

WHAT LIES IN THE PUBLIC INTEREST?

A LEGAL HISTORY OF OFFICIAL SECRETS IN BRITAIN

by

Barbara Ann Hocking*

Synopsis

This paper focusses upon the history, operations and ambit of the United Kingdom's Official Secrets legislation. Through a critical appraisal of the background and uses of the legislation, broader political and legal assertions are advanced concerning the management of particular sorts of information, particularly under the Thatcher administration. It is suggested that the breadth of useage to which the law has been put, means that the term, official secrets cannot be conceptualised narrowly in relation to the activities of the United Kingdom government. In summary, what the paper suggests is that where the framework of the law is technically "what lies in the public interest," a more accurate interpretation of the use of the law might be to question "what lies" have been told to justify the use of the law in troubled political times.

Although this paper does not attempt an exhaustive analysis of the use of the law in relation to the official information of the United Kingdom government, it is asserted throughout that those cases which have been examined exemplify the problematic nature of the notion of public interest and the government interest. It would appear that the British government has resorted to the law as a means of controlling political and official information (between which there is often an uneasy elision) more readily than the government in Australia. Britain has exemplified in this context what Professor Finn has referred to as "public interest paternalism."¹ Indeed, it has been suggested that Britain has developed an obsessive official secrecy mindset. "No other Western democracy is so obsessed with keeping from the public, information about its public servants, or so relentless in plumbing new legal depths to staunch leaks from its bureaucracy."²

It is also contended here that a re-appraisal of the law is particularly critical in the light of what appears to be a continuing tendency on the part of the government of the United Kingdom to control the dissemination of political information. The paper therefore concludes with an examination of the judgments in the *Spycatcher* case (*Attorney-General for the United Kingdom v Heineman Publishers Australia Pty Ltd*³) and with the decision in *Brind v Secretary of State for the Home Department*⁴, attempting to set this series of litigation within both a political and legal context. Both cases are broadly concerned with governmental censorship and narrowly concerned with information management. Both exemplify British constitutional tensions. Indeed, one commentator has recently observed in relation to the *Brind* case that the concerted attempts

* Faculty of Law, Griffith University, Nathan, Q. 4111. Thanks are due to the anonymous referee for suggestions concerning this paper and to the Lionel Murphy Foundation for the 1988 and 1989 scholarships which assisted in research for a PhD (with the University of Queensland Faculty of Law) on political uses of conspiracy law.

1 P Finn 'Official Information (Integrity in Government Project: Interim Report 1)' (ANU Canberra, 1991) Professor Finn notes that contemporary Australian law is in a period of transition from a phase of "governmental authoritarianism" to one of liberal democracy.

2 G Robertson *Freedom, The Individual and The Law* 6th ed. Penguin Books 1989 at 129.

3 (1987) 8 NSWLR 341; (No 2) (1988) 78 ALR 449.

4 (1991) 1 All ER 720.

by British governments at controlling aspects of political information provide “an interesting microcosm of constitutional problems.”⁵ This is a vital issue because the balance between access to, and protection of, personal and official information continues to plague British administrations. This links into broader problems reconciling the revised liberal concept of a “positive notion of government”⁶ with the full citizenship which that entails.⁷

Information management through law and memory

Concepts of criminality are not fixed and the process of “criminalization,” in certain legally contentious areas, can involve a consideration of the public interest and the interests of the government. Where information is of critical public concern it is most likely to become available to the public through the media. The scope of their obligations is defined accordingly around concepts of the public interest exemplified in the epithet the “citizen’s right to know.”

In his article on the *Spycatcher* case, E Barendt said:

“In practice it will be newspapers, and perhaps the broadcasting media, which are most likely to serve the *citizens’* interest in receiving information, which, though confidential, is of legitimate public concern - because it relates to the conduct (or misconduct) of government.”⁸

While the decision by the High Court in the *Spycatcher* case⁹ crystallises around the issue of the management of official governmental information, the case also has significant implications for the role of the courts, the role of the media, concepts of confidentiality and national security. In a significant paper on the *Spycatcher* case, Burnet and Thomas observed in 1988 that “there has been very little attempt at locating the litigation within wider political and legal developments.”¹⁰

It is the contention in this paper that the *Spycatcher* litigation can be located within the long established and somewhat intractable British tradition of resort to official secrecy law. In that context, the words of Williams remain as relevant today as when they were written nearly thirty years ago:

“It is surely desirable that the operation of the *Official Secrets Acts* should be severely confined. They should not be wielded as an all-purpose weapon, whatever the literal wording of their provisions. They should not be invoked unnecessarily - where other appropriate laws are available - or for trivial considerations. Their only admissible purpose in a democracy should be to restrain and punish espionage, gross breaches of trust and gross carelessness in respect of State secrets. They should not be used to intimidate the Press and to encourage a timidity in the handling of official information which in the end deprives an administration of the scrutiny and criticism necessary for efficiency and responsibility. If they are used too readily to stifle exposures of governmental inefficiency and corruption they could become as oppressive as the law of sedition once was.”¹¹

Maher’s salient comments in relation to the use of the law of sedition are equally relevant. Maher suggests that offences which effectively narrow the scope for free speech in a community

5 M Halliwell ‘Judicial Review and Broadcasting Freedom: The Route to Europe’ (1991) 42 *Northern Ireland Legal Quarterly* (No. 3) 246.

6 B Fitzgerald ‘Proportionality and Australian Constitutionalism’ (1993) 12 *University of Tasmania Law Review* 263.

7 *Ibid* at 263 Fitzgerald observes that in “... the postmodern epoch the role of government within our society still presents a perennial problem.”

8 E Barendt ‘Spycatcher and Freedom of Speech’ (1989) *Public Law* 205 at 207.

9 (1988) 62 ALJR 344.

10 D Burnet and R Thomas ‘Spycatcher - The Commodification of Truth’ (1989) 16 *Journal of Law and Society* (No. 2) 210.

11 D Williams ‘Not in the Public Interest: the Problem of Security in Democracy’ Hutchinson & Co London 1965 at 208.

pose a particular threat to the public interest. Nor should new prohibitions on free speech be created, even by the legislature, unless there is the clearest possible indication that this provides a valid protection of the public interest:

“It is submitted that the law should permit the widest possible scope for the expression of ideas and opinions. In the absence of a constitutional guarantee of freedom of expression, legislatures should not create new prohibitions on free speech unless an unequivocally clear and convincing case is made out that a prohibition is essential to protect some vital public interest and that there is not other means available to protect that interest.”¹²

Although Maher’s comments are directed at sedition, which has a highly explicit effect on free speech, they are equally applicable in the context of the issues addressed in this paper. How do we decide what lies in the public interest? Part of the difficulty in assessing the *Spycatcher* litigation lies in the recognition that Wright’s is not a particularly well written or reliable book. It is at this point that law and memory question each other.

Cameron Watt summarizes the acknowledged difficulties in factually relying upon the book:

“A moderately careful reading of Wright’s book, let alone any checking of such statements he makes that can be checked, reveals, as most serious reviews of the book in the American press have shown, that Mr Wright’s command of the facts, let alone his claims to universal knowledge, are such as to cast the gravest of doubts on his credibility where his assertions cannot be so cross-checked.”¹³

Over-reliance cannot be placed on the revelations in *Spycatcher*. Perhaps the kindest personal conclusion reached in a review is in fact Lustgarten’s observation that Wright is clearly “neither fool nor hidebound.”¹⁴ However, Lustgarten also concludes that the significance of the book may well lie more generally in its providing “powerful evidence of the need for greater and continuous parliamentary oversight of the security services.”¹⁵ Not that the book is “riddled with sensational new disclosures of conspiracies.”¹⁶ While their authority may appear questionable, it does at least appear likely that the revelations in the book offer at least partial confirmation for many of the arguments put forward by the British left concerning the extensive domestic surveillance undertaken by British security services over the preceding ten to fifteen years. These claims were often dismissed as paranoia and conspiracy theories. Wright asserts their reliability, it is his contention that the activities of the British security services turned inwards during the 1970’s against a background shift in political circumstances and ideology:

“The Irish situation was only one part of a decisive shift inside MI5 towards domestic concerns. The growth of student militancy in the 1960s gave way to industrial militancy in the early 1970s. The miners’ strike of 1972, and a succession of stoppages in the motor car industry, had a profound effect on the thinking of the Heath government. Intelligence on domestic subversion became the overriding priority”.¹⁷

The vital police intelligence link - Special Branch

An emphasis on the operations of the security services is an important one, and encompasses a consideration of the Special Branch of the police. The British Special Branch, essentially a political force within the police, has formed one of the institutional background pivots to the ambit

12 L Maher ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287 at 290.

13 D Cameron Watt ‘Fall-Out From Treachery: Peter Wright and the *Spycatcher* Case’ (1988) *Political Quarterly* 206 at 207.

14 L Lustgarten ‘Old News (Review of *Spycatcher*)’ (1987) *New Society* (11 Sept.) 26.

15 *Ibid.*

16 *Ibid.* Lustgarten points out that “In a book of nearly 400 pages, Wright devotes exactly four to describing plots and embryo plots which he was invited to join.”

17 P Wright *Spycatcher* Heinemann Publishers Melbourne 1987 at 35.

and operation of the United Kingdom's Official Secrets legislation. While in theory the public police forces should act in the public interest, control of the political police is particularly problematic.

The inter-connected wings of the Security Service in Britain encompasses not only M15 and M16 but also the Special Branch units within the police forces. Special Branches are therefore linked to the protection of national security: their work is essentially concerned with that which is the province of the security services. In each case, they have historically not operated within a clear legal framework, and have not been governed by statute or constitutional law. Indeed, as Narain has observed about the historical development of the British security service, "its existence is extra-legal and extra-constitutional."¹⁸ Up to 1989, the closest equivalent to a form of public control consisted of the Maxwell-Fyfe administrative directive of 1952.¹⁹ However, whatever its operational impact, this Directive officially had no legal force and consequently, the service, which (broadly defined) encompassed the Special Branch police force within a force, operated for many decades within parameters that were essentially internally defined. Although the British security service was placed on a statutory basis for the first time following the enactment of the *Security Service Act* (UK) in 1989, nevertheless, the legislation accorded the service such extremely broad statutory functions²⁰ that the statutory powers appear to have implicitly perpetuated the cloak of secrecy.

The rationale for the inveterate secrecy lies in the recognition by successive British governments that "it would not be in the public interest to give detailed accounts of security matters."²¹ However, stemming directly from this secrecy is a problematic public accountability. It has appeared at times that the United Kingdom's security service has autonomously determined targets and methods of surveillance. The continuing governmental reliance upon legislation such as that dealing with official secrets has served to underscore the independent nature of processes and operations rather than giving effect to appropriate mechanisms of control or re-direction. Rather, through the emphasis upon legal means of protecting official information and processes, various British governments have politicized the area and precluded reasonable debate.

The most formal legally identifiable requirement in relation to the operations of the British Special Branch consists of a mooted link between an authorised surveillance target and the problematic concept of subversion. Special Branches use the classic definition of subversion that was pronounced by Lord Harris of Greenwich in February, 1975 in the House of Lords as being:

"... activities are generally regarded as those which threaten the safety or well being of the state and which are intended to undermine or overthrow parliamentary democracy by political, industrial or violent means."²²

In 1979, this was confirmed as the definition of subversion in the British Parliament.²³ Both limbs of the definition must apply before an activity can rightly be considered to fall within the definition: the requirement is both that the activity threatens the state, and that it is intended to

18 BJ Narain 'Confidentiality, National Security, and the Right to Know - the *Spycatcher* decision' (1988) 39 *Northern Ireland Legal Quarterly* (No. 1) 73 at 75.

