COMPASSION IN CARE
Reg. Charity No. 1102282
Founder and CEO Eileen Chubb
Patrons
Roger Graef OBE
Erin Pizzey
Auriol Walters
@compassnincare
19A TRANSMERE ROAD
PETTS WOOD
ORPINGTON
KENT
BR5 1DT
www.compassionincare.com
info@compassionincare.com

PUBLIC INTEREST – ENEMY No 1

Whistle-blowing and the Official Secrets Acts

By Eileen Chubb

Introduction

This report is in response to the Law Commission's proposals for the "Espionage Act"[i] which amount to the **greatest attack on free speech** in generations. This consultation will directly affect whistle-blowers and whilst accepting that the area of Official Secrets needs to balance safety and freedoms our concern is that freedoms are being taken away by stealth.

Firstly, we are concerned

1. that any whistle-blower who is charged with a criminal offence under any **new** or existing legislation is given a **fair hearing** and the chance to defend themselves to the same degree as **any** other citizen charged with a criminal offence.
2. that there is **no** increase in prison terms and
3. that any amendments made to this area of law are made to improve the law in the interests of fairness, transparency and justice, not for political motives.

Secondly, we completely reject the inclusion of **Damage to the Economy** as a new offence because this could be misused by the state to protect the corporate interests of private companies to the degree that **any** damaging information could be suppressed for fear of prosecution.

Thirdly it is essential that we have a **free press** who protect their sources and who must have access to a public interest defence in order to serve the public interest.

Whistle-blowing or Espionage?

As neither the current Law nor the recommendations for new legislation in the form of **The Protection of Official Data** make **any** clear distinction between **Espionage** and **whistle-blowing** and **other leaking**, we suggest the following categories:

Espionage: An individual who intentionally obtains information for the purposes of giving an advantage to either another state or a hostile entity with the intent of causing harm to the public or the state.

Whistle-blowing: An individual who during the course of their work is confronted by evidence of wrong-doing and who either

a) discloses the evidence internally but no action is taken to address the wrong so then they would have to decide whether or not to go outside,

b) or the internal route is compromised or inadequate, resulting in disclosure to the public with **only** the intent of serving the public interest by stopping the wrong-doing.

Other Leaking: There is also the category of leaking for other reasons, political or financial gain or personal motives for example. This category needs to be clearly and separately defined because this is **not** whistle-blowing and should be a separate issue.

Clearer terminology should be used as “leaking” is too broad a term.

There should be a non-exhaustive list of examples of **what is** and **what is not** a Public Interest Disclosure. I suggest that a public consultation on this list should take place separately, making specific efforts to include whistle-blowers from all the sectors covered by the current Official Secrets Act, both from the UK and **also** from the countries whose legislation the Law Commission included in their consultation paper 230. There should be no new legislation without this important point being clarified. We are already working on gathering information from all sectors as part of our work on drafting Edna's Law[ii]. We have the advantage of our many years of experience in being contacted by whistle-blowers from all sectors, because this is the reality that underpins Edna's Law.

Burden of Proof

The Law Commission Consultation (Page 45)

*"As we discussed in our analysis of the current law, one of the aims of the Official Secrets Acts 1911 and 1920 was to **ease the prosecution's burden** in respect of proving elements of the offences in the Official Secrets Act 1911.*

*For example section 1(2) of the Official Secrets Act 1911 provides that the prosecution does not need to show that the defendant committed any particular act tending to show a purpose prejudicial to the safety or interests of the state. Notwithstanding that no such act has been proved against them, **the defendant may be convicted** if, from the circumstances of the case, or from the defendant's conduct, or **from their known character as proved**, it appears that their purpose was a purpose prejudicial to the safety or interests of the state. Therefore the prosecution does **not** need to prove beyond reasonable doubt that the defendant had a purpose prejudicial to the safety or interests of the state. It suffices that **it appears** the defendant had such a purpose **from their known character.**"*

