical Association was reported as saying that there remained "a climate of fear in the service".[51] In 1994, the union MSF carried out a survey among its representatives in the NHS to gauge the effect of the guidance; according to the survey results, 40% of those replying had not heard of the guidance, 70% had not seen a copy and 84% stated they had not been consulted on the setting up of local policies.[52] Bill Walsh of MSF was quoted in the *Health Service Journal* as finding the results "very disturbing".[53]

Although concerns have been expressed that the guidance does not offer adequate protection in cases where staff members see no alternative to making their concerns public, the aim of fostering openness in the NHS has general support. Christine Hancock, the general secretary of the Royal College of Nursing, for example, commented in the *Health Service Journal*[54] that where health services encouraged openness about professional concerns, then "over the long term, this would make almost all whistle-blowing unnecessary". She also commented on the importance of clinical audit and peer review in maintaining and raising standards, and pointed out that nurses are in fact bound by their professional code to speak out when they feel standards of care are threatened. One example of an NHS trust introducing a clear policy on what could be called internal whistleblowing is the Northwick Park NHS Trust, which recently launched a "whistle-blower's charter" for all staff. As well as encouraging both informal and formal approaches to an individual's line manager, the charter also states that a team of eight people from the Trust's ethics committee would be available to offer support

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49 Department of Health press notice 92/331, 16 October 1992

50 "Guidelines for whistle blowers are 'toothless'", *Health Service Journal*, 17 June 1993 p.7

51 "Press 'gag' on health staff", *The Guardian*, 10 June 1993 p.9

52 MSF, *"Freedom of speech in the NHS - MSF Survey Results*", 1994

53 "DoH advice fails to allay fears of 'whistle-blowing'", *Health Service Journal*, 12 May 1994 p.6

54 "Whistle while you work", *Health Service Journal*, 14 September 1994 p.23

to any member of staff, and that staff approaching this team would be guaranteed confidentiality.[55]

The Department of Health has also recently proposed that the duty to take action where a colleague's performance is poor should be specifically included within doctors' terms and conditions of service. Currently, this duty is set out in guidance on good professional practice from the General Medical Council,[56] but is not included within employment contracts. The proposal was made by a review group set up by the Department of Health in 1993 after an interim report on tumour diagnosis in South Birmingham showed that colleagues had been aware for some time of misdiagnoses by the pathologist, Dr Carol Starkie, but had failed to act on their suspicions.[57] The review group's report[58] was published in August 1995; its recommendations also included inviting the British Medical Association to set up a national helpline to provide confidential anonymous advice on poor medical performance, and investigating the feasibility of setting up "mentoring" systems for all hospital medical staff to lessen professional isolation.

IX Disclosure of Sources

Section 10 of the *Contempt of Court Act 1981* provides that

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Clause 8 of the *Public Interest Disclosure Bill* would remove the "interests of justice" requirement in a case where the information referred to was subject to an obligation of confidentiality, and the court was satisfied that, notwithstanding any such claim, its publication was in the public interest.

This is to be distinguished from what is merely of interest to the public. The Press Complaints Commission's Code of Practice creates exceptions to rules about, for example, invasion of privacy or obtaining of information by subterfuge, which may be covered by invoking the public interest and for the purposes of the code this is defined as

- Detecting or exposing crime or a serious misdemeanour

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55 "Whistle while you work", *Nursing Times*, 20 September 1995 p.18

56 GMC, "*Duties of a doctor*", 1995

57 Department of Health press notices 93/932, 26 August 1993 & 95/398, 7 August 1995

58 Department of Health, "*Maintaining medical excellence*", 1995

- Protecting public health and safety

- Preventing the public from being misled by some statement or action of an individual or organisation.

Clause 7 of the NUJ Code of Conduct states that "A journalist shall protect confidential sources of information", and s.10 of the *Contempt of Court Act 1981* establishes a presumption in favour of journalists who wish to protect their sources, unless the court decides that disclosure is required on one of the four grounds identified.

