11 June 2003

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Mr Cyril Pereira
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Dear Mr Pereira,

National Security (Legislative Provisions) Bill

Thank you for your letter of 15 May.

As we have emphasized on various occasions, we are keenly aware of the importance of the freedom of information to the continued success of the HKSAR as a regional hub of media organizations. The Bill will not affect the freedom of information and other fundamental rights and freedoms. We have stated, not once, but three times in the Bill that all its provisions must be interpreted, applied and enforced in a manner consistent of Chapter III of the Basic Law. This is the clearest possible constitutional and legislative guarantee that international standards on rights and freedoms are fully protected.

Sedition offence

As mandated by Article 23 of the Basic Law, the HKSAR has to enact legislation to prohibit the act of sedition. Under the Bill, the existing broad offences of sedition left over from colonial rule would be substantially narrowed down to target only acts of inciting others to commit serious crimes endangering the state. As you are aware, it is well-established that inciting others to commit an offence is already an offence under the common law. The proposed section 9B of the Crimes Ordinance of the Bill provides that if the Bill is enacted, the existing common law offence of incitement to the relevant

crimes would be abolished, and instead such acts would be covered by the reformed sedition offence with all the additional safeguards in the Bill. There would be no additional "layers of criminality", nor are there any potential for abuse.

Handling seditious publications

The proposed offence of handling seditious publications is tightly defined and would not in any way stifle the freedom of expression. First, the definition of seditious publication, as one that is likely to cause the commission of serious offences, already provides a very high threshold as to what constitute such publications.

Secondly, to prove an intention to incite others to commit an offence, the prosecution must prove, beyond reasonable doubt, that the defendant has persuaded or encouraged others to commit a crime, with the intention that commission of the offence would take place. It is not sufficient to show that one handles a publication when he has reasonable cause to believe that it is seditious.

The provisions certainly impose no burden on anyone handling publications to assess whether it is seditious. The offence would not be committed without the subjective intent to incite a crime. The new provisions are in fact much narrower than the existing provisions on seditious publications, and should relieve rather than cause any concerns of "self-censorship".

"Imminent danger" test

As regards the application of the "clear and present danger" test and the Principle 6 of the Johannesburg Principles, our views have been set out in detail in an earlier paper submitted to the LegCo (Paper No. 2), attached at **Annex I** for your reference.

In short, such tests would be unnecessarily restrictive. It would often be too late if threats to national security can only be dealt with when the danger is imminent. Furthermore, even the drafters of the Johannesburg Principle agree that "imminence" is an elastic concept. This would add to the uncertainty of the law, and application of the test is contrary to our criminal law. Instead, we consider that our present standard has struck the right balance between the protection of national security and the freedom of expression and information.

Time limit for prosecution

I enclose at **Annex II** our submission to the Bills Committee (Paper No. 66), which sets out the rationale for removing the time limits for the prosecution of treason and sedition offences.

You would perhaps wish to note that the Administration has proposed to introduce a Committee Stage amendment to the Bill, stipulating that a prosecution against the offence of handling seditious publication may not be brought three years after the commission of the offence.

"HKSAR Affairs under the responsibility of the Central Authorities"

First, the "new" category is derived and narrowed down from the existing category of "international relations" in the Official Secrets Ordinance, which presently includes information related to the relations between the Central Authorities and the HKSAR. The latter would be excluded from the definition of "international relations." (See section 32 to the Schedule of the Bill). The category is therefore not an "expansion" of the existing Ordinance.

Your letter seems to have overlooked the element of "damaging test" which is essential in the constitution of the offence. Only when the disclosure of the information endangers national security or is likely to endanger national security would the disclosure be considered "damaging". (Section (2) of the proposed section 16A.) "National security" is a tightly defined legal term under the existing laws of Hong Kong, meaning only the safeguarding of territorial integrity and independence of the People's Republic of China. If the disclosure is not damaging, or the person disclosing the information did not know and had no reasonable cause to believe so, he would not be criminally liable. It is extremely unlikely that matters such as appointment of officials would damage national security.

On the other hand, if the disclosure of such information would damage national security, which is tightly defined as set out in the preceding paragraph, we see no reason why the information should not be protected.

Information obtained by illegal access

As explained in the Consultation Document, the intention is to amend the existing provisions to plug the loophole that the same information is protected when it was obtained through unlawful disclosure of a public servant or government contractor, but not when it was obtained through unauthorized

access such as hacking. The Bill has limited the means of unauthorized access to only five specified illegal means.