With regard to "***easing the prosecution's burden***" if there is **no evidence** other than somebody's subjective opinion, **there should not be any prosecution**. As an organisation which is evidence-based ourselves, we find this particularly alarming and so should everyone, because most people are unaware that this is current law. The presumption of "**innocent until proven guilty**" is a fundamental right. **To place the burden of proof on the accused undermines the right to a fair hearing**. Consider this example: Mr S had a

criminal conviction for burglary as a teenager and has never re-offended, and is now a hardworking family man who bitterly regrets the crime of his youth. Mr S is on his way home from work and is arrested as it "***appears because of his known character***" that he was intending to break into a house he passed by on his route home.

Private Companies

Damage to the Economy. The information given for this new inclusion is sufficient to raise serious concerns about the possible consequences. The term insofar as it affects the national interest could be applied to the corporate interests of any large organisation. **No corporate interest should be protected by the state. If there is damaging evidence about an organisation that affects the public then it is in the public interest for it to be disclosed**. For example, if a whistle-blower disclosed documents about wrong-doing at a bank and the bank collapsed as a result, could this be twisted into "*damage to the economy*"? The fact such a possibility is being considered at all is chilling.

Attorney General

*Law commission Consultation page 74. 3.113 "The essence of the Attorney General's function under the Official Secrets Acts is that **he draws upon his political experience**, and is able to obtain the views of the responsible minister on the national interests, for the purpose of exercising more efficiently his impartial law enforcement role. He is not influenced by party considerations in exercising this role"*

I consider this an **unsafe process** for impartial judgement because there is clearly a potential conflict of interest. For example, if a particular Minister or Government have been damaged by disclosures made by a whistle-blower and the views of that same Minister are allowed then to directly influence the decision to prosecute, then it cannot be considered impartial. An independent judicial panel should decide if a prosecution is in the public interest, not a politician.

Trial by Jury

If the decision is taken to prosecute a whistle-blower then they should be tried by a jury in an open court.

Any decision to prosecute a whistle-blower should be tested by the process of a fair hearing.

Clive Ponting[iii] [iv] was an assistant secretary in The Ministry of Defence who discovered that the Government had misled the House of Commons over the sinking of the Argentinian battleship the General Belgrano. Clive Ponting was prosecuted under The Official Secrets Act as it stood at that time, which banned Ponting from making such a disclosure unless it was to someone "*to whom it is his duty in the interests of state to communicate the information*."

Ponting admitted that he had leaked the information but argued that he was justified in doing so because it was in the interests of the state that such information be disclosed to an MP. This argument was flatly rejected by the judge, who stated that the "*interests of the state*" simply meant "*of the Government of the day*" and directed the jury **not** to allow Ponting's defence. The jury ignored this direction and acquitted Ponting, causing major embarrassment to the Government. This case raises the question, **why** did the Attorney General decide to prosecute and was it an impartial decision?

Justice and the law can be two very **different things**; a jury is the best hope of them being the **same thing**.

The Internal Route

*Law Commission page 178, 7.83 "According to research conducted by Savage, the total number of approaches civil servants have made to the Civil Service Commission has remained low since it gained the **power to investigate**. For example between March 2014 and April 2015, the Commission dealt with **four cases**. Savage attributes these low numbers to two factors, first many of the complaints made to the Commission concern **human resources issues** which it rejects on the basis that the Civil Service Code precludes it from considering such matters. Secondly Savage suggests that the Commission's own guidance **steers prospective complainants towards internal departmental and agency complaint mechanisms**"*

Firstly, I should point out that whistle-blowing is described as a **"**human Resources issue**"** because PIDA wrongly classes it as an employment issue so that, as stated above, such issues cannot be investigated. In effect those individuals that are **most likely** to be whistle-blowers and **most likely** in need of an effective internal route are the very people **refused** an effective investigation.

There are numerous references throughout the Law Commission Consultation document about using internal procedures such as the staff counsellor or the Civil Service Commission as a means of addressing concerns without resorting to public disclosure. It is not surprising these routes are rightly seen by whistle-blowers as entirely ineffective because **they are used to divert attention from the concerns being raised**, and to suggest that the only problem is the employee.