The first of these: "in the interests of justice" is the most open to interpretation. It was discussed by Lord Bridge in *X Ltd v Morgan Grampian Ltd*:[59]

> But the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. A question arising under this part of s 10 has not previously come before your Lordships' House for decision. In discussing the section generally Lord Diplock said in *Secretary of State for Defence v Guardian Newspapers Ltd* [1984] 3 All ER 601 at 607, [1985] AC 339 at 350:
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> > 'The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in s 19 of the 1981 Act before a tribunal or body exercising the judicial power of the state.'
>
> I agree entirely with the first half of this dictum. To construe 'justice' as the antonym of 'injustice' in s 10 would be far too wide. But to confine it to 'the technical sense of the administration of justice in the course of legal proceedings in a court of law' seems to me, with all respect due to any dictum of Lord Diplock, to be too narrow. It is, in my opinion, 'in the interests of justice', in the sense in which this phrase is used in s 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.
>
> Construing the phrase 'in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by

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59 [1990] 2 All ER p.8

> s 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

This was the case involving the journalist William Goodwin who in 1989 was telephoned by a source which gave him information about the financial status of a company, X Ltd, which he proposed to use in an article for publication in *The Engineer*.

Having been approached by Mr Goodwin to check the unsolicited information he had been given, the company concluded that the information was derived from a draft of their confidential corporate plan. On 7 November 1989 they applied for and obtained an *ex parte* interim injunction to restrain the publishers of *The Engineer* from publishing any article including material derived from the corporate plan. An order was obtained that the publishers should disclose the applicant's notes which would enable identification to be made of his source. On 22 November 1989, Mr Justice Hoffman stated that it was necessary "in the interests of justice" for the source's identity to be disclosed to enable X Ltd to bring proceedings against the source. He was satisfied that there was *prima facie* evidence that X Ltd had suffered a serious wrong by the theft of its confidential file, and that it would suffer commercial damage if the information was disclosed.

In December 1989 the Court of Appeal dismissed the appeal against the disclosure order, as did the House of Lords on 4 April 1990: "They found that the necessity for disclosure in the interests of justice was established. They considered that the importance to X Ltd of obtaining disclosure to obviate the threat of severe danger to their business and consequently to the livelihood of their employees, outweighed the importance of protecting the source. They had regard in this balancing exercise to their deductions that the source had at the very least committed a gross breach of confidentiality and also to their assessment of the lack of pressing public interest in publication of the information."[60]

In September 1990 Mr Goodwin appealed to the Court of Human Rights that the disclosure order constituted an interference with his freedom of expression guaranteed by Article 10 of the European Convention. The Commission in its report of 1 March 1994 expressed the opinion by 11 votes to 6 that there had been violation of this provision. The judgment of the Court is awaited. Mr Goodwin contends that the disclosure order breached his duty of confidentiality to his source and that the law permitting such orders, particularly the criterion of the "interests of justice" is not formulated with sufficient precision to enable the individual to foresee with reasonable certainty when it will be applied, and casts a 'disproportionate

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[60] Human Rights Case Digest: Goodwin v UK, September-October 1993, p.227

chilling effect on the free flow of information to the public."[61] The Government, while recognising that s.10 provides a strong presumption against ordering disclosure, submitted that interference was necessary in a democratic society for the purpose of protecting the rights of others and for preventing the disclosure of information received in confidence. The *Independent* 24th April 1995, reported that the Government had drafted a caution which journalists should deliver before accepting information from a source. It was reported to read as follows:[62]

> 'You have my word that I will not under any circumstances divulge your identity unless I am ordered to do so by a court, and I will resist any attempt by the court to impose an order on me. 'But you and I have to recognise that there are occasions - historically they have been very few - when the court may make an order against me in the interests of national security, to prevent disorder or crime, or when the interests of justice require it. We are, of course, neither of us, above the law, but the courts can be expected to lean over backwards to preserve confidentiality if at all practicable.'

