

# Law Commission Consultation on the Protection of Official Data (CP 230): Response from Professor Lorna Woods, Dr Lawrence McNamara and Dr Judith Townend

## Contents

1. Introduction .....	1
2. Public interest defence .....	2
3. The statutory commissioner model and the Canadian model .....	10
4. Access to court by members of the public .....	14
5. Conduct of criminal trials .....	17
6. Contact details .....	19

## 1. Introduction

1.1. This submission has been prepared by Professor Lorna Woods, professor in law and a member of the Human Rights Centre, University of Essex; Dr Lawrence McNamara, reader in law, University of York and senior research fellow, Bingham Centre for the Rule of Law; and Dr Judith Townend, lecturer in media and information law at the University of Sussex. We all specialise in research relating to information and media law.

1.2. We are also affiliated to the Information Law and Policy Centre (ILPC) at the Institute of Advanced Legal Studies (IALS) as associate research fellows (Woods and Townend) and advisor (McNamara). Since launching in 2014-15, the ILPC has hosted research and debates that relate to freedom of expression, surveillance and privacy. In April 2017 we attended a meeting at the IALS with representatives from the Law Commission. The views expressed by the authors in this report are made in a personal capacity and do not represent the views of the ILPC.

1.3. This submission focuses on aspects of the consultation that relate to freedom of expression and the public interest: the public interest defence; the Independent Statutory Commissioner model; and access to proceedings. We also address the related issue of the conduct of trials.

1.4. In summary, we suggest that:

- **there should be a public interest defence in official secrets offences for all those engaged in journalism in the public interest, including sources** (see section 2);
- **any reformed system should adopt the Canadian model of an Independent Commissioner in addition to a Public Interest Defence for official secrets offences** (see section 3);
- **the test of necessity for closing public access to proceedings is an improvement on the current law, but that proposed change alone falls short of what is required to adhere to the rule of law** (see section 4);

- **there is no good reason at this point in time to embark on a wider review of criminal process and national security issues** (see section 5).

## 2. Public interest defence

- 2.1. We agree that the assessment of the extent and nature of any defence should take place against the backdrop of the offence to which it relates. Nonetheless, it is problematic to assume that the narrowing of an offence means that defences should be similarly narrow. Such an approach implicitly assumes that the relationship between offence and defence in the original statute had the balance right, which is not necessarily the case.
- 2.2. As a further general point, when considering the relationship between offence and defence, it is important to bear in mind who determines whether key elements of the offence/defence have been satisfied; where the executive has control of these boundary points, a public interest defence becomes the more important to counter that control which could otherwise be misused.<sup>1</sup>
- 2.3. We note that the Consultation Paper recognises that a public interest defence protecting whistleblowers may help hold government accountable, a point with which we agree. The existence of a public interest defence is an important safeguard for whistleblowers, allowing the scrutiny of governmental actions, which is essential for a democratic society.
- 2.4. **LC Provisional conclusion 22:** We are of the opinion that in practice it is difficult to comply with the requirements of Article 10 ECHR without the existence of a public interest defence (for the reasons set out below).
- 2.5. **LC Provisional conclusion 23:** We do not agree that the difficulties of instituting a public interest defence outweigh the benefits.
- 2.6. It is our view that the optimal model is one that establishes a commissioner but contains a fall-back public interest defence (Model 3: The Canadian model).
- 2.7. **LC Provisional conclusion 24:** We are of the opinion that a public interest defence should be available to any publisher making a disclosure.
- 2.8. It is our view that any statutory public interest defence for official data disclosure and espionage offences should protect all those engaged in journalism in the public interest, not only the traditional press and broadcasters, and should further extend to whistleblowers in the public interest.
- 2.9. While the availability of a public interest defence for espionage offences may on its face seem difficult to justify, it is important that the possibility exists because it provides

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<sup>1</sup> See European Commission for Democracy through Law (Venice Commission), 'Report on the Democratic Oversight of the Security Services' (2007) CDL-AD (2007) 016 at 146; Council of Europe Resolution 2045 (2015) on Mass Surveillance, para 13.

a safeguard against the abuse of executive power. In particular, if a public interest defence is not available for espionage charges then there is a risk espionage charges will be used more broadly than is appropriate (i.e. where disclosure offences are the more appropriate charge), simply to block the public interest avenue.

### **Requirement to prove damage**

2.10. In this submission we do not deal with the drafting and scope of the offences under the OSA and concentrate on other aspects of the consultation. However, we share concerns raised in consultation submissions by NGOs such as Public Concern at Work, the Campaign for Freedom of Information and Article 19 in relation to the proposed removal of damage requirement from certain offences in the Official Secrets Act 1989. We are not persuaded that the evidence or arguments presented in the consultation document justify removing this important protection. Removal of this requirement would significantly and detrimentally weaken an important protection for disclosure of official information in the public interest, and especially so in the absence of any public interest defence. We believe that both protections – the damage requirement *and* a public interest defence are vital.

### **Supporting case law and evidence**

2.11. It is important to remember that freedom of speech is fundamental to a democracy. The UN Human Rights Committee has described it as ‘the foundation stone for every free and democratic society’ and the basis for the enjoyment of other human rights.<sup>2</sup> In the light of its importance, the European Court of Human Rights has repeatedly re-iterated the general point that exceptions to freedom of expression must be narrowly interpreted and that there is little scope for restrictions on discussion on matters of public interest.<sup>3</sup>

2.12. Against this background, the Strasbourg case law stresses the fundamental principle of protecting journalists’ sources because of the importance of protecting those who scrutinise those holding power.<sup>4</sup> The importance of the role of the media has similarly been recognised by the domestic courts.<sup>5</sup>

2.13. Further, not only are the media under a duty to report on matters of public interest (e.g. *Bladet Tromsø and Stensaas v. Norway*<sup>6</sup>), but the public has a right to receive that information (*The Sunday Times v. United Kingdom* (no. 1)<sup>7</sup>). The non-provision of a defence sets certain classes of information outside public reach entirely, irrespective of context and the public interest and thus interferes with the public’s right and

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<sup>2</sup> Human Rights Committee, General Comment 34-Article 19: Freedoms of Opinion and Expression (CCPR /C/GC/34), 12<sup>th</sup> September 2011, para 1 and para 4.