The concept of internal reporting refers to PIDA, The Public Interest Disclosure Act as a source of guidance but PIDA is a completely flawed law. The Proscribed Regulator model has been proven beyond doubt to be entirely ineffective due to either being totally inadequate, incompetent, or in the few cases where they have effectively investigated and upheld concerns, their findings have been disregarded in PIDA judgments such as the BUPA 7[v] case.

There are also a significant number of cases coming to our attention where a proscribed regulator such as the CQC has informed the employer of a whistle-blower's identity.

It is therefore completely unrealistic to rely on a proscribed body or investigator in any sector, and even more so where whistle-blowers face such a high risk of criminal prosecution for disclosing information in the public interest. That is why Edna's Law is **not** based on the proscribed regulator or investigatory commissioner model, but on three effective stages.

A detailed special report on how Edna's Law will work in practice will be published later this year and is based on evidence from thousands of whistle-blowers.

However, when a whistle-blower discloses information, then assessing the effectiveness of the internal whistle-blowing route or any circumstances that led up to a whistle-blower by-passing the internal route, should be considered. These are the initial issues that should be covered:

1. Is the whistle-blower raising **convenient** or **inconvenient** issues?

2. Take account of **any** possible incentive to cover-up the issues.

3. Take account of the work record of the employee **prior** to whistle-blowing, and also any attempts to smear or discredit the person **after** the first time they raised concerns internally.

4. Take account of the track record of the employer i.e. how have they treated other whistle-blowers and what action was taken on reported concerns?

5. Consider situations where the internal route is being by-passed because for example, any of the concerns being raised by the whistle-blower are of such a serious nature that the whistle-blower reasonably believes an **imminent** or on-going harm or risk of harm to others is involved. Or that the employer could be implicated in the wrong-doing or may have **prior knowledge** of the wrong-doing by any act or any failure to act.

6. Would the nature of the wrong doing be a **motive** for an employer to discredit or cause detriment to the whistle-blower?

7. What motive has the whistle-blower in raising the concerns? eg Had they **anything** to gain by the disclosures? Why would they risk whistle-blowing?

8. What action was taken to address the wrongdoing? Is that action proportionate given the nature of the wrongdoing?

Law Commission Consultation Page 151 6.42 "Lord Hope then proceeded to make the following comments, "As I see it, the scheme of the Act (OSA) is vulnerable to criticism on the ground that it lacks the necessary degree of sensitivity. There must as I have said, ***be some doubt*** *as to whether a* ***whistle-blower*** *who believes that he has good grounds for asserting that abuses are being perpetrated by the security or intelligence services will be able to persuade those to whom he can make disclosures to take his allegations seriously, to persevere with them and to effect changes which, if there was substance in them, are necessary"*

Law Commission Consultation 7.85 "although it is used infrequently, something which is perhaps attributable to its own guidance, a process does exist that enables concerns from civil servants to be investigated by independent statutory commissioners. ***We believe that this satisfies the public interest*** *as it means allegations of impropriety can be investigated and* ***ultimately resolved****.*

The Law Commission have not provided **any** figures for "***the resolved impropriety***". Given both the total numbers of civil servants and possible numbers of **"*resolved concerns***" I would have expected at least a moderate number of case prosecutions for wrong-doing via this route, **if** it were truly effective. I would ask the Law Commission to publish the full data on the numbers of concerns reported and what resulting action was taken during the last ten years in order to assess this. Meanwhile I remain **doubtful that this route would satisfy anyone's idea of meeting the public interest**.

The security services have their own staff counsellor, who has handled **149** cases since **1987**. That is only just over **3** a year.

However I also note that in chapter 7 of the Law Commission Consultation a number of schemes are suggested and repeated reference is made to ***Dealing with complaints***. Whistle-blowers **never** make complaints - they raise **concerns**.