Geoffrey Robertson QC, who acted for Mr Goodwin, is critical of the approach taken by the courts in interpreting s.10: "The case illustrates how the judicial value accorded to property rights will tend to prevail over ethical claims by the journalists in balancing exercises that require a subjective appreciation of competing public interests".[63] The authors comment: "The case of Bill Goodwin demonstrates that s.10 will not afford any real protection to journalists until it is amended to exclude the "interests of justice" exception.....An alternative reform would be to confine the exception to "the interests of criminal justice" which would confine disclosure to cases where it was necessary to establish guilt or innocence at a criminal trial". [64]

X Legislation Abroad

In the **USA,** statutory protection for whistleblowers was first provided by the *Civil Service Reform Act* of 1978. The act was designed to encourage disclosure of fraud, waste or abuse by providing protection from reprisal to employees, former employees, or applicants who made such disclosures. However, it was felt that the legislation had little impact and in 1989 the *Whistleblower Protection Act* was passed to strengthen whistleblower protection. The 1989 Act established the Office of Special Counsel (OSC) as an independent agency responsible for protecting federal employees, especially whistleblowers, from "prohibited personnel practices"; for investigating complaints of whistleblower reprisal; and, when reprisal was found, for initiating corrective and disciplinary actions. A report by the General Accounting Office in March 1993 found wide disparities in how the 19 agencies it reviewed

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61 *Ibid*, p.227

62 "Government drafts caution for 'Whistle blowers' to give sources"

63 Media Law, 3rd ed., 1992, p.201 with Andrew Nicol

64 ibid.

had implemented the statutes.[65] Some agencies had informed their employees about whistleblower protection rights but most had not. Many employees are not aware of the protection available, and it is often difficult to find evidence that a particular "prohibited personnel action" was the result of whistleblowing activity rather than some other cause.[66]

A range of environmental protection Acts covering such things as clean air[67], safe drinking water[68] and toxic substances[69] provide protection from discharge or other discriminatory action by employers in retaliation for employees' good faith complaints about safety and health hazards in the workplace. They cover all private sector employees and are enforced by the Wage and Hour Division of the Employment Standards Administration.[70]

Several states in the USA have their own whistleblower protection legislation. That in **Michigan** is unusual in that it covers private sector employees as well as the state's own employees. On the other hand, protection is limited to cases where reports are made to a public body. Thus, internal whistleblowing is left unprotected.[71]

There is also special legislation in the USA designed to encourage employees to report malpractice in any case involving public contracts. In 1985, revisions were made to the *False Claims Act* 1863, to allow people who expose financial malpractice in industries contracting with the government to receive substantial compensation based on a share of 15-30% of the savings recouped by the federal government. Very large sums have been awarded under these provisions. For example, in December 1992, Chester Walsh, an employee of General Electric, received $13.4 million after exposing a fraud involving US foreign military sales aid.[72] More recently, Frederick Copeland, a worker at Western Geared Systems, a subsidiary of the British company, Lucas Industries, was awarded $18 million after claiming that employees had falsely certified work on gearboxes for fighter aircraft.[73] Providing financial incentives to whistleblowing has had some success in the US, but it also creates problems. Some commentators believe that the rewards are now so large that the whistle should be blown on whistleblowers themselves. It is feared that some employees may be deterred from raising a concern internally at an early stage, in the hope of large financial gains later on.[74]

A number of Australian states also have whistleblower protection legislation. In **Western Australia**, only persons providing information to the Official Corruption Commission, and covered by that Commission's jurisdiction, can be protected against reprisal. A new *Public*

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65 US General Accounting Office, Report to the Chairman, Committee on Post Office and Civil Service, House of Representatives, *Whistleblower Protection*: *Agencies implementation of the whistleblower statutes has been mixed*, March 1993

66 Lucy Vickers, "*Protecting Whistleblowers at Work*", p 36

67 *Clean Air Act* (Title 42 US Code, section 7622)

68 *Safe Drinking Water Act* (Title 42 US Code, section 300j-9(i)

69 *Toxic Substances Control Act* (Title 15 US Code, section 2622)

70 US Department of Labour, *Whistleblower Protection*, via the Internet, http://bubba.dol.gov/dol/welcome.htm

71 Lucy Vickers, "*Protecting Whistleblowers at Work*", p 37

72 Public Concern at Work, *Speaking up by sector. Blowing the whistle on Defence Procurement*, section 4

73 *Observer*, 22 October 1995, "Whistleblowers hear a new tune"

74 *Sunday Telegraph*, 16 July 1995, "Sin bin for whistleblowers?