<sup>3</sup> e.g. *Stoll v Switzerland* App. No. 69698/01 (ECHR, 2007) / (2008) 47 E.H.R.R. 59; *Karapetyan v. Armenia* App. no. 59001/08 (ECHR, 2016).

<sup>4</sup> *Goodwin* (1996) 22 E.H.R.R. 123, para 39.

<sup>5</sup> See e.g. *McCartan, Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, p. 290.

<sup>6</sup> *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93 (ECHR, 1999).

<sup>7</sup> *Sunday Times v United Kingdom*, Series A/30/ (1979-80) 2 E.H.R.R. 245, para 65.

consequently public debate, transparency and accountability.<sup>8</sup> One-sided information is also a potential interference with the public's right to hold opinions. The European Court of Human Rights has recognised the importance of public scrutiny; it held that:

*In a democratic system, the acts or omission of government must be subject to the closest scrutiny not only of the legislative and judicial authorities but also of the media and the public. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence. [Guja, para 74]<sup>9</sup>*

On this reasoning, the role of the media is important but essentially instrumental to achieving the main goal of informing the public.

2.14. The Commission relies on *Shayler*,<sup>10</sup> a judgment which has been much criticised. Two points should be noted about the strength of *Shayler* as authority. First, while a ruling of the House of Lords, it cannot provide a complete answer to the requirements of the ECHR. Only the European Court of Human Rights can do that; *Shayler* did not go to Strasbourg. In this context, it should be noted that the House of Lords and now the Supreme Court has not always interpreted Convention obligations in the same way as the Strasbourg court. Of course, the British courts are not formally bound by Strasbourg case law but must take it into account. Nonetheless, *Shayler* may be seen as a case of misapplication of the relevant principles. Indeed, as regards *Shayler*, its analysis of proportionality in particular has been seen as lacking. The Supreme Court's approach to proportionality has developed as its jurisprudence under the Human Rights Act became more extensive.<sup>11</sup> *Shayler* may not therefore represent the Supreme Court's current position.

2.15. Second, since *Shayler* was handed down, the environment in which the European Court of Human Rights assesses State actions has changed. While it allows a significant margin of appreciation with regard to national security, there has still been a change in emphasis in relation to the secret powers of the state, for example in the surveillance case law. There it has been less deferential, and has placed greater emphasis on rule of law factors and the need to protect democracy. In our view, this approach may be read across to the context of official secrets. In *Bucur and Toma v. Romania*,<sup>12</sup> which concerned a whistleblower, the European Court noted the risk that protecting national security may come at the price of damaging democracy. In sum, actions of the state should not be effectively unchallengeable and there is a danger that, for some areas of activity, the refusal to allow a public interest defence has exactly that effect.

2.16. The existence, or conversely the lack of a public interest defence, would be a factor in any analysis seeking to balance, on the one hand, the whistleblower's rights to freedom

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<sup>8</sup> On the importance of transparency, see also General Comment 34, para 3.

<sup>9</sup> *Guja v Moldova* App. no. 14277/04 (ECHR, 2008) / *Guja v Moldova* (2011) 53 EHRR 16.

<sup>10</sup> *R v Shayler* [2002] UKHL 11.

<sup>11</sup> See e.g. Lord Reid in *Bank Mellat v Her Majesty's Treasury* (No. 2) [2013] UKSC 39.

<sup>12</sup> App. no. 40238/02 (ECHR, 2013).

of expression and the corresponding right of the public to receive that information, and on the other, the public interests sought to be protected by restricting the information. A public interest defence, operating on a case-by-case basis, is a more targeted response, and therefore more likely to be a proportionate reaction. Specifically, it allows space for the interests of the whistleblower, journalists and audience.<sup>13</sup>

2.17. Proportionality is key to balancing the rights of the individual and societal interests and here we have some concerns about the analysis put forward in the consultation paper. The Law Commission's definition of necessity<sup>14</sup> omits the 'in a democratic society' requirement which is a central driver of the Strasbourg court's jurisprudence. It identifies that the case law does not require a test of 'absolutely essential', but does not comment on the fact that it is still higher than 'useful'. While the Law Commission notes five principles (identified by Clayton and Tomlinson in relation to freedom of expression generally) in relation to assessing proportionality, it seems that the modern trend in jurisprudence relating to whistleblowers under Article 10(2) is found in *Guja* (and has been applied repeatedly since<sup>15</sup>). Although *Guja* is noted in the consultation paper, we would like to emphasise the following points.

2.18. *Guja* contains six criteria which should be considered in assessing proportionality of any restriction on the speech of a civil servant:

- Whether there are effective alternative channels (para 73)
- The public interest in the information disclosed (para 74)
- The authenticity of the information (is it reasonable to suppose it is accurate, as opposed to rumours<sup>16</sup>);
- The level of detriment actually caused (para 76 and following on from the approach in *Hadjianastassiou*<sup>17</sup>);
- Whether the whistleblower acted in good faith (para 77); and
- The penalty imposed (para 78, see also *Fuentes Bobo*<sup>18</sup>) bearing in mind the chilling effect of severe penalties.

2.19. While the Court has accepted the importance of employee loyalty, the case law demonstrates that such loyalty cannot be absolute. Further, while the Consultation Paper emphasised<sup>19</sup> the Court's approach in *Hadjianastassiou* and the special role of the armed forces, it does not seem that in *Guja* the Court focusses on the position of the employee in assessing proportionality but rather the context of the disclosure.

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<sup>13</sup> This is the 'fourth element' in e.g. *Huang* [2007] UKHL 11 para 19 and *Quila* [2011] UKSC 45, para 45.

<sup>14</sup> Law Commission consultation 6.22.