My concern is that using terminology such as "complaints" or "grievances" implies an attitude of either ignorance or intolerance towards whistle-blowers and an attempt to characterise the whistle-blower as a problem employee.

The Law Commission Consultation page 179, 7.85 "Although it is used infrequently, something which is perhaps attributable to its own guidance, a process does exist that enables concerns from civil servants to be investigated by independent statutory commissioners. ***We believe that this satisfies the public interes****t as it means allegations of impropriety can be investigated and ultimately resolved."*

There is **no evidence** to support the above claim, in fact **all** the evidence points in the very opposite direction. The above judgment by the Law Commission would not meet **most** people's idea of **satisfying the Public Interest.**

*The Law Commission Consultation Page 179 7.88 "In addition to these office holders, there are a number of processes which exist and which are available to a member of the security and intelligence agencies who has concerns relating to their work. A **tiered regime** is in operation, in the sense that concerns are **first raised internally** but then can be raised with someone who is independent of the agency in question."*

Whistle-blowers from all sectors who report specific concerns internally and then take those **same** concerns to any independent investigatory agency are identified by this **very act**. When an employee **also** discloses an employer's failure to act it will cost a person their livelihood (Beyond The Façade[vi]). Edna's Law recognises this fact as it is based on comprehensive evidence.

The Law Commission consultation however concludes that the **more** people you approach internally, ie "the tiered regime", as being an effective route when **our evidence** points to this route resulting in **smearing or discrediting of whistle-blowers**. The result is that disclosures of wrong-doing are **never** dealt with at all.

No one **chooses** to be a whistle-blower, it is something they are forced to do by circumstances, an act of conscience in response to a wrong-doing that they cannot justify or turn a blind eye to. Whistle-blowing in any sector results in punishment from employers who are beyond the law.

Blowing the whistle already costs people their jobs, future, and all hope. To place a whistle-blower in a prison cell for committing an act of conscience is not only abhorrent, it is **such a grave injustice that it undermines public confidence in the justice system.**

Public Interest Defence for Whistleblowers

*Law Commission Consultation Page 155 6.60 "In **Guja v Moldova** the applicant disclosed to a newspaper internal letters that demonstrated **political interference** with decisions whether to **prosecute individuals** for criminal offences. When it was discovered that he was the source of the disclosures, **the applicant was dismissed from his job in the Prosecutor General's Office**. This is not therefore a case in which the discloser of the information was prosecuted for a criminal offence, however the European Court of Human rights has relied upon the principles articulated in Guja v Moldova in subsequent criminal cases."*

The case of *Guja v Moldova* raises a number of issues:

Any prosecution of this whistle-blower (Mr Guja) could only have confirmed the political interference with such decisions. This brings us back to our objections on the role of the Attorney General, which is a political appointment.

Were those involved in the wrong-doing ever held to account for perverting the course of justice and **if not**, why not?

Did the whistle-blower pursue his/her case via the domestic courts and how long did he suffer financial hardship for the act of protecting others?

What were the other individuals accused of and why were they being prosecuted?

*Law Commission Consultation Page 155 "The public interest in the disclosed information-The Grand Chamber stated that the interest which the public may have in particular information can sometimes be so strong so as to **over-ride even a legally imposed duty of confidence**. The court did not however provide further elucidation of what the term "Public Interest" means in this context, how it ought to be assessed or by whom."*

Defining the term **Public Interest** seems to cause much difficulty as opposed to the term, **National Interest** which encounters no such difficulty. Surely these two interests should run parallel? The further apart they are is a greater indication that something is very wrong.