19 *Ibid.*

20 KD Ewing and CA Gearty *Freedom Under Thatcher* Clarendon Press New York 1990 at 175.

21 House of Commons, Fourth Report from the United Kingdom Home Affairs Committee Session 1984/5, *Special Branch* at 4.

22 *Ibid* at viii. The Committee refers (at p. 6) in the minutes of evidence to the fact that Lord Harris's definition is an extension of the one proffered by Lord Denning in his report into the Profumo Affair in 1963. Lord Denning pronounced in a narrower formulation that subversives "... would contemplate the overthrow of government by unlawful means."

23 *Ibid* at 22 (Memorandum submitted to the Committee in evidence by the National Council of Civil Liberties). The Fourth Report (at p. 4) says that the "definition was endorsed by the Present Home Secretary when he spoke in a House of Commons debate as Minister of State in the Home Office on 7 November 1979."

undermine or overthrow Parliamentary democracy. Should an activity not satisfy both limbs of the definition, “it is not, by this definition, subversive.”²⁴ Notwithstanding the qualification built into the parliamentary explanation, the British National Council of Civil Liberties has stressed the inherent dangers in a wide and non-statutory formulation of the terms of reference of the Special Branch. By this view, the definition encompassed an extremely broad concept of subversion with the potential to include those seeking to use non-violent means to overthrow the government: that is, it might encompass a wide range of political and industrial activities. The Council suggested to the Home Affairs Committee Report into Special Branch that the remit of the Special Branch should only extend to specific investigation of unlawful criminal activity.²⁵

The scope and constitutional legitimacy of security operations has been problematic throughout western liberal democracies: constitutional legitimacy tended to rest for several decades upon an operational legitimacy connected with the dictates of the Cold War. Thus Wright’s assertion of an inward shift in the activities of the United Kingdom security services, if accurate, represents a decided shift away from what was at that time a more commonplace legitimacy largely politically contingent upon the continuation of the Cold War. A still more recently politically contingent development, however, which has taken place in all the major advanced Western democracies, has been that away from the notion of the implicit legitimacy of the security services, and in the direction of debate and contention concerning their public legitimacy. As Narain has noted, since the *American Freedom of Information Act* US (1966), which is “essentially based on the right to know about public affairs,”²⁶ there has been “a growing movement in the United Kingdom towards a legislative recognition of such a right.”²⁷

However, an examination of the British developments indicates that the development of a comparable notion of security service accountability based on the public right to know has been hampered by the intractable resort of British governments to the official secrets laws where politically sensitive issues have been raised in particularly sensitive political contexts. In Britain, notwithstanding the focus on the criminal justice system occasioned by the revelations of the miscarriages of justice in relation to the Birmingham Six and Guildford Four, nevertheless, a comparable scrutiny has only intermittently been placed upon the ambit and useage of the law dealing with official secrets.

Furthermore, any attempt at enforcing accountability is hampered by the fact that in Britain the Security Service remains essentially “an entirely covert force.”²⁸ The general level of secrecy that pertains to its operations is also underscored by the pattern to attempted parliamentary mechanisms of control, which tend to episodically perpetuate the amorphous requirement of subversion in other conceptual terms. The General Secretary of the National Union of Seamen, Jim Slater, drew attention to the continuing conceptual authorisation of security service and Special Branch operations in his statement to the House of Commons Home Affairs Select Committee Inquiry into the Special Branch:

“...the scope for continued surveillance of non-criminal trade union activities is formally acknowledged in the Interception of Communications Bill, which would justify phone tapping and tampering with mail on the grounds of a threat to the ‘economic well - being of the United Kingdom’. Presumably this definition would be applied to trade unionists

24 *Ibid* at viii.

25 *Ibid*. This would effectively rely upon Lord Denning’s formulation of subversive referred to above, which essentially required that criminal activity must be involved.

26 *Supra* n.18 at 75.

27 *Ibid*.

28 *Supra* n.13 at 208.

taking industrial action and not to City speculators selling Sterling short or to Ian MacGregor planning to close pits and destroy the economic well-being of mining communities."²⁹

Geoffrey Robertson has also commented upon the incorporation of political surveillance into the underwriting of economic priorities through the security network:

"There have been allegations that the Branch has prepared a blacklist of 'political dissidents' for construction-industry employers, and there is startling evidence, uncovered by the Sunday Times Business News in 1974, that a Special Branch officer had been 'infiltrated' into Strachans (a Ford engineering contractor), in the guise of a commercial traveller, to collect information on leaders of a 'sit-in' that had prevented the factory from closing down. Apparently the Branch were operating to assist the management of Ford's to cope with their own internal problems."³⁰

Neither the operational policies of the United Kingdom's Special Branch nor the accompanying prosecutorial policy are confined to or completely circumscribed by statute. Furthermore, the available prosecutorial weapons are seemingly flexible and broad in application. John Pilger recounts that Patrick Connolly, who served in the RAF at Maralinga, was threatened with prosecution by the British Special Branch after he had disclosed:

"... during the two and a half years I was there I would have seen 400 to 500 Aborigines in contaminated areas. Occasionally, we would bring them in for decontamination. Other times we just shooed them off like rabbits."³¹

Many times, national security has encompassed highly notional and convenient security, both at home and abroad. Robertson cites the example of a "detailed and disturbing study of the eating habits of British schoolchildren" which was completed in 1983 and "kept under wraps" until it was leaked in 1986. However, the (now retired) government scientist who had conducted the report was warned by DHSS lawyers that she could not publicly discuss it, due to the continuing nature of the obligation of confidence.³²

It is part of the remit of the British Special Branch to enforce the Official Secrets legislation. Several particularly disquieting features apart from the government information aspects to the law have characterised the prosecutions for a criminal act occasionally initiated under that legislation. The search and seizure powers of police under official secrets law effectively by-pass, in certain instances, more stringent requirements recently formulated under the British *Police and Criminal Evidence Act*. This has facilitated a particularly effective police operational strategy: the obtaining of both evidence and political information through the use of dramatic raids prior to consideration of instigating a legal trial. Robertson cites the example of the 1987 Special Branch raid of the BBC offices in Glasgow and accompanying raid on the homes of three New Statesman journalists in pursuit of journalist Duncan Campbell's *Secret Society* series. This represented a particularly effective strategy in a possible case involving the media as warrants issued under s.2 of the *Official Secrets Act* by-passed the requirement in the *Police and Criminal Evidence Act* that "special procedure" applications for journalistic material should be preceded by a notice to the person in possession of it in order that the application may be contested in court.³³ Thus s.2 appears to be used at times as "a pretext for searches and seizures of journalistic material."³⁴ In the Secret

29 Written evidence to the Home Affairs Committee Report into Special Branch.

30 G Robertson *Reluctant Judas* Temple Smith London 1976 at 46. See also, for a more recent paper on comparable Australian developments, G Carne 'ASIO and economic espionage: The new Subversion?' (1993) 18 (3) *Alternative Law Journal* 117.

31 J Pilger *Heroes* Pan London 1987 at 558. Pilger does not mention the precise charge mooted in this case.

32 *Supra* n.2 at 138.

33 *Ibid.*

34 *Ibid* 139.

Society case, no actual prosecution under s.2 resulted.³⁵ In some of the earlier cases, long term and intrusive domestic surveillance of a wide range of political activity converged into selective targeting of particular individuals for prosecution.

In the light of the pivot provided by the notion of the public interest, cases brought under the ambit of official secrecy laws can therefore be highly politicized. In the British context, resort to the law has often involved a use of the official secrets law in a totally unexpected way and for a totally unexpected purpose.³⁶ It is difficult therefore to construct a comprehensive analysis of the case law: the difficulty is compounded by the fact that very few of the prosecutions under s.2 of the legislation (which deals with possession of information and has been considered a section of “staggering scope”),³⁷ are reported in the Law Reports.³⁸ While reliance upon the law in relation to the protection of official information now encompasses reliance upon other, related legal instruments or procedures³⁹, it is instructive to recall, following *Spycatcher*, what Williams argued in 1965 that:

“Our knowledge of the workings of the central government nowadays is to a very large degree controlled by the *Official Secrets Acts*.”⁴⁰

This might have remained true today in the United Kingdom, but for the fact that, as Fitzgerald has observed, the “...sea change has been ushered in through the EC.”⁴¹

Some Major Theoretical Perspectives

(a) Changes in policing and policing change

In one of the earlier works specifically dealing with this area from both a legal and political perspective, Bunyan examines the scope of Special Branch operations in detail. The specific orientation is that of an analysis of political dimensions to law enforcement: the breadth of this perspective reveals a consistent contradiction between the:

“... liberal democratic right to pursue political ideas and actions contrary to those of the prevailing order, and, on the other hand, the consistent surveillance and harassment of those engaged in activities perceived to be a danger by the agencies of the state.”⁴²

Bunyan advances the concept of “pre-emptive” policing as the fundamental distinction between policing in Britain since the mid-60s. The concept of pre-emptive policing involves two assumptions: that those convicted of a crime are likely to commit another criminal act and that the police have to keep themselves informed about those people likely to commit certain crimes, even though they have committed no criminal offence. While recognizing that those assumptions

35 *Ibid.*

36 *Supra* n.11 at 96. Williams cites the example of a prosecution undertaken in 1935 under the auspices of section 5 of the legislation (which deals with keeping of accommodation) despite the fact that the section was clearly aimed at tracking possible spies. For Williams, such a prosecution illustrates “the elasticity of the law and, above all, the readiness of the courts to interpret the law broadly.”

37 *Supra* n.20 at 138.

38 *Ibid.*

39 Ewing and Gearty note for example, the existence of the purge procedures which restrict those engaged in government employment and have, since the end of the last war, been in operation to purge from the service on security grounds, anyone sympathetic to communism. Those procedures were extended in April 1985 to include a member of or a person sympathetic to a subversive group “whose aims are to undermine or overthrow parliamentary democracy by political, industrial or violent means.” Just over a year earlier, the government had decided that staff at GCHQ, the civilian operated branch of government connected to the security services and providing signals intelligence for the Government, could no longer be permitted to be members of an existing trade union but could only join a Government approved departmental staff association. Ewing and Gearty, *supra* n.20 at 130-131.

40 *Supra* n.11 at 208.

41 *Supra* n.6 at 265. Fitzgerald notes that in Australia, the “solution has been generated by judicial creativity and integrity.”

42 T Bunyan *The Political Police in Britain* Quartet Books London 1976 at 123.

had previously been the informal practice of the uniformed police and CID at the local level, Bunyan argues that the technological developments adopted since the mid-60s facilitated this change in the nature of domestic policing: the formalisation and centralisation of information of this kind marks a qualitatively new aspect of policing. With these changes, the emphasis in investigation has changed, accordingly, from evidence gathering after the commission of a crime to intelligence gathering in advance of any particular crime being committed.