<sup>15</sup> e.g. *Heinisch v Germany* App. no. 28274/08 (ECHR, 2011); *Sosinowska v Poland* App. no. 10247/09 (ECHR, 2011).

<sup>16</sup> c.f. *Soares v Portugal* App. no. 79972/12 (ECHR, 2016) para 75.

<sup>17</sup> *Hadjianastassiou v Greece* App. No. 12945/8712945/87 (ECHR, 1992).

<sup>18</sup> *Fuentes Bobo v Spain* App. no. 39293/98 (ECHR, 2000).

<sup>19</sup> Consultation Paper para 6.13.

Furthermore, in *Guja* the Court noted that in some instances a civil servant (or someone under an analogously strong duty of loyalty) may be part of only a small category of persons who are in a position to know about the wrong-doing and is thus ‘best-placed’ to make such a disclosure. Following the general trend of Article 10 jurisprudence, the Court also recognises that the publication of secret government information may correspond to a ‘strong public interest’.<sup>20</sup>

2.20. The Strasbourg Court accepts that, in principle, an employee should seek to use internal procedures before going public, but this does not require employees to use systems that are ‘clearly impractical’. The Consultation Paper emphasises that the Strasbourg Court used the phrase the ‘last resort’.<sup>21</sup> In clarifying what ‘impractical’ and ‘last resort’ might mean, the Court later states that the test is ‘whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover’.<sup>22</sup> It is submitted that the test of effectiveness should be understood similarly to that used in the context of the requirement to exhaust local remedies in the Convention; that is, they are capable in practice of providing redress in relation to the particular situation at hand.<sup>23</sup> It is questionable whether purely internal arrangements could ever be effective in this sense. For example, the Public Administration Committee in its Tenth Report on Leaks and Whistleblowing in Whitehall in 2009 noted that the civil servants from whom it took evidence (including whistleblower and former GCHQ employee Katharine Gun) ‘did not have much faith in internal whistleblowing procedures’.<sup>24</sup>

2.21. The Law Commission consultation notes that from *Guja* ‘[i]t is unclear whether the court intended for the existence of other competent bodies to be a threshold question that must be answered in the affirmative before other principles are considered or whether this is merely a further principle that must be considered alongside others’.<sup>25</sup> It is submitted that, following *Heinisch*<sup>26</sup>, the criterion should be understood as just one of six and not as a requirement to be satisfied before the other criteria are considered. According to this reasoning requiring a would-be whistleblower to use only internal mechanisms, or indeed to exhaust internal mechanisms would be likely to be disproportionate. As the Council of Europe, Parliamentary Assembly held:

*Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.*<sup>27</sup>

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<sup>20</sup> *Guja*, para 72.

<sup>21</sup> Para 6.64.

<sup>22</sup> *Guja*, para 73.

<sup>23</sup> *Open Door and Dublin Well Woman v. Ireland* App. no. 14234/88; 14235/88 (ECHR, 29 October 1992); *Zhu v UK* App. no. 36790/97 (ECHR, 12 September 2000).

<sup>24</sup> HC 83, Tenth Report of Session 2008-09, para 81.

<sup>25</sup> Law Commission, para 6.63.

<sup>26</sup> *Heinisch* paras 64-65; see also *Guja* para 74 where the Court continues from its discussion about internal mechanisms to say ‘the Court must also have regard to a number of other factors’ which does not indicate that the factors are secondary.

<sup>27</sup> Council of Europe Parliamentary Assembly, Resolution 1729 (2010), Protection of Whistleblowers, para 6.2.3

2.22. While the Court in *Guja* did emphasise the reliability of the information as an important factor, and that the informant would have a responsibility to verify, this obligation was not described as absolute but rather limited ‘to the extent permitted by the circumstances’, citing inter alia *Bladet Tromsø*,<sup>28</sup> thus linking the standards of responsibility here to those of ethical journalism.<sup>29</sup>

2.23. While the Court has recognised in *Guja* that harm will play a role in determining whether a penalty is proportionate, it should be noted that the European Court requires actual damage rather than a claim that the information is of a type that could be damaging. It has been suggested that in determining whether an offence has been committed. As Robertson and Nicol note:

*National security might be threatened by the revelation of a limited class of information to foreign powers, but too often this danger is used as a pretext for the Government to withhold embarrassing information from its own citizens.*<sup>30</sup>

While the requirement for damage to the national interest may be tightened up, the use of a damage test is still not a substitute for a public interest defence; as noted above, both protections are important.

2.24. The fact there is some risk that a jury would not agree that the public interest defence applies may limit the effectiveness of the public interest defence as a mechanism for encouraging public interest whistleblowing to some degree, particularly as regards the objective version of the defence, but does not undermine it entirely. A person may make an evaluation of the risk depending on the different circumstances. Further, the fact that a public interest defence would not eliminate the risk does not justify the position that there should be no defence at all (c.f. LC 7.32). There is therefore, in our view, value in including a defence.

2.25. The argument that this is too difficult for a jury is not convincing; juries have to deal with difficult questions of fact frequently – it is part of the general mechanism of the English legal system. The claim that a public interest defence undermines the coherence of the criminal law is similarly unconvincing. The drafting of a statute creates a defined field in which the defence would operate.

2.26. As regards the difficulties in defining public interest, there are public interest defences in other areas which could operate as a model (e.g. s. 55 Data Protection Act and changes that would be brought in by amendments contained in Criminal Justice and Immigration Act 2008; and, in a different context, s.5 of the Contempt of Court Act 1981). Moreover, a defence could be subject to a reasonable belief as to it being in public interest (as in s. 32(1)(b) DPA – albeit in the context of civil law enforcement, not criminal law).

2.27. In our view, the most appropriate balance between the conflicting interests may be

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<sup>28</sup> *Guja*, para 75.

<sup>29</sup> See similarly, Council of Europe, Parliamentary Assembly Resolution 1729 (2010), para 6.2.4, which puts burden of proof on employer, not the whistleblower.