A list of examples of what would be considered a Public Interest Disclosure should form part of a **separate public consultation**. I can think of no-one better qualified than the **public** to ask what is in their **interests**. This would address the argument about legal certainty and therefore **would allow a Public Interest Defence.**

*Law Commission Consultation page 160 7.3 "At the outset it is necessary to point out that there are two versions of **public interest defence** that may be envisaged. The first type would require an assessment of whether the disclosure was in fact in the public interest. The second type would require an assessment of whether the defendant had a **genuine belief** that the disclosure would*

be in the public interest. Strictly speaking only the former constitutes a true public interest defence. Given that the latter is not in fact concerned with the public interest, but rather with what the defendant believed to be in the public interest. Both of these formulations will be considered when evaluating the merits of introducing a public interest defence"

My view is that a public interest defence **must** be included. In my experience one of the many failures of The Public Interest Disclosure Act (PIDA) is that it relies on the "**reasonable belief**" model which is flawed as will be explained below:

Firstly, PIDA has been misused and this has allowed a number of cases to succeed with **questionable or even no** public interest elements to the detriment of all **genuine** whistle-blowers (eg Parkins v Sodhexo[vii] [viii])

Secondly the **reasonable belief** element shifts the focus in judgments onto the individual rather than onto the evidence of disclosure.

All genuine whistle-blowers want the wrong-doing or abuses dealt with and all the evidence on the disclosures examined and judged. Edna's Law would provide this. Genuine whistle-blowers do not "***reasonably believe*"** they are acting in the public interest, **they know they are**. Edna's Law will include a comprehensive list of examples of what is a true public interest disclosure in every sector, negating the need for "reasonable belief" which relies not on evidence but on subjective opinions, of the defence, the prosecution and the jury.

*Law Commission Consultation page 162 7.12 "Our preliminary consultation with Stakeholders confirmed **(the Public Interest) Defence is pleaded very rarely"***

*Law Commission Consultation page 167 7.32 "The argument that is often made is that if an individual cannot make a disclosure to the public in the knowledge that they could plead a defence that the disclosure was in the public interest if prosecuted, then the wrong-doing may never be brought to light and may never be rectified. A public interest defence could remedy this by encouraging an individual to make a public disclosure safe in the knowledge that they could plead that the disclosure was in the public interest if prosecuted, of course as discussed they could have no way of knowing in advance whether **a jury would agree** with their assessment that the disclosure was in the public interest. The existence of a public interest defence does not eliminate this risk"*

*Law Commission Consultation 7.63 "secondly the lack of clarity surrounding the concept of public interest would **open the floodgates.** Virtually anyone who wishes to raise the defence in relation to a charge of unauthorised disclosure could do so, notwithstanding the circumstances in which the offence was committed. If the public interest was a defence to unauthorised disclosure, it seems that no information could necessarily be guaranteed to be safe"*

If the defence is **rarely pleaded** it is because whistle-blowing is rarely done lightly. The Law Commission consultation accepts this defence is **rarely** pleaded. Yet they go on to state that allowing such a defence would amount to "***opening the floodgates*.**" Whistle-blowers will be risking their careers and face long term financial hardship, these very large obstacles are a consideration also. Having a non-exhaustive list of what is "a Public Interest Disclosure" would also give clarity. With regard to the jury being a risk? The jury in Clive Ponting's case delivered a **just** if **inconvenient** verdict.

Public Interest Defence for Journalists

*Law Commission Consultation page 177 7.75 "In addition it is our view that the introduction of a statutory public interest defence solely for journalists could be considered **arbitrary**, given that there are other professionals who **might violate the law in the pursuit of their legitimate activities**."*

I do not agree, firstly because it would not be "arbitrary" if whistle-blowers were **also** afforded this defence. How can they violate the law if the activity is legitimate?

Secondly, the scope which this proposed legislation has to suppress information could easily be extended to include **any information** about **anything,** Government departments, local authorities, private companies, prisons, the list is endless. The Law Commission Consultation relies on the Leveson Inquiry[ix] conclusions.

As an organisation that supports both whistle-blowers and the families of those who have suffered abuse, avoidable death and negligence, our aim is to break the chain that allows **all** abuse: ie complacency, ignorance, denial and most of all, silence. We work closely with the media to expose both the abuse and the failures of the authorities to act.