Interest Disclosures Act is proposed which would protect a much wider range of potential whistleblowers and establish a confidential Public Interest Disclosures Advice Unit to assist people considering making such disclosures.[75] In **South Australia**, there is a *Whistleblower's Protection Act 1993* whose object is "to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally (a) by providing means by which such disclosures may be made; and (b) by providing appropriate protections for those who make such disclosures."

XI Further Reading

1. Sandra Fredman and Gillian S Morris: *"The State as Employer: Labour Law in the Public Services"* (1989), pp 224-232 on `Freedom of Expression'

2. Marlene Winfield, "*Minding Your Own Business. Self-Regulation and Whistleblowing in British Companies*", Social Audit, 1991

3. NHS Management Executive Circular EL (93) 51, 8 June 1993: *"Guidance for staff on relations with the public and the media*"

4. *Industrial Relations Law Bulletin* 483, Oct. 1993: "Guidance Note: Confidentiality and Disclosure of Information: Employees' Rights and Duties"

5 Incomes Data Service Focus 68, Oct. 1993: "*Whisteblowing*"

6. Public Concern at Work, *Speaking up by Sector:*
   - *The Police*, 1993
   - *Local Government*, 1994
   - *Defence Procurement*, 1995

7. MSF*: "Freedom of speech in the NHS - MSF Survey Results",* 1994

8. Gerald Vinten (ed), *"Whistleblowing - supervision or corporate citizenship*", 1994

9. Public Concern at Work, First Annual Report 1994

10. *Labour Research*, February 1995, "Cracking down on whistleblowers"

11. *Financial Times*, 29 June 1995, "Don't shoot the messenger", review of Gerald Vinten's book by Sir Gordon Borrie

12. *IDS Brief* 544, July 1995, "Whistle blowing"

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[75] Commission on Government, Western Australia, Report No 2, Part 1, Chapter 5, December 1995

13. Civil Service Management Code, 1995

14. Institute of Employment Rights, *"Protecting whistleblowers at work*", by Lucy Vickers, 1995

15. *IDS Brief* 553, November 1995, "Employment protection - health and safety cases"

16. *Guardian*, 6 December 1995, "Corporate whistleblowers set to receive protection they deserve"

17. Public Concern at Work, *Four windows on whistleblowing*, 1996. Contains four essays:
    - *Business ethics and accountability* by Sir Gordon Borrie
    - *A vindication of whistleblowing in business* by Dr Elaine Sternberg
    - *Lift up thy voice like a trumpet* by Canon Eric James
    - *Confidence, public interest and the lawyer* by Michael Brindle QC and Guy Dehn

18. Responses to the consultation on the *Whistleblowers Protection Bill*, 1995. (Many of these are very brief letters of acknowledgement and general support)

    - Forte
    - CBI
    - Roger Freeman, Minister for Public Service
    - GMB
    - MSF
    - Committee on Standards in Public Life
    - Council for Academic Freedom and Academic Standards
    - Thorn EMI
    - BT
    - Institute of Directors
    - Social Audit Ltd
    - Bates, Wells & Braithwaite
    - Financial Fraud Information Network (Bank of England)
    - The Law Society
    - Seeboard
    - Co-operative Wholesale Society
    - Cadbury Schweppes
    - Institute of Management
    - BMA
    - TSB
    - Association of Community Health Councils
    - Guild of Editors

19. Press Release issued by Don Touhig, 13 February 1996, "*Bill will protect people blowing the whistle on serious wrongdoing"*, with accompanying Notes on Clauses

20. *Independent*, 14 February 1996, "Whistle-blowing on secret Britain" [leading article]

21. *Independent*, 14 February 1996, "Promise of protection for blowing the whistle"