By this view, policing is considered to have shifted fundamentally in the direction traditionally the province of the security services, which is concerned with "estimating degrees of risk."⁴³ This interpretive approach has also been stressed by Hocking, who has noted that recently:

"... although the police forces have generally been considered the appropriate organisations in which to locate domestic intelligence collection, this collection has been expanded at a national and international level to encompass the intelligence collection activities of security services ...".⁴⁴

(b) Information management: corporate and corporatist propaganda

Such policing debates are relevant but the most critically appropriate theoretical arguments for the purposes of this paper are those that have been advanced concerning information management. In setting the litigation over *Spycatcher* in a social and legal context, Burnet and Thomas refer to Carey's characterization of this century as the "Century of Propaganda."⁴⁵ Although not specifically concerned with Carey's exposition of the development of "corporate propaganda," Burnet and Thomas give weight to this idea by linking it into their argument that a realistic recognition of the processes of information management in this century requires a recognition that "control means monitoring rather than exercising authority."⁴⁶ Such control requires flexible decentralized structures which permit "central oversight while also facilitating interchange with other - often rival - networks."⁴⁷ It is therefore not just at the governmental level that the control of information is narrowing in Britain: the processes of governmental control of official information are paralleled by developments in the corporate sector.

Equally compelling, although intended more as a general analysis of corporatist legal arrangements, is Lewis' contention that the British Constitution has been silently yet "increasingly undermined" partly because "an intensification of the processes of centralisation has made the manipulation of popular ideology that much easier."⁴⁸ Shifts in the locations of sites of power underwrite the resulting narrowing of political discourse. Implicit in this development is a subversion - or at least a continuing erosion - of constitutional assumptions. For Lewis, the *Spycatcher* episode is part of a chapter in British governmental history which evidences a commitment to a system of "closed politics."⁴⁹ The resulting concept of governmental obligations is both confined and unique. For:

"... it is understandable that any government should be sensitive to the very special requirements of the security services, but what is unique in the British case is the insistence that the duty is unqualified, that it bends to no higher duty (eg, the maintenance of the ground-floor democratic conditions), and that ministers rather than judges shall be the determiners of the public good."⁵⁰

43 *Supra* n.13 at 208.

44 J Hocking *Beyond Terrorism* Allen and Unwin St Leonards 1993 at 23-4.

45 D Burnet and R Thomas 'Spycatcher - The Commodification of Truth' (1989) 16 *Journal of Law and Society* (No. 2) 210 at 211.

46 *Ibid.*

47 *Ibid.*

48 N Lewis 'Undemocratic Centralism and Neo-Corporatism: The New British Constitution' (1990) XXVIII *Alberta Law Review* (No. 2) 540.

49 *Ibid* at 544.

50 *Ibid.*

The law of official secrets occupies a strategic place within the framework of this system of closed politics. The Thatcher government placed considerable reliance upon this particular area of law as a means of proscribing political debate within the limited guarantees of free speech provided by the British constitutional process. It has therefore been suggested that, while the erosion of freedom of speech has not been solely the province of one political party in office since 1970, yet since the Conservative election victory in 1979, "the process of erosion has become more pronounced."⁵¹ Robertson suggests that when the Government introduced a new Official Secrets bill in 1989 to replace s.2, it acted with the purpose of refurbishing "the criminal law as a weapon for punishing leaks from the intelligence community or which relate to defence and foreign policy, by removing or narrowing potential defences that may have been available under the old s.2 ..."⁵² For Robertson, an examination of what the State had previously prosecuted under s.2 provides some indication of the impact of this recent legislative endeavour.⁵³

The official secrets legislation: was espionage the genesis of the law?

The original Official Secrets legislation was passed by both Houses of the British Parliament in 1911 in the belief that its provisions would strike only at espionage and similar offences. Even if the law was aimed at preparatory activities, it was the activities of spies and saboteurs with which the legislation was concerned. It would appear that the general purpose in enacting the law was simply to strengthen those procedures of law that were available to deal with espionage and the violation of obligations with regard to official secrets.⁵⁴

The emphasis in its political presentation was upon the public interest and the purportedly purely procedural nature of the amendments. The law therefore passed through Parliament with a minimum of debate. Robertson states that the bill "astoundingly" passed through all its parliamentary stages in one day, with no more than one hour's debate, and that, in the course of that time, "s.2 - cunningly inserted between sections dealing with espionage - was not mentioned once."⁵⁵

Robertson saliently asserts that the potential ambit of that section was, and remained, extremely formidable precisely because it failed to distinguish types of information:

"Until 1989 s.2 forbade any of our one million public servants, or any of the further one million civilians employed under Government contracts, from revealing any information about their jobs, or any information obtained in the course of their jobs, if the disclosure had not been 'authorised' by a superior. In legal theory, it was a crime to reveal the number of cups of tea consumed each day in the MI5 canteen."⁵⁶

The 1911 *British Official Secrets Act* was amended in 1920, again (as for the 1911 Act) during a spy scare.⁵⁷ The 1920 amendment to the 1911 Act provided for a new armoury of misdemeanours for a range of actions which were arguably tangential to spying. These included the improper use or wearing of any military, police or other official uniform, forging, tampering with a passport, falsely pretending to hold office under the Crown, unauthorised possession of any seal or stamp belonging to a government department (provided the action was done for the purpose of gaining admission to a prohibited place) or for any other purpose prejudicial to the safety or interests of the state.⁵⁸ It was also provided that the retention, for any purpose prejudicial to the

51 *Supra* n.20 at Preface.

52 *Supra* n.2 at 132.

53 *Ibid.*

54 D Hooper *Official Secrets* Martin Secker and Warburg Ltd London 1987 at 29.

55 *Supra* n.2 at 132.

56 *Ibid.*

57 *Supra* n.11 at 38.

58 *Ibid* at 35.

state, of any official document when there was no right to so retain it, or when it was contrary to one's duty to retain it, should be a misdemeanour. Again, where the misdemeanour required proof of the purpose prejudicial to the State the onus of proof rested upon the defence.⁵⁹

As Hooper asserts, the effect of the amended law was draconian. By these amendments, it was no longer incumbent upon the prosecution to prove that the accused's case was prejudicial to the safety or interests of the state.⁶⁰ Circumstantial evidence or the defendant's conduct or known character would in future be sufficient proof in relation to a purpose prejudicial to the safety or interests of the state.⁶¹

However, the most significant consequence of the amending Act was to provide, through the broadly based s.2 of the legislation, for the creation of an armoury of new offences connected with the "wrongful communication or retention of official documents" including failure to take reasonable care of those documents. Possession of those documents provided a presumption of guilt and the jurisdictional scope of the legislation encompassed an action by an English court to try an offence under the Act wherever it might have been committed.⁶² This exemplifies the incongruous duality of British judicial jurisdiction which survives to this day: it is essentially and generally formulated narrowly in relation to technical areas of law such as criminal conspiracy and broadly in relation to the defence of the public interest in securing the confidentiality of British civil servants. Yet the scope for judicial creative endeavour has been met in each instance.⁶³

However, it remained the theory and intention, even at the time of the passage of this severe 1920 amending Act, that charges under s.1 of the legislation should only be laid in cases involving spying for a foreign power. Indeed, Williams states that this spirit of the law had in fact been the preceding practice: "none of the prosecutions under the Official Secrets Act in the first few years after 1911 was concerned with anything other than espionage proper."⁶⁴ Yet, the 1920 amendment was underscored by a further parliamentary determination to "lay greatest stress upon the need to strike down espionage in all its forms."⁶⁵ By the time that a conference on the *Official Secrets Acts* and freedom of the press was convened in 1938, Dingle Foot was to argue that the severity of the law was stealthily encroaching upon other areas:

"These Acts now constitute a sort of statutory monstrosity abrogating nearly all the usual rules for the protection of accused persons and there is nothing to compare with them anywhere else in our criminal law."⁶⁶

A political perspective

In "The Political Police in Britain," Bunyan also examines the political context to the creation of the British legislation. Writing from a socialist perspective, the legislation is set within the British tradition of the constitutional protection of certain fundamental civil liberties. For

59 *Ibid* at 35-6.

60 *Supra* n.54 at 31.

61 *Ibid*.

62 *Ibid*.

63 See for example the comments by the United Kingdom Law Commission in its Working Paper (No 29) on the Territorial and Extra-Territorial Extent of the Criminal Law, published in 1970: 'As to conspiracies abroad to commit offences in England. We take the view that such conspiracies should not constitute offences in English law unless overt acts pursuant thereto take place in England.' The comments are difficult to reconcile with the widely recognised flexibility and breadth accorded conspiracy law.

64 *Supra* n.11 at 32.

65 *Ibid* at 36.

66 'Freedom of the Press and the Challenge of the Official Secrets Acts' 1938 (speeches at a conference on the Official Secrets Acts and freedom of the press, convened by the NUJ and NCCL) 5 Nov: 6. Also cited in Williams, *supra* n.11 at 71-2.

Bunyan, the denial of the class nature of democratic institutions performs an important legitimating function in overriding the inherently political basis to state actions and institutions. In particular, it leaves implicit the neutrality and impartiality of the criminal law: the criminal law is seen as being free from governmental or political influence and the legislative definition of offences is seen as inherently neutral. Political opposition and the resort to the criminal law to contain political activity are seen as inherently value free. "Working class political action is therefore not seen for what it is, a confrontation of capital and labour, but as action against the interests of all."⁶⁷

In an analysis of the political uses of the criminal law in the United Kingdom, Bunyan turns this theoretical myth around: the fundamental purpose of the criminal law is the maintenance of a political order acceptable to the British ruling class; this was the primary purpose of the secrets legislation:

"The British state has available to it the whole of criminal law for use against political opposition: the laws used against political activists embrace those normally used against the criminal and those for maintaining public order."⁶⁸

For Bunyan, then, even the claim of wartime exigency advanced in support of the 1920 amendment to the official secrets law was by way of a smokescreen: this amendment too, like the purpose of the Acts in general, was primarily aimed at containing internal revolution and controlling internal enemies. By their very nature, the penalties involved were of negligible effect in deterring the activities of foreign agents involved in spying while the reverse was true in internal affairs: the Acts effectively threw a blanket of protection around the internal activities of government and government officials:

"The protection offered by wartime legislation like the *Defence of the Realm Act* (DORA) was coming to an end and the government wished to avail itself of similar defences in peacetime. The 1920 *Official Secrets Act* and the 1920 *Emergency Powers Act* were specifically geared to this need."⁶⁹

Seen from this perspective, the Acts have always constituted repressive political legislation in that their central purpose has primarily been one of political censorship precisely because they were enacted as a means of providing internal rather than external protection to government.

The potential ambit of the law

These laws therefore provide the British government with the potential legal means of criminalization of government employees as well as a means of mounting a prosecutorial attack upon criticism of the government more generally. The importance of the legislation lies both in its providing a means of attack on any possible disclosure of confidential or official information about the activities of the security services and other governmental areas, and in its connection with definitions of "public interest." At its broadest, it has been used as a means of delimiting acceptable boundaries of public debate, public knowledge and political opposition. The further relevance of the *Spycatcher* litigation lies not only in its redefining the concept of the public interest in the narrow legal sense that connects it to the official secrets legislation but more widely in its providing the necessary precedent for breaking with officially prescribed concepts of public interest in legal areas which also possess inherent political and free speech implications.

This block of statute law has provided the backbone to the impenetrable secrecy of the British state and legitimated much of the surveillance activities of the security services. Parallels can be seen between the changes in prosecution policy under the legislation and changes in the activities

67 *Supra* n.42 at 2.