<sup>30</sup> Robertson and Nicol, *Media Law*, 2007 (5th ed.) p. 631.

found through use of a defined list of areas identifying the scope of public interest.<sup>31</sup> Examples of this approach can be found, for example, in PIDA 1998. A further example of this approach can be found in Principle 37 of The Global Principles on National Security and the Right to Information (The Tshwane Principles),<sup>32</sup> for Categories of Wrongdoing:

*Disclosure by public personnel of information, regardless of its classification, which shows wrongdoing that falls into one of the following categories should be considered to be a “protected disclosure” if it complies with the conditions set forth in Principles 38–40. A protected disclosure may pertain to wrongdoing that has occurred, is occurring, or is likely to occur.*

*(a) criminal offenses; (b) human rights violations; (c) international humanitarian law violations; (d) corruption; (e) dangers to public health and safety; (f) dangers to the environment; (g) abuse of public office; (h) miscarriages of justice; (i) mismanagement or waste of resources; (j) retaliation for disclosure of any of the above listed categories of wrongdoing; and (k) deliberate concealment of any matter falling into one of the above categories.*

2.28. This is not a claim that journalism lies beyond the law (*Pentikäinen v. Finland*; Leveson, 2012<sup>33</sup>), but merely an argument that there should be a mechanism allowing the courts to judge the facts in a given case depending, inter alia, on the importance of the matter discussed. Further, the European Court takes into account the extent to which national courts have considered and balanced the right of freedom of expression with the other interests to be protected and a failure on the part of the national courts so to do is a factor towards a finding of violation (see e.g. *Matúz v Hungary*, para 49). Without the possibility of a public interest defence it is hard to find the place where such an analysis could take place.

2.29. The concern about trust in the civil service seems misplaced. While the interests of an impartial civil service and of maintaining the trust of those working together are important, there is no reason why these interests justify an absolute bar to any disclosure. In other contexts where trust is important whistleblowing is still accepted, even if only in limited circumstances. Indeed the Consultation Paper gives examples relevant to the civil service (e.g. 7.31). Moreover, recent examples of whistleblowing - whether or not for partisan reasons - have revealed serious misconduct. For instance, the disclosures by staff that revealed appalling failings at Mid-Staffordshire NHS Foundation Trust between 2005 and 2008.<sup>34</sup>

2.30. In any event, motive is not decisive for the question of whether whistleblowing should be accepted if the matter is in the public interest (*Guja*). More generally, as

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<sup>31</sup> For a more detailed discussion and evaluation of such an approach, please see: Kagiros, D., 2015. Protecting ‘national security’ whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression. *The International Journal of Human Rights*, 19(4), pp.408–428.

<sup>32</sup> Supported by Council of Europe Resolution 1954 (2013).

<sup>33</sup> Leveson, 2012, Vol 1, Ch 2, para. 5.6.

<sup>34</sup> Noted by Jeremy Heywood, head of the Civil Service, in this article in 2014: <https://civilservice.blog.gov.uk/2014/12/17/whistleblowers/>

Robertson and Nicol suggest, better quality advice might result from the possibility of that advice later coming to light.

*The argument that civil servants would be less frank if their advice were shortly to be made public is a canard; the evidence from other countries suggests that the advice would be better considered and better expressed.*<sup>35</sup>

- 2.31. Similarly, although in a different context for information disclosure, in 2012 the House of Commons Justice Committee was ‘not able to conclude, with any certainty’ that a chilling effect on civil servants has resulted from the Freedom of Information Act.<sup>36</sup> The former Information Commissioner Christopher Graham has suggested that ‘if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy’.<sup>37</sup> Conversely, the possibility of information disclosure within legitimate limits should improve the quality of governmental work.
- 2.32. Finally, while the European Court of Human Rights has accepted that measures aimed at preserving the political neutrality of a precise category of civil servants can in principle be considered legitimate and proportionate (as in *Ahmed v UK*<sup>38</sup>), this sort of mechanism must be calibrated in response to issues pertaining to particular classes of civil servants rather than applied as a general rule (*Karapetyan*<sup>39</sup>).
- 2.33. The Consultation notes that any prosecution of the media must satisfy the public interest as set out in the CPS guidelines. Even though the CPS is instructed to consider whether the prosecution is likely to have success in the light of any defence and the position of the media, this is not the same as making a final decision on whether the disclosure is in the public interest after the prosecution has been put to proof on the issue. To accept that assessment by the CPS once again puts key aspects relating to the determination of what is made public or not in the control of the executive, rather than the courts with an independent judiciary where claims can be tested. It is important to note that not only is the Attorney-General’s consent required for a prosecution for almost all offences under OSA statutes (as the Consultation Paper notes at 3.111), but also the DPP’s independence is not absolute in this area. Specifically, national security ‘is the one exceptional category of case in which the Attorney-General ... may direct that a prosecution is not started or not continued’, and there is no certainty that Parliament will be notified, let alone be able to scrutinise any such direction.<sup>40</sup>
- 2.34. Any public interest defence should not be limited to the traditional media simply because it is hard to define the boundaries of the media precisely; rather, as a recent

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<sup>35</sup> Robertson and Nicol, *Media Law* (2007, 5<sup>th</sup> ed.) p 632.

<sup>36</sup> HC 96-I, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012–13, para 200, p.75.

<sup>37</sup> <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/>

<sup>38</sup> *Ahmed v UK* App. no. 22954/93 (ECHR, 1998); [1998] ECHR 78.

<sup>39</sup> *Karapetyan v. Armenia* App. no. 59001/08 (ECHR, 2016); [2016] ECHR 1010 (17 November 2016).