We are already seeing the negative impact of the **Leveson Inquiry** on the work we do with the media to expose abuse, it has become harder to get stories printed**, not** because there is any lack of evidence but because **just** the **threat** of legal proceedings has become a much more effective method to stop the truth being printed. The menace of costs has been used effectively to silence or punish whistle-blowers. The threat of costs against the **winning side** in a libel case is yet another attack on free speech, and is against natural justice. There needs to be the right balance in protecting people from invasion of privacy but also in protecting people by exposing abuse.

Law Commission Consultation page 131 "In Scott v Scott Lord Shaw of Dunfermline described ***publicity in the administration of justice as one of the surest guarantees of our liberties."***

Defence of Necessity

Law Commission Consultation Page 76 3.124 "In the case of Katharine Gun who disclosed information that came into her possession during the course of her work at GCHQ, the defence suggested that Ms Gun also intended to plead necessity as a defence. The CPS offered no evidence against Ms Gun, which meant that the prosecution was halted before the judge had to evaluate whether to leave the defence to the jury."

Law Commission Consultation page 77 "Duress is generally accepted in legal terms to be an excuse whereas necessity is generally seen to be a justification. Duress can be pleaded as a defence under the Official Secrets Acts 1989"

The defence of necessity should be allowed for whistle-blowers. Ms Gun's case[x] shows that the Attorney General **cannot** be relied on for **impartiality.** There are cases that clearly warrant this defence.

Conclusion

The public perception of The Official Secrets Act is that it applies only to the intelligence agencies and top secret information. However our concern is that much of the information which this proposed law aims to protect has no bearing on the national interest. For example, many medical staff employed by Government departments would be asked to sign the OSA and therefore if there was a need to whistle-blow about abusive conditions or negligent

care the Official Secrets Act would be a deterrent. However **any detriment to the national interest would only be done by NOT whistle-blowing.**

Noel Finn[xi], a nurse working at Yarls Wood Detention Centre is a prime example because he was asked to sign the OSA and refused.

When is a Crime not a Crime?

The judge ruled in Clive Ponting's case that the interests of the state simply meant the **interests of the Government of the day**. Because the Law Commission has included and relied on legislation from several countries including the United States, we ask this question:

If for example, a security service in the USA leaks negative information about their own **Government of the day** and this is **not** treated as a criminal offence. but a whistle-blower from the USA is imprisoned for exactly the same action[xii], would this not undermine the administration of justice?

So the answer to "When is a crime not a crime?" appears to be "When it suits those in power".

---

[i] Law Commission Consultation on *Protection of Official Data* http://www.lawcom.gov.uk/project/protection-of-official-data/

[ii] Edna's Law http://www.thewhistler.org/edna-s-law.html

[iii] *The Right to Know: The Inside Story of the 'Belgrano' Affair* by Clive Ponting, Sphere, 1985, ISBN 0 7221 6944 2

[iv] *English Legal System, Elliott, C & Quinn F, 2016-7, p173 and others*

[v] *Breaking The Silence Part* 3 page 117-118 http://www.compassionincare.com/node/168

[vi] *Beyond The Façade* Chubb, E, Chipmunka Publishing, 2008

[vii] *Parkins v Sodhexo 2001* http://www.bailii.org/uk/cases/UKEAT/2001/1239_00_2206.html

[viii] www.11kbw.com/uploads/files/PHPaper.pdf

[ix] Leveson Inquiry
http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/

[x] Katharine Gun in *The Guardian* 2016
https://www.theguardian.com/commentisfree/2016/jul/08/chilcot-iraq-war-gchq-inquiry

xi BBC *File on 4, Whistleblower's concerns over safety at Yarl's Wood,* 2014
http://www.bbc.co.uk/news/uk-27906730

xii *Petraeus Gets Wrist Slap for Sharing CIA Intel as Other Leakers Face Harsh Sentences,* Liz Fields, Vice News 2015

https://news.vice.com/article/petraeus-gets-wrist-slap-for-sharing-cia-intel-as-other-leakers-face-harsh-sentences