68 *Ibid.*

69 *Ibid* at 3.

of the security services as they shifted throughout the 1970s away from counter espionage and into domestic surveillance. The Attorney-General is the "key figure in the enforcement of the *Official Secrets Act*" and is "deemed to represent the public in assessing the public interest."⁷⁰ Indeed, the Attorney-General's fiat is required for all prosecutions under the legislation⁷¹: a restriction considered "not uncommon in twentieth-century statutes of a political as well as legal character."⁷² Williams suggests that there are clear public policy reasons why enforcement of statutes couched in "such wide terms" ought not be dependent upon the initiative of private individuals.⁷³ Nevertheless, as a corollary, there is little to guard against the use of the law as an oppressive means of prosecutorial law making "or from motives of political persecution."⁷⁴

The central tension which characterizes the use of the legislation lies therefore in the initial narrow ambit of espionage and in its having increasingly proved "both convenient and useful to punish or deter forms of conduct which fall short of espionage and yet should be punished or deterred in the public interest."⁷⁵ For Williams, the initial link with espionage is critical to a subsequent understanding of the expansion of the law: it was always the intention that each of the crucial sections in the legislation be "closely confined in its use."⁷⁶ The explanations for its expansion must lie in a range of politically expedient adaptations and advantages. Yet, although the law has been broadened and adapted, it remains characterized by its original application and purpose in regards to espionage. Williams considers "fundamentally unsatisfactory" the practice of "adapting criminal statutes to purposes for which they were never intended."⁷⁷

The original emphasis on espionage was confirmed by legal stringencies such as the fact of the onus of proof falling on the defence in relation to s.1, a legal measure "solely in order to ease the conviction of spies."⁷⁸ The severity of possible sentences available under the legislation undoubtedly provides a partial explanation for the lifting of the law out of its narrow espionage context. Sentencing under legislation primarily designed for the control of spies endeavours to combine punitive and deterrent functions together with the protection of the realm. Once a broad conceptual approach to the legislation is adopted, it can readily be fitted into a framework for the protection of all forms of governmental and official information. The courts are then placed in an "invidious position" in relation to government: they must either uphold or confront government control of official information while implicitly underwriting the government role in determining the boundaries to political debate. Griffiths argues that "state secrecy is a form of secrecy" resting upon "the patrician assumption" enunciated by Lord Wilberforce in *British Steel Corporation v Granada Television Ltd*. His Honour observed:

"... there is a wide difference between what is interesting to the public and what it is in the public interest to make known."⁷⁹

The cumulative expansionary effect of the cases

The case law fully attests to the extent to which the courts adopted this patrician notion and read it into their approach to the law.

70 *Supra* n.11 at 103.

71 *Ibid* at 101. Although, interestingly, Williams notes that there has traditionally been no technical requirement for the Attorney-General's fiat for a conspiracy case to proceed: an anomaly identified by Williams as one springing from the crime of conspiracy.

72 *Ibid* at 101.

73 *Ibid* at 101-2.

74 *Ibid* at 106 Williams also suggests that the requirement of the Attorney-General's consent to all official secrets prosecutions has also ensured the likelihood that "there shall be no prosecutions likely to embarrass the government." (at 103).

75 *Ibid*.

76 *Ibid* at 115.

77 *Ibid* at 112.

78 *Ibid*.

79 [1981] AC 1096 at 1168.

(a) Prejudicing the state

In the 1963 case of *R v Fell*,⁸⁰ there was no intention, in the passage of confidential information between a senior official in the central office of information and an employee at the Yugoslavian embassy in London, to prejudice the safety of the state. However, the Court of Criminal Appeal held that the offence under the Act was absolute and irrespective of the contents of the documents or the motive behind the communication of the information.⁸¹

A significant broadening of the conceptual application of the law was effected within the framework of a narrow formulation to the context of the legislation in the House of Lords decision in the *Wethersfield* case⁸². The case, *Chandler v Director of Public Prosecutions*,⁸³ provides a significant illustration of prosecutorial law making in order to meet the political exigencies of the day.⁸⁴ The activities of the members of the Committee of 100 (formed to promote the aims of the Campaign for Nuclear Disarmament by non-violent demonstrations of civil disobedience) were prosecuted as a conspiracy to commit a breach of s.1 of the Act. The House of Lords held that the mischief aimed at in s.1 of the Act of 1911, on its true construction, could not be limited to espionage but embraced also acts of sabotage. Therefore, the facts of the case were capable of amounting to a conspiracy to commit a breach of s.1(1) of the Act.

Furthermore, if it was a person's direct purpose in approaching a "prohibited place" to cause obstruction or interference, and such obstruction or interference was found to be of prejudice to the defence dispositions of the State, an offence was thereby committed under the section. The indirect purposes or motives of the accused in bringing about the obstruction or interference did not alter the nature or content of the offence.⁸⁵

The House of Lords therefore ruled that s.1 extended to sabotage as well as to espionage: the Act countenanced the saboteur just as much the spy. Lord Radcliffe commented in the course of judgment that the protesters in question were saboteurs within the range of the Act despite the fact that they "wished to use their obstruction and interference as a demonstration in the hope that through some long process of agitation and persuasion the policies they canvassed would be adopted."⁸⁶ The short-term purpose of the protesters - to obstruct the airfield - was considered decisive in relation to liability under the Act. That the longer term purpose - compelling the government to abandon nuclear weapons - might be in the interests of ("or, at any rate, non-prejudicial to the interests and safety of the state") was not considered justiciable as a decisive means of determining the required purpose and consequent offence under the Act.⁸⁷

By this judicial interpretation, there is no scope within the context of the *Official Secrets Act* for a political argument concerning the merits of the deployment of nuclear weapons in relation to the interests of the state. This political matter is simply "not justiciable" in the context of legislation designed to protect state secrets and the instruments of the State's defence. The principle formulated in this case is that it is up to the Government itself to determine the boundaries to that which is prejudicial to the interests of the state: the intentions of the defendants

80 (1963) Crim LR 207, cited in Ewing and Gearty, *supra* n.20 at 138.

81 *Ibid.*

82 *Supra* n.11 at 106. The case concerned the prosecution of members of the "Committee of 100", whose aim was to further the cause of nuclear disarmament by demonstrations of civil disobedience. As a result of a demonstration held at Wethersfield airfield in 1961, six leading members of the Committee were arrested and charged with conspiring to incite others to commit and conspiring to commit a breach of Section 1 of the Act by entering a prohibited place for a purpose prejudicial to the safety or interests of the state. The airfield was a prohibited place under Section 3 of the Act.

83 (1962) 3 WLR 694.

84 *Supra* n.11 at 113.

85 *Supra* n.83 at 695.

86 *Ibid* at 708.

87 *Ibid* at 709.

involved are irrelevant. Where national security is the paramount concern, the broader context to the political motives of the defendants do not take a "triable form."⁸⁸ As Hewitt has noted, the House of Lords in this case, in holding that the defendants' own intentions were irrelevant, implicitly held that it is up to Government to determine what is prejudicial to the interests of the state and that the rationale for this view is the paramountcy of national security.⁸⁹

Another consequence of this formulation was that the severe penalties available under s.1 (of fourteen years for spying) were held applicable also to saboteurs and the protesters were jailed for eighteen months.⁹⁰ Williams has questioned the appropriateness of this prosecution, noting that prosecution was actually possible under various other laws and suggesting that this was not the occasion to seek an extension of what had until then been understood as the range of s.1 of the Act.⁹¹ A similar view concerning the appropriateness of prosecution policy from a legal just as equally as a political perspective has been expressed in theoretical comment concerning the uses of the Act since 1978.⁹²

(b) Communication of information

In *R v Galvin*⁹³ the Court of Appeal also considered the question of communication of information. The appellant controlled a company which bought and sold spare parts for military aircraft and ships and wished to supply spare parts to Argentina, with whom Britain had recently been in conflict. In order to identify the parts required, reference to a Ministry of Defence manual which was classified as "restricted" was required. However, the Ministry had disseminated without restriction parts of the relevant information in tender documents and had supplied copies of the manual for the aero version of the engine to purchasers of aircraft. The appellant arranged to obtain a loan of the manual through a company which had contracts with the Ministry. The Court held that the onus lay with the Crown to prove that the communicator of the relevant information was not authorised to communicate it to the recipient. The appellant was convicted on one count of unlawful reception of a document, contrary to s.2(2) of the *Official Secrets Act* 1911 and one count of conspiracy to use information for the benefit of a foreign power, contrary to s.2(1)(aa) of the 1911 Act and s.(1) of the *Criminal Law Act* 1977.⁹⁴ The case turned on whether the Ministry of Defence, by disseminating the manual and the information in it as widely as it had, without restriction as to its future use, had impliedly authorised anyone who came into possession of it to make such use of it as they saw fit. The jury had not been directed to that effect and the appeal was therefore allowed.

In the course of judgment, Lord Lane CJ commented that the provisions of the Act did not cease to be applicable by virtue of the fact that the material in question had already been published or made public and brought within the public domain. The provisions:

"... unambiguously define the type of material which is protected, the type of person who is under a duty not to communicate it, the circumstances under which the recipient of such communication may be guilty of an offence and the matters which may offer him an excuse."⁹⁵

Related political argument is again considered outside the parameters of the interpretive context to official secrets law: that the transactions of the spare parts were to the Argentines and (erroneously) therefore regarded by the parties as illegal, is mentioned within the framework of "additional complications."⁹⁶

88 *Ibid* at 712.

89 P Hewitt *The Abuse of Power* Martin Robertson Oxford 1982 at 51.

90 *Supra* n.54 at 31.

91 *Supra* n.11 at 115.

92 *Supra* n.20 at 139. The authors observe in relation to the uses since 1978 that "it is questionable whether the *Official Secrets Act* was the most appropriate vehicle for dealing with many of these cases."

93 (1987) 2 All ER 851.

94 *Ibid* at 852.

95 *Ibid* at 855.

96 *Ibid* at 856.

*R v Bingham*⁹⁷ was also concerned with a communicative offence under the Act. The case concerned the ingredients of an offence under s.7 of the 1920 Act of doing an act preparatory to the commission of an offence under the 1911 Act. The appellant had been convicted of communicating to a foreign power, for a "purpose prejudicial to the safety or interests of the state," information that was "calculated to be or might be or was intended to be directly or indirectly useful to an enemy" contrary to s.1 of the 1911 Act.⁹⁸ The Court of Appeal held that it was sufficient for the purposes of the provisions of the Act that it be shown that the appellant realised that the transmission of prejudicial information was possible: the Court rejected the narrower test that the transmission of prejudicial information be probable.

(c) Need the information be secret?

In 1919 a clerk in the war office was prosecuted under the Act for passing on information relating to contracts between the war office and government contractors. The information was not secret, nor was there any suggestion that the interests of national security had been compromised. Nevertheless, again the absolute nature of the offence prevailed and a conviction was secured.⁹⁹

A prosecution in 1970 spearheaded the establishment of the Franks Committee to investigate s.2 of the *Official Secrets Act*.¹⁰⁰ The Attorney-General authorised the prosecution of a journalist, Jonathan Aitken, and the editor of the *Daily Telegraph* for disclosure of a secret army document which contained information about the Biafran war that was at variance with the Prime Ministerial statements to Parliament on the matter. Part of the defence argument was that both journalist and editor were under a moral duty to make the information available to the public in order to rectify the statements made in the House. The technical legal argument that was accepted however turned on the question of *mens rea*. It was argued that there was no "chain of guilty knowledge"¹⁰¹ as one of the effective participants in the passage of the documents that led through to the paper had not been prosecuted. The weakness in the "chain of guilty knowledge" argument was emphasised by the judge, who furthermore, "... in a sympathetic summing-up told the jury that it was high time that s.2 was pensioned off."¹⁰² All the defendants were acquitted. Robertson considers this case to mark the "decline of s.2."¹⁰³

Official secrets law was drawn upon again in 1978 in order to prosecute the investigative journalists, Duncan Campbell and Crispin Aubrey and an ex-British soldier, John Berry, for a criminal offence under the Act in the so-called ABC prosecution. The protracted two year case concerned the protection of military information which had been made available to Campbell, a journalist¹⁰⁴ who had published an article called "the Eavesdroppers" in 1976. The article comprised a detailed description of electronic eavesdropping by Government communication headquarters on military traffic and diplomatic and commercial communications.¹⁰⁵ This was the first public indication that the function of GCHQ was in fact the interception of communications.¹⁰⁶ In his defence, Berry relied upon the argument that moral duty justified his action in the

97 (1973) 2 All ER 89.