<sup>40</sup> *Protocol between the Attorney-General and the Prosecuting Departments*, July 2009 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/15197/Protocol\\_between\\_the\\_Attorney\\_General\\_and\\_the\\_Prosecuting\\_Departments.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15197/Protocol_between_the_Attorney_General_and_the_Prosecuting_Departments.pdf)

Unesco report on source protection suggests, all ‘acts of journalism’ must be protected.<sup>41</sup> The report recommends that that ‘source protection should extend to all acts of journalism, and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data’.<sup>42</sup>

2.35. There may be others who legitimately publish relevant information (e.g. on a small-scale hyperlocal news or investigative blog) and the European Court has accepted that in contributing to public debate, they also deserve protection (see e.g. *Morris and Steel*<sup>43</sup>). Furthermore, whistleblowers themselves should be protected. Quite apart from the risk of incidental identification without a journalist’s disclosure of the source of a story, or the identification of a source following a search of a journalist’s office/materials or interception of their communications, there is a concern about putting all the pressure on journalists to protect sources when there is no public interest safeguard for the sources in the law. This might also act as a deterrent to individuals thinking of whistleblowing (*Görmüs v Turkey*<sup>44</sup>).

### 3. The statutory commissioner model and the Canadian model

3.1. In this section we examine the statutory commissioner model proposed in CP 230 at 7.97-7.122 and **Provisional Conclusion 25**. It is our position that the statutory commissioner model has some benefits but does not ultimately provide an adequate method for ensuring the accountability of the executive. Instead, the Canadian model is to be preferred (cf. **Provisional Conclusion 26**).

3.2. We agree with the Law Commission’s views at 7.101 of the Consultation Paper, that the staff counsellor role should not be enhanced to create a statutory role. While we are not in a position to know the internal workings of the agencies, although some evidence about the ineffectiveness of the internal complaints mechanism was given to Parliament,<sup>45</sup> it seems to us a very strong and sensible argument that to make this post one of a statutory commissioner ‘could undermine the Staff Counsellor’s role as an informal, independent mediator who achieves the resolution of issues by way of dialogue and explanation’ (7.101). We also note some weaknesses<sup>46</sup> with the possible remedies that an internal actor could take to remedy wrongs, especially those that are deep-rooted in practice. We also note that a role with that function is consistent with the comments of Sir David Omand and Lord Hope on the importance of understanding the ‘bigger picture’ (7.44-7.45). We agree also with the Law Commission’s view that a new statutory post should be created. However, we are cautious in our views about the role of the staff counsellor and note, in particular, the submission of *Liberty* on these

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<sup>41</sup> Posetti, 2017, ‘Protecting Journalism Sources in the Digital Age’ available at: <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf>.

<sup>42</sup> *Ibid*, p.9.

<sup>43</sup> *Morris and Steel v. UK* [2005] EMLR 314.

<sup>44</sup> *Görmüs v Turkey* App. no. 49085/07 (ECHR, 2016).

<sup>45</sup> House of Commons, Public Administration Committee, Leaks and Whistleblowing in Whitehall, 10<sup>th</sup> Report (session 08-09) paras 81-86.

<sup>46</sup> Wadham J, ‘Official Secrets Act: at last a right to disclose for spooks?’ (2002) 152 *New Law Journal* 556, p. 558.

points, especially paras 100-101 of the *Liberty* submission.

- 3.3. The statutory commissioner model as proposed is a welcome step forward and provides a measure of accountability by virtue of establishing a pathway within which concerns can be raised. However, in our view this model needs: (a) to be fleshed out more fully with some uncertainties resolved, (b) to have a pathway for former employees, and (c) accompanied by a public interest defence, as the Canadian model is. As such, we do not agree with **Provisional Conclusion 25**. It is a welcome starting point but we have too many concerns about it to agree with **Provisional Conclusion 25**. We elaborate on some of our main concerns in the following paragraphs.
- 3.4. First, although the statutory commissioner will either be a current or former holder of high judicial office, it would appear that the functions of the commissioner are executive functions. The investigation of complaints and reporting to the Prime Minister seem both to be done in executive capacity, and the report is to the executive. This is a limitation on the transparency of the system and its findings. There seems to be no proposal that the commissioner has power to make any orders or provide any remedies. If the commissioner is unsatisfied with the outcome of any action by the Prime Minister, there seems to be no pathway open to the commissioner to press a matter further directly with parliament or via judicial review. As such, it seems to be fundamentally weak as a mechanism for ensuring accountability.
- 3.5. One possible answer to this is that the Prime Minister has a duty to lay a report before parliament, as is the case for the reports of the Investigatory Powers Commissioner. However, this does not effectively remedy the flaws above because that duty will be ‘subject to the need to ensure information relating to national security is not jeopardised’ (7.98). That limit seems sensible on the face of it, albeit that it does not raise the question of other public interests that may also be in issue (e.g., a public interest in accountability of the intelligence and security agencies). While not a direct comparator, it is noteworthy that the disclosure of s. 94 Telecommunications Act notices effectively never happened because of a similar constraint on publicity. At the least, therefore, it would seem that the complete report should be laid before the Intelligence and Security Committee of Parliament, and it should be laid in full before at least one other committee (e.g., Home Affairs, Joint Committee on Human Rights).
- 3.6. Another possible answer – but not canvassed in the Consultation Paper – is that the person who brought the matter to the statutory commissioner might seek a judicial review of the decision by the statutory commissioner. However, this may not be practical as it is not clear whether or to what extent the person will find out the outcomes of the statutory commissioner’s actions. We would like to see the Law Commission clarify this. We would however guard against the use of special tribunals, such as the Investigatory Powers Tribunal, to hear any such proceedings. Exceptions to long-established principles and procedures and the use of exceptional processes are undesirable and, furthermore, there is a risk of ‘capture’ in the context of such specialist tribunals. The Investigatory Powers Tribunal has been criticised for being deferential to

Government interests, for example – the *Liberty* case<sup>47</sup> was the first in which it found against the government over a decade and a half.