22. *Times*, 14 February 1996, "Bid to protect whistleblowers"

23. *Guardian*, 14 February 1996, "Union leaders try to rescue whistleblowers' bill"

Appendix Disaster Reports

A series of reports into disasters and scandals highlighted the role which whistleblowers could have played in averting them. They include:

- 1987 - Herald of Free Enterprise capsizes off Zeebrugge. 193 people die. The inquiry found that staff had warned middle management five times before the disaster about the ferry sailing with its bow doors open and that a suggestion that lights should be fitted to the bridge to indicate whether the doors had been closed had been ignored. [*Sheen Report on the loss of the Herald of Free Enterprise*, Department of Transport, 1987]

- 1988 - Piper Alpha oil platform explodes 110 miles off the coast of Scotland. 167 people die. The inquiry found that workers did not want to put their jobs in jeopardy through raising a safety issue which might embarrass management. [*Report of the Public Inquiry into the Piper Alpha Disaster*, Department of Energy, November 1990. Cm 1310]

- 1988 - Clapham rail crash. 35 people die. The inquiry found that a supervisor had noticed the loose wiring a few months earlier but did nothing because he did not want to "rock the boat". [*Hidden Report of the Investigation into the Clapham Junction Railway Accident*, Department of Transport, 1989, Cm 820]

- 1991 - BCCI collapse. The Bank of Credit and Commerce International closed as a result of a 19 year old fraud causing estimated losses of over £2 billion world-wide. The inquiry found that BCCI had an "autocratic" environment in which no-one dared to speak up. [*Bingham Report on the Supervision of the Bank of Credit and Commerce International*, HC 198 1992/93]

- 1992 - Ashworth Hospital scandal. The inquiry into a brutal three year regime of physical and mental abuse at a special hospital found that the few staff who had been brave enough to speak out were attacked, received death threats and their property vandalised. [*Blom-Cooper Report on Complaints about Ashworth Hospital*, Department of Health, 1992, Cm 2028]

- 1993 - Cancer misdiagnosis. 2,000 bone tumour cases had to be re-examined after an inquiry discovered that a senior pathologist at Birmingham's Royal Orthpaedic Hospital had misdiagnosed 42 cancer cases. Two consultants had expressed doubts over the diagnoses over several years, but they had failed to speak up through official channels. [*Report on the errors in pathological diagnosis provided to the bone tumour service, Royal Orthopaedic Hospital 1985-1993*, South Birmingham Health Authority, 1993]

- 1993 - Lyme Bay Canoeing tragedy. 4 children drown. Some time before the accident, two instructors had written to the Head of the Centre warning that he should have a careful look at safety standards or children might die. This warning was critical to the head's conviction for manslaughter and three year jail sentence in December 1994. The sentence was later reduced to two years but the judges stressed that the verdict was in no way unsafe. [*The Lyme Bay Canoeing Tragedy, Interim Report*, Devon County Council, July 1993]

Recent papers on related subjects have been:

Employment & Training

96/19	Employment (Upper Age Limits in Advertisements) Bill [Bill 18 of 1995/96]	31.01.96
96/7	Unemployment by Constituency December 1995	17.01.96
96/5	Jobseeker's Allowance	16.01.96
95/92	The Social Chapter	28.07.95
95/51	Employment and Training Schemes for the Unemployed	21.04.95
95/9	Disability Discrimination Bill 1994/95 [Bill 32]	19.01.95
95/7	A Minimum Wage	17.01.95

Government & Parliament

96/16	The Scott Inquiry: Approaching Publication	25.01.96
96/14	Special Standing Committees in both Houses	23.01.96
96/2	Security Service Bill [Bill 38 of 1995-96]	04.01.96
96/1	Parliamentary Pay and Allowances: The Current Rates	02.01.96
95/131	The Government of Scotland: Recent Proposals	18.12.95
95/118	The Nolan Resolutions	23.11.95
95/109	Aspects of Nolan - The proposals for Parliament	02.11.95
95/108	Making Jopling permanent: the 1994-95 sittings experiment	01.11.95