98 *Ibid.*

99 *R v Crisp* (1919) 83 JP 121, quoted in Ewing and Gearty, *supra* n.20 at 138.

100 The Report was considered "a very disappointing document" which in its concern to strike a balance between openness and secrecy, recommended that s.2 be replaced as part of an *Official Information Act*, which would be drawn more narrowly, so as to catch a narrower band of information within the criminal law. Criminal sanctions would therefore protect only "what is of real importance." Ewing and Gearty, *supra* n.20 at 189-90.

101 R Thomas 'The British *Official Secrets Acts* 1911-1939 and the Ponting Case' in RA Chapman and M Hunt *Open Government* Croom Helm London 1987 at 106.

102 *Supra* n.2 at 134.

103 *Ibid.*

104 See M Frankel 'Making an Ass of the Law' (1989) *New Statesman and Society* 28. Frankel observes that all four instances where journalists have been prosecuted over the past thirty years have involved information about police or military matters.

105 *Supra* n.54 at 104.

106 *Supra* n.2 at 134.

passing of the information to Campbell without authority.¹⁰⁷

The so-called ABC case had significant political and legal ramifications. Like the Aitken case, it was initiated by a Labour government¹⁰⁸ on the basis that the publication of the information obtained by Campbell was harmful to the security of the state. The “staggering scope” of s.2 of the 1911 Act in relation to the possession and communication of information provided the basis to the prosecution of the two journalists and of the source of the information. Charges were originally laid against Campbell under s.1 (usually reserved for spying) of the Act on the basis that “for a prejudicial purpose he had collected information that might be useful to an enemy.”¹⁰⁹ However, the s.1 charges against Campbell were later dropped in the course of the defence.¹¹⁰ This was presumably because s.1 has always been more explicitly directed at spying whereas s.2 is directed at a range of activities and people.

Nevertheless, the Crown vigorously pursued the charges laid against the defendants under s.2 of the Act. The use and interpretation of the law therefore entered a new political dimension with this prosecution and several further political and legal aspects to the trial warrant consideration. The case revealed both control over information gathering and the surveillance of political activity by police and was simultaneously underscored by revelations of subtle strategies of news-media manipulation. A political campaign by the police in favour of politically screening the jury, represented as a “more efficient” way of implementing the law, emerged and seemed to consolidate during the course of the trial.¹¹¹ In mobilising the forces of law enforcement in this way, the case provides a significant illustration of Williams’ contention that the old presumption that penal statutes should be interpreted strictly in favour of the liberty of the individual has “never played any part in the evolution of official secrets law.”¹¹²

Another interesting aspect of the ABC case relates to the critical elements to the more recent findings in the *Spycatcher* litigation. It has been suggested that one of the most distinguishing features of the evidence in the ABC case was the public availability of that evidence.¹¹³ The case also has significant implications for the lengths to which the British government subsequently also pursued Peter Wright through the courts. The pattern to prosecution policy appears to have consolidated during the ABC case and Campbell too fell foul of the *Official Secrets Act* yet again. The law was subsequently used as a means of intimidating him concerning a programme he made called “Secret Society” in 1987. Search warrants were issued under s.9 of the Act which section (of “quite extraordinary scope”) grants extensive powers of search warrant where there is reasonable grounds to suspect that an offence has been or is about to be committed under the Act.¹¹⁴

107 Thomas, *supra* n.101 at 111.

108 *Supra* n.54 Preface. Robertson states in relation to the Aitken case: “The defence claimed the case was a ‘political prosecution’, initiated by a petulant Labour Government ...”.

109 A Nicol ‘Official Secrets and Jury Vetting’ (1979) *Criminal Law Review* 284 at 285.

110 *Supra* n.89 at 51.

111 *Supra* n.109.

112 *Supra* n.11 at 96.

113 *Supra* n.109 at 286. It would appear that at least some of the evidence in this case had been ‘officially published’ before the trial.

114 *Supra* n.20 at 150.

Related more recent prosecutions

It appears to be accepted wisdom that the British reliance upon the *Official Secrets Act* changed direction in the mid-1980s.¹¹⁵ In an analysis of the “insidious process of erosion” of the constitutional guarantees found in pre-corporatist Britain, Lewis points to the recent uses of the *Official Secrets Act* and “other accompaniments of state security law.”¹¹⁶ For Lewis, the *Tisdall* (*Guardian Newspapers Ltd v Secretary of State for Defence*)¹¹⁷ and *Ponting* (*R v Ponting*)¹¹⁸ cases exemplify the increasing steps in the process of “closed politics.”¹¹⁹ These cases proceeded on a slightly different basis, in that they represented, more overtly, attempts to protect the government from political embarrassment.¹²⁰ The issue in the *Tisdall* case has been identified by Hooper: “The issue in this case was whether the interests of national security overrode the fact that the return of the memoranda would reveal Miss Tisdall’s identity as their source.”¹²¹ What is particularly interesting about the *Tisdall* case is the uneasy elision between protection of national security and against government embarrassment. The documents Tisdall leaked revealed that the Government was uneasy about the delivery of the missiles and that a statement would be made to Parliament after and not before the delivery so as to focus attention upon the position of the Government and control Opposition and peace movement reaction.¹²²

In *Tisdall*, at the specifically legal level, the government tested the efficacy of the statutory defence available to newspapers¹²³ which granted protection to journalists with respect to their sources of information. The case comprised one means of identifying the person who had supplied the documents: the aim in seeking the court intervention was the facilitation of a prosecution on this basis. For the purpose of the protection of the public interest, the Court was effectively placed in an active interventionist role. Disclosure could be required under the Act if the Court was satisfied that such disclosure was necessary in the interests of national security, justice or the prevention of disorder or crime.¹²⁴ At first instance, Scott J ordered on 15 December 1983 that the documents should be given back. The next day, this decision was affirmed by the Court of Appeal.¹²⁵ The consequent performance of forensic tests facilitated the identification of Tisdall as a prime suspect in the matter.

Despite a close division within the House of Lords on the issue, the decisions of Scott J and the Court of Appeal were upheld in July 1984 and the order for the delivery up of the documents was confirmed. The interests of national security underpinned the House of Lords holding that

115 For example, Robertson comments that “Since 1986 the Government has abandoned prosecutions under the Official Secrets Act and used civil actions for breach of confidence as a substitute, claiming that any book written by a civil servant could be embargoed.” Robertson refers to the use of the interim injunction to effect a power to censor, noting its use in cases as diverse as suppression of material concerning the background to Thalidomide manufacture, the “financial manipulations” of James Slater, the “law-breaking” of MI5 and the “sex life of the Rolling Stones”. Where the courts “obligingly” grant these interim injunctions, it leaves “the merits of ‘public interest’ defences to be decided at trials in years to come.” *Supra* n.2 at 258.

116 *Supra* n.48 at 544.

117 (1984) 3 ALL ER 601. Sarah Tisdall, a junior civil servant employed in the private office of the Foreign Secretary, copied documents concerning the security arrangements that had been made in relation to the arrival of the Cruise missiles which encompassed also consideration of contingency plans with respect to the Greenham Common women and the possibility of US servicemen opening fire. Tisdall ‘leaked’ the documents to the *Guardian* newspaper which published an article based on the information contained therein: the government therefore investigated the leak.

118 (1985) Crim LR 318. Clive Ponting leaked information concerning the sinking of the General Belgrano during the Falklands war. The government used the powers under s.8 of the *Official Secrets Act* 1920 and s.4 of the *Contempt of Court Act* 1981 to muzzle the media and therefore stopped the information from being made public.

119 *Ibid.*

120 *Supra* n.20 at 139.

121 *Supra* n.54 at 126-7.

122 *Supra* n.20 at 140.

123 Through s.10 of the *United Kingdom Contempt of Court Act* 1981.

124 *Supra* n.20 at 141.

125 *Ibid* at 140.

the identity of the disclosing person must be established and the documents returned. Nevertheless, Lord Scarman alluded to the problem upon which so much of the British government's case in *Spycatcher* foundered: that it was not enough for the government to simply assert that a document was secret; secrecy might be motivated by fear of political embarrassment and asserted in relation to documents whose contents were innocuous from a national security perspective.¹²⁶

However, the judiciary for the most part ignored the artificiality of the elision which had been developed between the arguments concerning information which was official and hence considered secret and failed to point the way towards a reformulation of the concept of public interest in this area.

The *Ponting* case concerned the passing by Ponting, a senior civil servant in the Ministry of Defence, of two official documents to a member of Parliament as a means of informing Parliament and the public that Ministers had misled the Parliament and intended to mislead a select committee about the Belgrano affair. Ponting was prosecuted under s.2(1)(a) which was part of the original 1911 Act. As noted, that section provides that it is an offence for a person holding office under Her Majesty to communicate official information to any person with the exemptive protection provided by "other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it." The case raised particularly interesting questions about the conceptual and legal elision between the interests of the State and the public interest.

Ponting was acquitted and galvanised considerable public support by an effective media campaign.¹²⁷ Ponting's defence rested upon the argument that the wide definition of "State" meant the "organised community."¹²⁸ By this argument, the interest of the State and the public interest are synonymous and Ponting was under a wider moral or civic duty to communicate the information in the *public* interest. The trial judge, however, conceptualised the duty in a narrow framework, delimiting an official duty from a moral or civic duty.¹²⁹ By this view, duty arises by virtue of one's office and can be contrasted with civic duty. By this view, too, the interests of the state are the interests of the Government of the day.

As Professor Finn observes "both propositions are contestable - the first because it appears to be inconsistent with the first exemption" (from the official secrecy offence provisions of the Commonwealth *Crimes Act* 1914, s. 79) and "the second, because it assumes an unrestricted entitlement of the organs of government to act in ways which may in fact be contrary to their constitutional duty."¹³⁰ Thomas has also critically alluded to the significance of the narrow formulation of the duty in *Ponting*:

"This judicial ruling removed the scope for either any unauthorised disclosure or any moral or civic duty to act in the public interest, so defeating the legal basis of Ponting's defence."¹³¹

Officiality, confidentiality or censorship?

The most significant common thread that runs through this brief selection of cases decided under the ambit of British official secrets law concerns the narrow use of the law as a means both of ensuring the confidentiality and security of government servants and places and the far broader

126 *Supra* n.20 at 143.

127 *Supra* n.101.

128 *Ibid* at 104.

129 *Ibid*. Citing *The Observer*, 10 February 1985.

130 *Supra* n.1 at 242 Finn refers to the the *Crimes Act* exemptions from its official secrecy offence, that is, communications which are made (a) to a person to whom the official is authorised to communicate the information or (b) to a person to whom it is, in the interests of the Commonwealth, the official's duty to communicate it. The Australian exemptions derive from the now repealed British law.