3.7. If a commissioner model is adopted, it is important that it be independent from the executive. In this context, criticisms raised about the Investigatory Powers Commissioner might prove instructive.<sup>48</sup> Despite a trend to the use of independent bodies to appoint for example, senior judicial figures in the interests of supporting their independence, the Investigatory Powers Act specified that the commissioner is to be appointed by the Prime Minister. Even if the commissioner acts independently, it is questionable whether he, as required by European jurisprudence,<sup>49</sup> looks independent – even if, as Lord Judge suggested, the Prime Minister in reality has little to do with the appointment.<sup>50</sup> The Commissioner’s institutional independence is consequently undermined. A further key point would concern resources: a key element of independence is adequate funding. In oral evidence to the Joint Committee on the Investigatory Powers Bill, Sir Stanley Burnton (Interception of Communications Commissioner, and formerly Lord Justice of Appeal) pointed out:

*The appearance of independence is undermined if one has to go through the Minister whose work one is supervising.*<sup>51</sup>

3.8. Second, what are the options open to (or obligations of) a statutory commissioner who comes across impropriety or illegality that while not criminal might give rise to a civil action? For example, section 231 of the Investigatory Powers Act makes provision for error reporting. Would the statutory commissioner have any such obligation or power? We note, for example, that the error reporting provisions in the Investigatory Powers Act are different from those in the original Draft Bill. The Joint Committee on the Draft Bill noted that the Bingham Centre for the Rule of Law had identified the approach to error reporting in the Draft Bill as being a matter of profound concern, quoting the Centre’s submission, which said:

*We accept fully that there will be circumstances where a person has suffered significant prejudice or harm but that there will be good reasons (e.g., national security) why they should not be notified, and it is right that the legislation provides for that. However, it is entirely inappropriate that the legislative presumption is against notification and that the legislation does not provide for notification at a future point when there are no longer reasons for secrecy. The rule of law requires access to justice, and this means that a person who is wronged should have an effective right to a remedy. This is especially so when that wrong has been at the hands of the state, and when the wrong has resulted in significant prejudice or*

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<sup>47</sup> *Liberty & Ors v GCHQ* [2015] UKIP Trib 13\_77-H (6 February 2015).

<sup>48</sup> See evidence of IOCCO to Joint Committee on the Investigatory Powers Bill, para 8.

<sup>49</sup> *Zakharov v Russia* App. No. 47143/06 (ECHR, 4 December 2015) paras 257-260.

<sup>50</sup> Oral evidence to the Joint Committee on the Investigatory Powers Bill (HC651), 2 December 2015, available: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/oral/25685.html>.

<sup>51</sup> 2 December 2015, Q 57, <https://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/oral-evidence-draft-investigatory-powers-committee.pdf>

*harm.*<sup>52</sup> .

The evidence of the Interception of Communication Commissioner's Office (IOCCO) also raised numerous concerns and highlighted the importance of ensuring that 'individuals adversely affected are able to seek effective remedy.'<sup>53</sup>

- 3.9. We are not convinced that the Investigatory Powers Act really addresses those concerns even now, even though there was some movement from the Draft Bill. Certainly, the concerns as articulated above apply all the more to the Law Commission's proposals here, which make no provision at all in this or similar respects. We would like to see some exploration and clarification about the scope of the statutory commissioner's powers, and proposals should be opened to further consultation.
- 3.10. Third, it is not clear why a former employee does not also have an option of approaching the statutory commissioner. The absence of this seems counter-productive as the statutory commissioner may be better placed than some of the other individuals or agencies to handle a concern. There does not seem to be any reason in principle why this could not happen; at 7.120 it is noted that 'all bodies with a link to investigatory powers, even if those are private companies' can contact the Investigatory Powers Commissioner. Moreover, there is absolutely no guarantee of accountability to parliament in any way at all where a former employee raises a concern. If this option is not to be open, it is our view that there needs to be a clear justification.
- 3.11. In our view, there should be accountability pathways where concerns are raised by current employees and by former employees. The proposed pathways are not adequate in either case.
- 3.12. Fourth, we note that the Consultation Paper suggests that the Investigatory Powers Commissioner may act as a commissioner in respect of those in the security and intelligence agencies. While we acknowledge that this may provide a neat solution in terms of expertise and as regards the potential sensitivity of the information in question, we would sound a note of caution. The Investigatory Powers Commissioner is a new role, albeit one central to the oversight regime in the Investigatory Powers Act, but how well it will operate in practice is yet to be known. In addition to the institutional questions we have flagged above, concerns were raised about the triple function of the commissioner and his office, both in terms of workload and in terms of internal tensions between those responsibilities. The question of the sufficiency of resources has not been finally addressed. Against this background, we question whether imposing a further responsibility on the Investigatory Powers Commissioner might overload the office and comprise the Commissioner's effectiveness both in this role and in regards to his existing responsibilities.
- 3.13. These weaknesses point to the strengths of the Canadian model. We disagree with the **Provisional Conclusion 26**. In our view, the Canadian model – and specifically the

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<sup>52</sup> Report of the Joint Committee on the Draft Investigatory Powers Bill, HL93 and HC 691, 11 Feb 2016, para 614.

<sup>53</sup> IOCCO, Evidence for the Joint Committee for the Investigatory Powers Bill, 21 Dec 2015, <http://www.iocco-uk.info/docs/IOCCO%20Evidence%20for%20the%20IP%20Bill%20Joint%20Committee.pdf>, pp 7-8.

fact that it provides for a public interest defence – is very valuable. It provides a last resort for dealing with failures of the state. Ideally, there should be no failures that fall for disclosure in this way. It should be extremely rare that disclosure should occur as a last resort because the systems, if good, should work. However, it is important because it provides an avenue that ensures the executive can still, in the last resort, be held to account.

3.14. We appreciate that the Canadian model, not having been relied upon, is difficult to assess (7.126). However, an issue that is not considered in contrast to the purported difficulties raised at 7.129 (a number of which we deal with above), is that the very possibility of an effective last resort disclosure might improve the processes that are established for resolving concerns. That possibility should exist in the UK.

#### 4. Access to court by members of the public

4.1. This section considers the ability to exclude members of the public from court proceedings (**Provisional Conclusion 19**). The Consultation Paper rightly observes (at 5.27) that open justice principles are engaged when the public is excluded from proceedings and that open justice is fundamental to the rule of law and democratic accountability. Accordingly, the threshold test for whether the public should be excluded should in every instance be high.