131 *Ibid*.

use of the law as a means of proscribing the boundaries to political debate and public interest. The identification of a lack of clarity concerning the need for information to actually be official and secret and not available publicly in order to fall within the ambit of the law provides a critical link into the more recent *Spycatcher* litigation. The apparent symbiosis of official with secret indicates that, as Lewis claims, a constitutional narrowness - an equation of "the state" with the prime minister"¹³² has underwritten British prosecution policy in this area in recent years.

This argument is exemplified by Lewis' contention that the acquittal of Ponting, which seemed to contradict the instructions of the trial judge, led the British government to develop a different strategy in relation to official secrets management. Reliance upon criminal prosecutions gave way therefore to the "(developing) civil law of confidentiality."¹³³

Ewing and Gearty note that a major development in this area was the decision in *Attorney-General v Jonathan Cape Ltd*¹³⁴ in 1976. Prior to that decision, it appears that the law of confidentiality had mainly been restricted to personal and private rights. However, the Lord Chief Justice pronounced in this case that public rights ought equally be drawn into the confidentiality net, stating that he saw no reason why "courts should be powerless to restrain the publication of public secrets."¹³⁵ Although stating the principle, nevertheless, in the instant case the Court declined to grant an injunction to restrain publication of the diaries of Richard Crossman. Lord Chief Justice Widgery also stated that restrictions must not be imposed beyond "the strict requirement of the public need."¹³⁶ Of further importance for the *Spycatcher* saga is the fact that the law had also been relied upon in this context in 1980 in Australia.

A comparable Australian action

Before turning to the *Spycatcher* cases, it is instructive to examine an action which was taken by the Commonwealth of Australia as a clear attempt to control official information. That action provided one clear instance of a comparable attempt by the Commonwealth government to restrain publication of particularly sensitive official material and hence to restrain the media in the public interest. The case, *Commonwealth of Australia v John Fairfax & Sons Ltd and Others*¹³⁷, concerned the intended publication in two newspapers of extracts from a book entitled "*Australian Defence and Foreign Policy 1968-1975*" and from a defence policy document and a Department of Foreign Affairs document on South East Asia. The Commonwealth was granted *ex parte* injunctions directed against the publishers to restrain publication of the documents.

The Commonwealth argument contended that the material to be published included confidential Government information, the publication of which would allegedly prejudice Australia's foreign relations. Justice Mason succinctly expressed the basis to the legal action, noting that the foundations of the equitable principle invoked here traditionally lay in the protection of "the personal, private and proprietary interests of the citizen."¹³⁸ In this case, however, the Court was being asked to formulate confidentiality in relation to official information and "the very different interests of the executive Government"¹³⁹:

"... the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."¹⁴⁰

132 *Supra* n.48 at 545.

133 *Ibid* at 544.

134 (1976) QB 752.

135 *Supra* n.20 at 154.

136 *Attorney-General v Jonathan Cape Ltd* (1976) QB 752 at 770-771.

137 (1980) 147 CLR 39.

138 (1981) 55 ALJR 45 at 49.

139 *Ibid*.

140 *Ibid*.

In delivering judgment, Mason J stated that the court will not prevent the publication of information simply because it throws light on previous machinations of government, even where it is not public property, "so long as it does not prejudice the community in other respects."¹⁴¹ It is suggested that in certain circumstances, disclosure might in itself serve the public interest "in keeping the community informed and in promoting discussion of public affairs."¹⁴² The appropriate formulation is recognized to be an imprecise and delicate one:

"If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."¹⁴³

Thus, although the Australian Court agreed with the balancing formulation pronounced by the Lord Chief Justice in *Attorney-General v Jonathan Cape Ltd* it decided that in this case also, the circumstances were not such as to warrant the granting of an injunction. Of further significance, however, is the decision in the case concerning copyright: the Court declared Commonwealth ownership of copyright in classified Government documents and this recognition effectively accorded the government a degree of protection of the documents. Justice Mason referred to the obstacles in the way of to a s.41 of the *Copyright Act 1968 (Cth)* defence of "a fair dealing" with the plaintiff's documents "for the purpose of criticism or review" in which "a sufficient acknowledgment of the work" was made.¹⁴⁴ There was no consent on the part of the author as the documents had been leaked: furthermore, "fair dealing" could not encompass the argument that dealing with unpublished works of government differed from that in relation to private authors, "merely because that dealing promotes public knowledge and public discussion of government action."¹⁴⁵ Nor could the public presentation of documents upon which the government had placed a secrecy blackout be considered criticism and review: any criticism or review merely comprised a "veneer" with the precise aim of "setting off what is essentially a publication of the plaintiff's documents."¹⁴⁶ Justice Mason noted that while the common law defence of public interest applied to disclosure of confidential information, public interest might also be a defence to infringement of copyright. The ambit to that defence is clearly enunciated:

"Assuming the defence to be available in copyright cases, it is limited in scope. It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public. So far there is no recorded instance of the defence having been raised in a case such as this where the suggestion is that the advice given by Australia's public servants, particularly its diplomats, should be ventilated, with a view to exposing what is alleged to have been the cynical pursuit of expedient goals, especially in relation to East Timor. To apply the defence to such a situation would break new ground."¹⁴⁷

Nor did Mason J consider the enforcement by injunction of the plaintiff's copyright in documents to amount indirectly to protection of the relevant information contained in the

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Ibid* at 50.

145 *Ibid.*

146 *Ibid* at 51.

147 *Ibid* at 50-51.

documents. His Honour observed that to advance such a conflation “is to confuse copyright with confidential information.”¹⁴⁸

Thus, it would appear that this body of cross-jurisdictional law might periodically offer strategic advantages to government in the protection of its information and equally that it is incumbent upon government itself to tighten the terms and conditions of employment of its employees. In Britain, while such a prosecution against Wright lay outside the ambit of the *Official Secrets Act*, those actions that were pursued might also effectively have achieved the same purpose as so much of the more specifically directed earlier law: official secrecy. However, the High Court decision in *Spycatcher* eroded the British government monopoly on defining the public interest by defining public interest into an action for breach of confidentiality and so threatening the British government’s limited concept of citizenship and notion of “acceptable world-views.”¹⁴⁹

The most recent phase to British official secrecy: litigation over *Spycatcher*

(a) The Australian cases

The protracted litigation over the publication of Peter Wright’s memoirs - the book *Spycatcher* - had its legal basis in the British Government’s decision to prosecute the former MI5 officer for breach of his life-long duty of confidentiality. However, the political context to that prosecution had its basis in the official secrecy that has been increasingly underwritten with a British legal agenda. The issue which was eventually to confront the High Court when it had to adjudicate on the matter was whether the United Kingdom government could prevent publication of *Spycatcher* in Australia. At that point, the case required resolution concerning the enforcement of the claims of a foreign state. The majority established that as a matter of principle, the court will deny enforcement of a foreign public law; a broader principle, concerned with a different form of public law, now applies to the pre-existing rule concerning the non-enforcement of penal and revenue laws.

Therefore, the Court decided “mainly on international law grounds.”¹⁵⁰ Howard sets the significance of the High Court decision firmly within its public law perspective in alluding to this critical aspect of the High Court decision:

“A further consequence is that what were previously termed ‘public’ laws of a foreign state can be seen as another manifestation of the broader principle and, therefore, are unenforceable. The statement of this broader principle which can be seen as having underpinned the previous non-enforcement of foreign penal and revenue laws is the central importance of the *Spycatcher* decision.”¹⁵¹

While the case for a ban was pending in Australia, the memoirs were published in America. Narain suggests that constitutional considerations explain the decision not to attempt to block publication in the United States. Despite the stringent efforts made by the British government in

148 *Ibid* at 51. The decision has recently been referred to in *Johns v Australian Securities Commission* (1993) 116 ALR 567. Toohey, J refers to the decision in stating ‘It is clear that in a proper case the courts will restrain the publication of confidential information.’ (*Johns*, at 598) and McHugh J observes ‘In *Commonwealth v John Fairfax & Sons Ltd*, Mason J said that equity may restrain the use of information where it is shown “not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be an unauthorised use of that information to the detriment of the party communicating it.” (*Johns*, at 613).

149 *Supra* n.9 at 545.

150 *Supra* n.20 at 156.

151 M Howard ‘*Spycatcher* Downunder: *Attorney General for the United Kingdom v Heinemann Publishers Australia*’ (1989) 19 *The Western Australian Law Review* at 160.

Australia, no comparable attempt to block publication was made in America “presumably because such an attempt would certainly have failed in the face of the First Amendment of the United States Constitution which guarantees freedom of expression.”¹⁵² That a different position was presumed to apply in America is also referred to in the judgment of Scott J in relation to the injunctions which were sought in England in *Attorney-General v Guardian Newspapers and Others*.¹⁵³ His Honour suggests that the guarantee of free speech in the First Amendment to the United States Constitution has resulted in it becoming law there that prior restraints against publications by newspapers simply cannot be obtained. Clearly, however, the United Kingdom government considered that Australia, lacking any comparable constitutional guarantees, might through its courts enforce the life-long duty of confidentiality which British Official Secrets law imposed upon Wright both at the time of his appointment and at the time of his resignation. Thus, the simple fact of fledgling Australian constitutional capacity to protect freedom of speech is implicit in the United Kingdom government’s decision to persistently pursue the case through the Australian courts.

The Australian litigation concerned several claims by the British Government. It was claimed that “the proposed publication of *Spycatcher* amounted to a breach of fiduciary duty, a breach of the equitable duty of confidence or, alternatively, a breach of the contractual obligation of confidence on Mr Wright’s part.”¹⁵⁴ All these issues were considered by the first two Courts to consider the matter.¹⁵⁵ However, by the time that the litigation reached the High Court, the British Government’s claim had devolved into one precise claim and was characterized as one claim in the High Court formulation.

The majority Judges in the Australian High Court in fact adopted the characterisation formulated by the majority in the New South Wales Court of Appeal and “treated these three alternate personal claims as being manifestations of one broad claim by the United Kingdom Government.”¹⁵⁶ As Howard notes, the characterisation of the United Kingdom’s case in broader terms than the simple enforcement of personal rights against Wright, is of crucial significance for the outcome of the High Court decision.¹⁵⁷ This enabled the Court to formulate the claim within a public law framework and to divorce the claim from one purely concerned with a servant’s loyalty and duty of confidentiality to their master. The Court held that far from the attempted enforcement of a private right in relation to the obligation of confidentiality, the claim represented “in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Services.”

By this view, the Court injects the duty of confidentiality with public interest. A major objection has been raised to the Court’s approach by Mann, who suggests that this reasoning is based upon the erroneous reasoning of Lord Widgery in *Attorney General v Jonathan Cape Ltd* by means of which His Honour “wholly inexplicably and wholly unjustifiably” introduced the notion of public interest as a “constituent element” into the claim for breach of confidence.¹⁵⁸

152 *Supra* n.18 at 76.

153 (1988) 2 WLR 805.

154 (1988) 62 ALJR 344 at 344.

155 At first instance, before Powell J (1987) 8 NSWLR 341; and in the New South Wales Court of Appeal (1987) 10 NSWLR 86.

156 *Supra* n.151 at 162.

157 *Ibid.* Howard also notes that the High Court decision can therefore be contrasted with that at first instance, where Powell J devoted a “considerable portion” of the judgment to defining the precise nature of the relationship between Wright and the United Kingdom Government.

158 FA Mann ‘*Spycatcher* in the High Court’ (1988) 104 *Law Quarterly Review* 497 at 498.

According to this interpretation, a *non sequitur* flaws the High Court's reasoning. The point is that the duty of confidentiality is not the creation of the law of England: it is therefore wrongly characterised as a form of governmental obligation and creation; the duty of confidentiality is an expression of the "contractual and equitable rights vested in employers."¹⁵⁹ By this view, the obligation of confidentiality cannot be taken out of its proper place within the domain of contractually bound employment and placed in the public domain where it is considered that a matter of public interest arises. It is not a form of governmental obligation and hence not connected with our broader notions of public interest and citizenship, but incidentally connected with government where it is simply part of employment by the government. Thus we see in the debates the significance of the characterization of the action.

A major deliberation on the *Spycatcher* matter took place in the New South Wales Court of Appeal in 1987. The three majority members of the Court characterized the case as one relating not to a private right such as an ordinary employer might have against their employee but more in the nature of the assertion by the Attorney-General of a public right. Justices Kirby and McHugh "differed between themselves as to the basis on which the relief sought by the appellant should be refused."¹⁶⁰ Justice Kirby considered the action one for the enforcement of the public law of secrecy imposed by statutes, common law and prerogative in the United Kingdom against officers and former officers of the security services of the United Kingdom and noted that the grant of relief would be inconsistent with the principle that Australian courts do not enforce the public law and policy of a foreign state.¹⁶¹ Justice Kirby also expressed the view that the obligation of confidence had come to an end because much of the information had entered the public domain.¹⁶² Justice McHugh however, took the view that as there was no contract between the parties, the appellant could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom: the Australian courts would not entertain an action requiring them to make such a judgment.¹⁶³ Chief Justice Street "acknowledged the existence of the principle that Australian courts will not enforce a foreign government's claim deriving from the entitlement of a state to protection against harm to the public interest of that state, the claim sought to be enforced being, in his Honour's opinion, one of this kind."¹⁶⁴

The New South Wales Court decided that the Attorney-General's case was not justiciable in an Australian court: it could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom; courts would not entertain an action requiring them to make such a judgment. Wright should be allowed to publish partly due to government complicity or complacency:

"... principally because the UK Government had either not prevented or in one case (Chapman Pincher's book 'Their Trade is Treachery') had acquiesced in the publication of all the information in *Spycatcher*."¹⁶⁵

Such a view draws attention to the government's motives in pursuing Wright so determinedly through the courts on this matter. The majority of the High Court noted that the case for relief against Wright, while comprising three distinct legal and equitable bases, took as its foundation

¹⁵⁹ *Ibid* at 501.

¹⁶⁰ Referred to at (1988) 62 ALJR 344 at 345.

¹⁶¹ *Ibid*.

¹⁶² Justice Kirby's view on this matter is referred to in *Johns v Australian Securities Commission* (1993) 116 ALR 567 at 604 where McHugh J suggests that "it seems that this view was based largely, if not entirely, on the fact that MI5 had authorised, or acquiesced in, earlier publications of the information, or significant parts of it."

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ J McDermott 'The European Court judgment in *Spycatcher*' (1992) *Media Law and Practice* 137.

“the peculiar relationship between the United Kingdom Government and Mr Wright as an officer of the British Security Service, being a security service engaged in counter-espionage activities.”¹⁶⁶

The fundamental principle laid down by the majority judges in the High Court decision in the *Spycatcher* case concerns the enforcement of British laws by a foreign state. While not part of the characterisation of the claim, inevitably consideration is also given to the incidental question of the scope of confidential obligations with respect to a public official. Several now familiar further features in the judgment are significant. It is emphasized that the material in question was already in the public domain: the world wide dissemination of the information in question appears to offset the duty of confidentiality lying on newspapers in relation to the information in the book.

In their joint judgment,¹⁶⁷ Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ emphasize the central consideration of the competing claims of confidentiality and the public interest in publication. Again, we witness an attempt at asserting the public interest within a perspective that breaks with the long-term British government stranglehold which seemingly views the public interest devoid of the British public and public life. As mentioned above, one of the most important public policy features of the High Court’s joint judgment concerns the mooted inappropriateness from a public policy perspective of enforcing claims connected inherently with governmental matters in foreign jurisdictions. This is considered the case even in the light of the “close relationship” between the United Kingdom and Australia.¹⁶⁸ Reference is made in both the judgement of the majority and in the minority judgment of Brennan J to the observations in the judgment of Kingsmill Moore J in *Buchanan, Ltd and Another v McVey*.¹⁶⁹ His Honour emphasized that a court should refuse to enforce all such claims, for in relation to these claims there was an inherent difficulty, and even: “... danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications.”¹⁷⁰

In adverting to the risks involved in judicial enforcement of a foreign law, the narrower consideration, according to the majority view in *Spycatcher*, relates to the precise subject-matter of the claim, which raises particularly contentious issues:

“These risks are particularly acute when the claim which the foreign state seeks to enforce outside its territory is a claim arising out of acts of that state in the exercise of powers peculiar to government in the pursuit of its national security.”¹⁷¹

Referring to the decision in *The Commonwealth of Australia v John Fairfax & Sons*¹⁷² the Court emphasised that it might be called upon to consider whether the Australian public interest in publication of information overrides the interest in preserving confidentiality¹⁷³ in relation to ASIO, which had been established for the purpose of protecting Australia’s security. Asserting therefore that the consideration of public interest would override even the enforcement of an obligation of confidentiality on the part of Australia’s security services, the Court identifies a broader consideration on the facts of this case: whether that public interest should prevail over the prima facie rights of a foreign state. It is not just that this is important in considering the public interest but that this holds, furthermore, significant implications for relations between states and foreign policy.

166 *Supra* n.160 at 347.

167 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 62 ALJR 344.

168 *Ibid* at 350.

169 (1954) Ir R 89, noted at (1955) AC 516.

170 *Ibid* at 107; (1955) AC 516 at 529 in (1988) 62 ALJR 344 at 349.

171 *Supra* n.160 at 349 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron, JJ.

172 (1981) 55 ALJR 45.

173 *Supra* n.160 at 349.

“A situation in which an Australian court could be called upon to determine whether the prima facie rights of a foreign state should be overridden by a superior Australian public interest in disclosure would inevitably involve a real danger of embarrassment to Australia in its relationship with that state.”¹⁷⁴

Furthermore, the majority judges actually advert to the possibility that publication in Australia may well be in the public interest precisely because *Spycatcher* contains material concerning the purportedly unlawful operations of the British security services. These revelations might be in the Australian public interest “because ASIO has a close and co-operative relationship with the British Security Service.”¹⁷⁵ The implicit recognition (drawn from the decision of Powell J at first instance) that the material had already been published in the United States (that there was therefore no confidential information to protect) prompted a British government claim that its principle of good government had in fact been denied judicial enforcement because of a technicality.¹⁷⁶ A government response confining the judgment within narrow legal parameters might be seen, within Burnet and Thomas’ framework of the commodification of truth, as a further example of the ongoing use of calculated legal means to *depoliticise* governmental reliance upon secrecy litigation.

(b) The British litigation

The Australian cases cannot be considered in isolation: they must be considered interdependently with two major House of Lords decisions which pronounced on related aspects to the litigation. These judgments and a more recent ruling by the European Court of Human Rights bring the extent of the picture into sharp focus. The *Attorney-General v Guardian Newspapers and Others* cases¹⁷⁷ arose out of the United Kingdom Attorney-General’s proceedings against various British newspapers for alleged contempt of court for publishing summaries of the allegations contained in *Spycatcher*. In so publishing, the newspapers had been reporting the basis to the Australian litigation.

It was held¹⁷⁸ that although entitled to an injunction due to the breach of duty involved in the publishing, nevertheless the publication of the book abroad had destroyed any secrecy as to the contents. At the hearing of the action in December 1987,¹⁷⁹ Scott J discharged the injunctions although they were to remain in force pending appeal to the House of Lords. In judgment, Scott J advanced a detailed enunciation of the law as to the matter although his decision as to the facts of the case held that publication was justified on the comparatively narrow ground that the reports were a fair report of the forthcoming Australian trial. He gave detailed consideration to the other grounds upon which the newspapers claimed to be justified in publishing, asserting that all involved the weighting of conflicting aspects of the public interest. Reference is made to the worldwide dissemination of *Spycatcher* and to Wright’s description of several operations of the security services.

Reference is also made to the “strenuous actions”¹⁸⁰ undertaken by the Attorney-General to prevent the publication of *Spycatcher* compared to the apparent lack of action in relation to previous revelations in similar books on the security services. It is mentioned that despite it having been the government’s view that Chapman Pincher’s ‘Their Trade is Treachery’ contained contents damaging to national security (confirmed by Sir Robert Armstrong in evidence) nevertheless no steps were taken to restrain its publication. Scott J also takes the government’s “main theme” of national security to task. His Honour suggests that this was a “very early and

174 *Ibid.*

175 *Supra* n.160 at 350.

176 *The Independent*, 3/6/88.

177 (1988) 2 WLR 805 and (1988) 3WLR 776.

178 At (1988) 2 WLR 805.

179 *Ibid.*

180 *Ibid* at 823.

critical”¹⁸¹ theme to the Crown case. “It determines the breadth and the duration of the duty of confidentiality placed on Mr Wright by his employment in MI5.”¹⁸²

His Honour points out that with the publication of the book, the underlying rationale to the Crown’s case in relation to the national security theme changed. The central Crown argument on this matter initially concerned the need for the preservation of the secret character of the organisation. Since publication, however, national security was being equated with the efficiency of MI5 requiring life-long secrecy on the part of its personnel. Injunctions were therefore now being sought for “quite different national security reasons.”¹⁸³ The reappraisal of the national security theme had the effect of shifting the argument and rephrasing it in terms of the promotion of the efficiency and reputation of the organisation.¹⁸⁴ The national security factors now relied upon by the Crown are addressed in detail as a means of weighting them in order to strike the balance required between the competing public interests - freedom of the press and national security - in the case.

Justice Scott discusses various public interest factors in the context of the case. He notes that the law on the matter is that Wright’s duty of confidentiality “would not extend to information of which it could be said that, notwithstanding the needs of national security, the public interest required disclosure.”¹⁸⁵ A significant suggestion relates to the publication of such unauthorized disclosures as a public interest means of making security services accountable. Noting that the processes of accountability to which they are subject may be a matter of “legitimate public debate,” it is suggested that this does not give rise to a form of public interest. For, they “do not, in my opinion, create any legitimate public interest requiring the public disclosure of the operations of the security services.”¹⁸⁶ Press freedom, particularly in the light of the “legitimate and fair reporting” of a matter that the newspapers were entitled to place before the public (the court action in Australia) is accorded “overwhelming weight”¹⁸⁷ as a competing public interest against the countervailing argument concerning the efficiency of MI5.

Referring to the judgment of Scott J in the appeals decision,¹⁸⁸ Sir John Donaldson, MR adverts to a possible misunderstanding in relation to consideration of the other grounds upon which the newspapers claimed to be justified in publishing. It is suggested that since these issues hold wider significance for the future they should be considered in the context of the case. Sir John notes that Scott J’s proposition might be misinterpreted as constituting an affirmation that newspapers have a special status and special rights in relation to disclosure of confidential information which is not enjoyed by the public as a whole. Sir John asserts that such is not the case and reformulates the press situation in terms of their obligation to act on behalf of the public: acting by way of trustees for the public. Clearly, should the public interest (for example in the safety of the realm) require no dissemination of particular information, the media is under a duty not to publish. If the public interest forbids indiscriminate publication, but permits or requires disclosure to a limited category of persons, the media correspondingly has a limited right or duty.¹⁸⁹ The rationale for Sir John’s approach is that the press occupies a crucial position, “... not because of any special wisdom” but because “the media are the eyes and ears of the general public. They act on behalf of the general public.”¹⁹⁰ Again, a narrow technical framework proscribes the secrecy and security debate but it is increasingly framed within notions that impute responsibility in the public interest.