4.2. We agree with **Provisional Conclusion 19** that the power to exclude the public ought to be subject to a test of necessity. However, we are cautious, limited and conditional in our agreement here for several reasons.

4.3. First, it is not clear precisely what phrase is intended. The language used in PC 19 at 5.41 ('ensure national safety') differs from the language used in the OSA 1920 ('prejudicial to the national safety'). The latter seems to set a lower threshold that could see the public excluded more easily, as the Commission's Summary document notes at 5.16 (but there is no parallel observation at 5.41 of the Consultation Paper). We would like to see further explanation of what might be intended.

4.4. Second, the Consultation Paper does not engage with other parts of OSA 1920 s 8(4) that provide assurance that the only part of a prosecution that would be public would be the passing of sentence.

4.5. Third, it seems that the Commission finds in *Incedal* a pathway that makes it acceptable and perhaps even comfortable to exclude the public from criminal proceedings. In our view, *Incedal* is an extraordinary departure from open justice and should not be seen as providing a ready pathway to excluding the public from proceedings and limiting the access of journalists and others. We draw attention to some of the shortcomings and uncertainties in *Incedal* to support and emphasise our view that the *Incedal* decision should not be seen too readily as a good decision nor adopted as a solution.

4.6. The Commission notes at [5.59] that there is a difference in the common law test and the OSA 1920 test: the former refers to ensuring the administration of justice is not prejudiced and the latter refers to the need to ensure the national safety is not prejudiced. However, at footnote 39 the Consultation Paper observes that 'the extent to

which these two tests differ as a matter of substance is debatable.’ In our view, the decision in *Incedal* does not ultimately turn on whether the administration of justice is prejudiced but, rather, turns on whether national security is prejudiced. This is apparent from the court’s statement that:

*If the court’s decision was premised on the basis that the DPP might not continue with the prosecution if the material was made public, it is difficult to see how it would be open to the court to decide subsequently to make that evidence public, as the prosecution would have proceeded only on the basis it would not be and the court had not made a determination as to the effect of that evidence on national security and why it could not be made public. ([59], emphasis added)*

- 4.7. The latter part of that sentence is the key: the decision is ultimately to be based on an assessment by the court (with considerable deference to the executive view) that a public hearing would pose a risk to national security. The court is, in essence, saying that the public interest in prosecuting terrorism offences is sufficiently strong that there should be departures from established principles of open justice, and the ‘strong public interest’ in the evidence being placed in the public domain (para [70]) is outweighed by national security considerations. Although it has been framed in terms of frustration of the administration of justice (e.g., [4] and the first part of the para [59] extract above), it seems more accurate to characterise decisions of this kind as being about national security.<sup>54</sup>
- 4.8. From this, it seems to us that there are substantial parallels emerging in the common law and OSA 1920 justifications for excluding the public on the grounds of national security. However, that does not mean the common law, as explained and applied in *Incedal*, provides a wise or just path. On the contrary, it is very worrying. We will highlight three concerns.<sup>55</sup>
- 4.9. First, in a pre-trial decision, the Court of Appeal rightly warned that the cumulative effects of secrecy must be considered.<sup>56</sup> However, the Court considered this only in terms of holding a criminal trial *in camera* and anonymising the defendants and while finding it ‘difficult to conceive of a situation where both departures from open justice are justified’, the secrecy issues are only considered at the level of an individual trial. There is no consideration of how those cumulative effects might be important across time and across different areas of law, not least of which are the ways that the Justice and Security Act now provides for secrecy in virtually the full range of civil matters. We urge the Law Commission to view the proposals around OSA reform in light of that wider

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<sup>54</sup> See L McNamara, ‘The implications of *Incedal*: managing the new normal in national security cases’ *The Justice Gap*, 14 Feb 2016, <http://thejusticegap.com/2016/02/the-implications-of-incedal-managing-the-new-normal-in-national-security-cases/>

<sup>55</sup> For more detailed discussion of these and other concerns see L McNamara, ‘Secret trials: a little transparency, a lot to worry about’ *UK Human Rights Blog*, 12 June 2014, <https://ukhumanrightsblog.com/2014/06/12/secret-trials-a-little-transparency-a-lot-to-worry-about-lawrence-mcnamara/>; L McNamara, ‘How open will this newly open justice be?’ *International Forum for Responsible Media (INFORRM) blog*, 14 June 2014, <https://inform.wordpress.com/2014/06/14/how-open-will-this-newly-opened-justice-be-lawrence-mcnamara/>.

<sup>56</sup> *Guardian News And Media Ltd v AB & CD* [2014] EWCA Crim (B1) (12 June 2014).

context.

4.10. Second, while there was some transparency in *Incedal* – e.g., a limited number of ‘accredited’ journalists were invited to attend (albeit with heavy restrictions on what could be reported), small parts of proceedings were to be held in open court, and the defendants not anonymised – the restrictions were nevertheless ill-defined and uncertain in scope and much could have been explained without any peril to national security. For example, in that case the following matters were not explained by the court:

- Who were the media parties to the proceedings? (The original decision<sup>57</sup> referred only to the Guardian whereas it seems clear there were others joining the Guardian in its application, as recorded in later judgments<sup>58</sup>)
- Which organisations or individuals were considered for ‘invitation’?
- Which organisations were ‘invited’? Which individuals were ‘invited’? If an organisation is invited, can it choose its own journalist?
- What were the criteria for invitation? For receiving or being refused permission to attend?
- Were other organisations or individuals asked to be admitted? If so, what was the outcome?

4.11. Procedures should be explained if the idea of open justice is to have any meaning. Again, surely an explanation of these issues cannot imperil security and, again, some examples:

- What is the process for deciding which organisations and/or journalists are being invited?
- Who ‘invites’ a journalist to attend?
- Who decides who will be ‘invited’ or who will be permitted to attend?
- What are the criteria for ‘accreditation’?
- Will decisions about accreditation be explained?
- Can the prosecution or defence object to any organisation or individual being invited or permitted to attend?