181 *Ibid.*

182 *Ibid.*

183 *Ibid* at 834.

184 *Ibid.*

185 *Ibid* at 854.

186 *Ibid* at 857.

187 *Ibid* at 862.

188 *Ibid* at 865.

189 (1988) 3 WLR 865 at 874.

190 *Ibid* at 874.

The immediate impact of this particular decision appears to be one of undue caution and a resistance to formulating constitutional principles in relation to the competing interests in the matter. Indeed, "there is little in the judgments which indicates a bold striking out in search of greater citizen rights against the state."¹⁹¹ However, mention is made in the judgment of the Master of the Rolls' of the matter of the accountability of the security services. It is suggested that the public is entitled to demand, and that the public interest requires, that the security service does not step outside its legitimate role, which is that of defence of the realm.¹⁹²

In the case of *Attorney-General v Guardian Newspapers (No. 2)*¹⁹³ the House of Lords confirmed that the duty of third parties in relation to confidentiality is extinguished by the information becoming available to the general public. The duty can also be outweighed by countervailing public interest requirements requiring disclosure but the essence of the judgment relies upon the fact that the information is now in the public domain and no longer confidential. Nevertheless, while refusing to continue injunctions against third parties in relation to publication of excerpts from *Spycatcher*, the House confirmed the "continuing existence of a primary obligation of confidence with respect to the information involved."¹⁹⁴ In judgment the Law Lords acknowledge the life-long obligation of confidentiality on security service members: Wright is referred to from this obligation in terms of "treachery,"¹⁹⁵ "turpitude"¹⁹⁶ and "disloyal."¹⁹⁷

Perhaps inevitably, given the strength of these judicial views, it has been noted in commentary that the decision in this particular case is short and eschews any attempt at formulating constitutional principles on the matter. Barendt has noted that the decision is more important for their Lordships' observations in relation to the law of copyright and on constructive trust remedies than for "any contribution to free speech jurisprudence."¹⁹⁸ If there was an "absence of reality" in the government's attempts at securing an injunction at this stage, there is an air of reluctant pragmatism and recognition of world weary reality in the House of Lords consideration:

"It was easy for the Lords to present their ruling as a matter of weary common sense - there were no secrets to protect and thus no harm to the public interest in allowing publication - rather than of legal principle. Further, it was natural for them to approach the case in a pragmatic manner, in the absence of any constitutional statement of freedom of speech and of the press, which would have required a fuller consideration of principle."¹⁹⁹

(c) The European Court of Human Rights

The start of the final round to this series of litigation did not take place until the European Court of Human Rights decided on 26 November 1991 that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court."²⁰⁰ In addressing the prior restraints against the newspapers, it was held unanimously that those following US publication violated Article 10 of the *European Convention on Human Rights* and by a narrow majority that those up until US publication did not violate Article 10.²⁰¹ The Court relied upon the right to freedom of expression in a very broad and almost commercial sense: information of legitimate public concern could increasingly not be held back at narrow geographical frontiers; the

*191 *Supra* n.48 at 552.

192 (1988) 3 WLR 878.

193 (1988) 3 WLR 776.

194 Cited in *Johns v Australian Securities Commission* (1993) 116 ALR 567 at 604 per McHugh J.

195 (1988) 3 WLR 790.

196 *Ibid* at 818.

197 *Ibid* at 791.

198 *Supra* n.8 at 205.

199 *Ibid*.

200 S Coliver 'Spycatcher - the legal and broader significance of the European Court's judgment' (1992) *Media Law and Practice* 142.

201 *Ibid*. Article 10 states that everyone has the right to freedom of expression. This is subject to the exceptions which are stated.

perishable quality of press news inevitably meant that threatened delay to publication might deprive it of its value and interest.²⁰² The focal question for the Court concerned the necessity of such interference with the press in a democratic society. Relying upon the “settled European Court jurisprudence”²⁰³ laid down in *The Sunday Times v United Kingdom*²⁰⁴ the Court therefore addressed the fundamental principles upon which freedom of expression is based in a democratic society. Essentially, they considered whether there was a ‘pressing social need’ for the injunctions and therefore injected the litigation with the consideration of the meaning of the notion of the public interest.

The reasoning by which the majority of the Court approached the earlier injunctions is instructive. The decision of the majority in this respect was influenced by the admissions on the part of both *The Guardian* and *The Observer* to the effect that they would publish further information from Wright not previously published if this disclosed further unlawful operations by the security services. The majority of the Court considered it improbable that such mooted publication would raise matters of public interest “which would outweigh the interests of national security.”²⁰⁵ Therefore, it was accepted that “the original injunctions were necessary.”²⁰⁶ In relation to the later injunctions, which the Court unanimously considered not necessary, it was again noted that the national security argument had “undergone a curious metamorphosis.”²⁰⁷

It has been noted that this marathon legal battle is not yet over. Coliver sets out the two important legal questions yet to be decided by the European Court. These are (a) whether *The Times* may be held to have breached a duty of confidence by publishing information from Wright which its editors knew or should have known to have been disclosed in breach of Wright’s duty of confidence to the Crown, and (b) whether *The Times* may be held in contempt for having violated an injunction directed against other newspapers whose “spirit was to prevent any publication of information derived from Mr Wright or the *Spycatcher* manuscript.”²⁰⁸ Therefore a central decision lies before the Court in relation to the *Sunday Times* challenge to that part of the House of Lords’ decision that “an injunction against one newspaper effectively binds the rest of the media which has knowledge of it.”²¹⁰

An alternative outlet? the prosecution in Brind

The case of *Brind and others v Secretary of State for the Home Department*²¹⁰ involved a related aspect of governmental protection of information, although this time the legal issue arose in relation to government control over broadcasting. The House of Lords was confronted with a dispute which related to directives which could be issued by the Home Secretary to the Independent Broadcasting Authority under certain provisions in the *Broadcasting Act 1981* and to the BBC under the licence and agreement under which the BBC operated. These directives concerned prohibitions against broadcasting direct statements by representatives of proscribed organisations in Northern Ireland. In making the decision to issue the directives, the Secretary of State noted in Parliament that the restriction is not a restriction on reporting but on broadcasts, that is, direct appearances. Briefly, in relation to the specific public interest arguments raised, the House of Lords held that the Home Secretary’s decision to issue the directives prohibiting the broadcasting of direct statements by representatives of proscribed organisations in Northern

202 *Ibid* at 143.

203 *Supra* at 165 at 139.

204 (1979) 2 EHRR 245 (The ‘*Sunday Times*’ *Thalidomide* case’).

205 *Supra* n.165 at 140.

206 *Ibid*.

207 *Supra* n.165 at 141.

208 *Supra* n.200 at 142.

209 *Supra* n.165 at 141.

210 (1991) 1 All ER 720.

Ireland on the ground that such directives were necessary in the public interest to combat terrorism, could not be said to be so unreasonable that no reasonable Secretary of State could have made such a decision.

The discretionary power to issue the directives granted by the relevant legislation and contractual provisions was not considered to have been exceeded in this instance. Lord Bridge suggested that, if anything, "what is perhaps surprising is that the restriction imposed is of such limited scope."²¹¹ Lord Ackner considered that "the extent of the interference with the right to freedom of speech is a very modest one."²¹² Referring to the '*Sunday Times*' *Thalidomide* case', Lord Ackner suggested that if the question asked is the European test of whether the interference complained of corresponds to a pressing social need, this must ultimately result in the question: is the particular decision acceptable?²¹³

The House of Lords pointed out in its decision that the *European Convention on Human Rights*, upon which the doctrine of proportionality was based, had not been incorporated into the domestic law of Britain. It therefore asserted that the principle whereby the courts will quash exercise of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, being still at a stage of early development in English law, cannot be relied upon in this instance. The Court appeared to decry to various degrees any alternative criteria for decision other than judicial review of administrative action. Lord Lowry suggests that "there can be very little room for judges to operate an independent judicial review proportionality doctrine, in the space which is left between the conventional judicial review doctrine and the admittedly forbidden approach."²¹⁴ This would be to introduce an "intermediate area of deliberation."²¹⁵ However, both Lords Bridge and Roskill refer to the possibility of a future development of the English law in this respect.

Conclusion: Where does the public interest lie?

One of the most significant aspects to the series of litigation known as the *Spycatcher* case concerns its implications for the weighting of national security (and relevant processes of confidentiality and criminalization) against the public's right to know and freedom of speech. It has been a major aim of this paper to address the context and background to the litigation - in particular, to examine the historical uses of the *British Official Secrets Act* - as a means of locating the *Spycatcher* litigation within a broader political and legal context. As a result, this article has examined various legal avenues pursued by the government of the United Kingdom in relation to protection of official information, and, in particular, the litigation connected with the publication of *Spycatcher*. It has been contended that, in pursuing Wright through the courts, the British government was relying on the notion, translated into law through the concept of national security, that good government depends on confidentiality and various secrecy related principles.

Yet, as a *Guardian* report on the outcome of the case makes clear, the Australian judicial conceptualisation of Wright's duty of confidentiality was framed in terms of Britain's "governmental interests."²¹⁶ The critical distinction in the terminology lends weight to Halliwell's conclusion that the *Brind* case also represents a "microcosm of constitutional problems."²¹⁷ This paper has attempted to argue that these (and a range of other) cases are not isolated *causes celebres* but exemplifications of a fundamental political strategy aimed at defining particular aspects of the public interest through the law. While that body of law known as official secrets may have

211 *Ibid* at 724.

212 *Ibid* at 733.

213 *Ibid* at 735.

214 *Ibid* at 739.

215 *Ibid*.

216 *The Guardian* 3/6/88.

217 *Supra* n.5 at 246.

provided the most clearcut legal mechanism, a range of related actions has supplemented and provided a broader context to the British State's emphasis upon secrecy.

Following *Spycatcher*, perhaps tentative conclusions might be drawn about the nature of British citizenship at both the narrow organisational level and at the wider national level and about their interaction. In this vein, Robertson observes that the "true public interest" in *Spycatcher* lies in precisely what it reveals about the nature of the specific organisational culture and ethos:

"... Wright himself was revealed as a conspiracy theorist of McCarthyite proportions. That, after all, was the real public interest in *Spycatcher* - a public interest which had never been mentioned in any of the court proceedings. How came it that this paranoid electrician was ever allowed to rise to a position of power and influence in MI5? Although he caught few spies, he and his henchmen destroyed a number of careers (T)he judges contented themselves with reviling Wright for treachery, but the real question was about the control of an organization which allowed his mentality to flourish to the point of damaging both its own reputation and the reputation of innocent citizens."²¹⁸

And at the national level as at the organisational level, this remains a problematic and elusive area of law and policy. Government control of information inevitably turns upon the government's own perception of the public interest. The cases examined here show a determined politicisation on the part of the British government, and often by the courts, in relation to the use of British official secrecy law. The distinction between official duty and moral or civic duty is inevitably not just a legal but a broadly political, conceptual and jurisprudential notion. Actions of the kind documented here are not unique to Britain but have been sufficiently extensively relied upon by the British government in recent years²¹⁹ to warrant close and critical attention.

²¹⁸ *Supra* n.2 at 265.

²¹⁹ See also *Lord Advocate v The Scotsman* (1989) 3 WLR 358.