4.12. Third, there is a risk in focusing exclusively on the media in considering open justice questions: the media may not always be the best or most effective representatives of

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<sup>57</sup> *Guardian News And Media Ltd v AB & CD* [2014] EWCA Crim (B1) (12 June 2014).

<sup>58</sup> *Guardian News And Media Ltd & Ors v Incedal* [2014] EWCA Crim 1861 (24 September 2014).

the public interest. We should be cautious about both the process and the media's role. It is not at all inconceivable that journalists will moderate the way they report so that they do not risk their 'accreditation'. That may mean pulling punches on how a matter is reported, how legal arguments and judicial reasoning are analysed and evaluated, or accepting (rather than contesting) decisions about what can be reported. This is especially so if processes are opaque and if a journalist may be taken off the 'approved' list at the will or request of the government, or indeed at the will or request of any party.

- 4.13. There has been no consideration of seeking or allowing attendance by organisations who may be able to offer valuable insights into the extent to which the proposed process protects and is consistent with the rule of law. This would be enhanced if professional bodies such as the Law Society or the Bar Council were invited to have an independent observer attend the trial. Similarly, NGOs working in the areas of open justice and human rights might be invited to have observers attend. They would of course be subject to any undertakings of confidentiality that apply to others.
- 4.14. In sum, we are cautious about the extension of secrecy in criminal cases. We can see there may be extraordinary circumstances in which the public might be excluded from parts of cases for OSA prosecutions, and we agree that a necessity test is appropriate for that. If **Provisional Conclusion 19** is seen to retain the OSA 1920 s 8(4) position that only the sentence is to be in public, then that seems inappropriate to us. Our view is that while the test of necessity is an improvement on the current law, that proposed change alone falls well short of what is required to maintain fidelity to the rule of law. The issues and suggestions above are, however, always a second-best. They are not a substitute for open justice. Neither the common law after *Incedal* nor the OSA provisions (as they are or as modified by the Commission's proposals) provide adequate protections for open justice. Where there is the prospect of a prosecution for disclosure of information that might be embarrassing to the state or might disclose state wrongdoing, transparency is vitally important for democratic accountability and public confidence in the courts.

## 5. Conduct of criminal trials

- 5.1. This last section considers issues that apply more generally to criminal trials in which sensitive information may be disclosed (**Provisional Conclusion 21**). The consultation paper draws attention at 5.49 to the fact that while it is principally concerned with trials relating to official secrets statutes, the issues addressed could arise in the context of any criminal trial involving national security information. We agree with that view.
- 5.2. The consultation paper then notes the sharp contrast between the way that the laws relating to criminal and civil proceedings have developed in recent years, noting that the Justice and Security Act 2013 (JSA) provides for the use of Closed Material Procedure (CMP) in civil matters generally. We appreciate that the Commission's 'aim is not to suggest that the procedure that is applicable in the civil context ought to be imported wholesale into the criminal' (5.53). However, the consultation paper goes on to say that

a review of criminal procedure in this area ‘would provide the opportunity to tailor these powers’ to the criminal context (5.59). We disagree vehemently with proposition that CMP or any variation on it should be transplanted to the criminal context. We disagree with **Provisional Conclusion 21** that a separate review of criminal procedure in this area is warranted. There are two main reasons for our disagreement.

- 5.3. First, in our view the consultation paper does not state the basis of the civil law processes in a way that reflects the genesis or reality of CMPs under the JSA. At 5.52 the paper says that one of the factors in the balance is upholding the principle of open justice. The JSA is not concerned with open justice; it dispenses with it. The JSA refers to the effective administration of justice, and not to open justice. In the parliamentary debates at the time there were moves to incorporate open justice considerations into the Bill but, after inclusion at committee stage, these were defeated. The Supreme Court decision in *Al Rawi*, which was the precursor to the JSA, distinguished between natural justice and open justice, and that distinction is in effect the basis on which the JSA proceeds. When CMPs are used, open justice is dispensed with and natural justice is compromised.
- 5.4. Secondly, the JSA was – and remains – highly contentious and there is great dissatisfaction with its approach that denies a party to the case access to relevant information and uses a special advocate procedure that, even with the best will in the world, cannot provide representation that is as effective as representation would be in ordinary criminal proceedings. As Lord Kerr said in *Al Rawi* (at [93]), ‘To be truly valuable, evidence must be capable of withstanding challenge. ... Evidence which has been insulated from challenge may positively mislead.’ In the course of consultation around the Green Paper that preceded the Justice and Security Bill, a submission signed by more than 50 special advocates noted the following:

*Those SAs who do have experience of acting in CMPs have consistently and regularly drawn attention, both in articles in print and in evidence to Parliamentary committees, to the considerable shortcomings of those procedures in terms of fairness. Nicholas Blake QC (now Mr Justice Blake, a High Court Judge) described the operation of CMPs in the Special Immigration Appeals Commission in the following way in evidence to the Joint Committee on Human Rights: ‘the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system’.<sup>59</sup>*

- 5.5. The suggestion in the consultation paper that such powers should be extended to the criminal context should be not be pursued. Moreover, there is no good reason at this point in time to embark on a wider review of criminal trial process and national security issues. The *Incedal* case is presently and should hopefully remain an exceptional one. On any reading of the JSA and CMP as it stands, there should be no move to transplant such processes into the criminal context. Within the JSA, section 13 states that its operation

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<sup>59</sup> Justice and Security Green Paper: Response to Consultation from Special Advocates, 16 Dec 2011, [12], [http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09\\_Special%20Advocates.pdf](http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf)

must be reviewed five years after its enactment. A statute that diminishes equality of arms, dispenses with open justice, has been widely criticised from its inception, and which has not yet undergone post-legislative review does not provide an adequate basis for reviewing the criminal law, especially in circumstances where the Court of Appeal in *Incedal* has not made any indication that existing processes are inadequate.

5.6. We disagree with **Provisional Conclusion 21** in the strongest possible terms.

## 6. Contact details

We are happy to offer further detail on this consultation response if needed. Please contact us using the details below.

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