It should be emphasized that the onus of proof that the information is obtained through illegal means is on the prosecution. No conviction is possible otherwise. There is no requirement for the defendant to disclose the source of information, nor is it necessary to ascertain whether certain information originates from illegal access.

Duty of confidence

The Bill would in no way "significantly expand the amount of restricted information". Present and former public servants or government contractors are already explicitly covered in sections 14 to 17 of the existing Ordinance. The amendment for section 18 only aims at clarifying the term "public servant and government contractor" in that section in line with the previous sections, as explained in the consultation document. "Agents and informants" are not explicitly specified in the Bill.

In fact, the scope of "public servant" is narrowed down in the Bill. It only includes public officers in the HKSAR by virtue of the amendments in Clause 8(1) of the Bill. Information disclosed by Mainland officials would not be protected after the enactment of the Bill.

Public interest and prior publication defences

The rationale against the addition of a general defence of "public interest" has been elaborated in another paper submitted to the LegCo (Paper No. 20), attached at **Annex III** for your reference. It must be pointed out that the context of access to information is different from that of the secrecy laws. For example, in the UK, if the disclosure is illegal under the Official Secrets Act, it would be exempted from disclosure under the Freedom of Information Act. We are not aware of any common law jurisdiction that incorporates a general "public interest" defence into its secrecy laws.

Regarding the defence of "prior publication", we consider that the approach of "damaging test" in our present Official Secrets Ordinance would be more logical and appropriate in dealing with the issue. If a piece of information is already widely available, it would be very difficult for the persecution to prove that further disclosure would be "damaging". On the other hand, if the "prior" disclosure is very limited, then serious harm would still results in the further disclosure of the information. A blanket "prior

publication" defence would not be appropriate in the latter case, and may lead to a loophole where, say, one can disclose protected information for a profit by first "publishing" it in an obscure place anonymously.

Perhaps I would add that our existing Official Secrets Ordinance, which has not been substantially amended in the current exercise, is adopted from the UK 1989 Official Secrets Act. The existing and the proposed offences under our Official Secrets Ordinance follow the equivalent UK provisions. We are not aware of any instances where the UK Act is adjudged to be in contravention of the European Convention on Human Rights (which is very similar to the ICCPR applicable to Hong Kong).

Proscription of organizations

The proscription mechanism aims to proscribe organized crimes that endanger national security. As mandated by the Basic Law, all proscription decisions must be made in accordance with international human rights standards. The criteria is in fact doubly entrenched in the Bill: first, the proposed section 8A(1) of the Societies Ordinance requires that proscription can only be made if the Secretary for Security reasonably believes that this is necessary in the interests of national security and is proportionate for such purpose. Secondly, the proposed section 2A requires that the interpretation, application and enforcement of the provisions must be in compliance with Chapter III of the Basic Law, which enshrines the ICCPR as applied in Hong Kong. This criteria is the most important safeguard that should not be overlooked.

It must also be emphasized that all the above provisions would ultimately be interpreted by our courts, which are well cognizant of international standards. There is also the right to appeal in our courts. The "One Country, Two Systems" principle is firmly complied with under the provisions.

Yours sincerely

(Johann Wong)
for Secretary for Security

c.c.
Clerk to the Bills Committee on National Security (Legislative Provisions) Bill
(Attn: Mr. Raymond Lam)
Solicitor General
Private Secretary to Chief Executive
Clerk to Executive Council

Annex I

Proposals to Implement Article 23 Broadly Consistent with Johannesburg Principles

Objective

This note explains why the legislative proposals to implement Article 23 of the Basic Law are already broadly consistent with the Johannesburg Principles, in response to the request raised at the joint meeting of the Panel on Security and Panel on Administration of Justice and Legal Services on 6 February 2003.

Introduction

2. The Government was determined to comply with the human rights guarantees contained in the International Covenant on Civil and Political Rights (ICCPR). This is required by the Basic Law.

3. There are views that full compliance with our human rights obligations is not sufficient; and that our laws should also comply with the Johannesburg Principles. This is notwithstanding that the principles do not belong to any international covenants and are not binding on the HKSAR, and even the advocates of the principles are unable to point to any other jurisdiction or country which has adopted that standard or which has laws which fully comply with the Principles. Nevertheless, we recognise that the Johannesburg Principles provide a useful benchmark against which the proposals may be judged.

4. Broadly speaking, the Article 23 proposals comply with most of the Principles. For example, Principle 7 enumerates a list of protected expression which should not be considered a threat to national security, including expression that advocates non-violent change of government policy or of the government itself; and criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation. The proposals to implement Article 23 of the Basic Law do not seek to prohibit any such forms of expression.

5. The Johannesburg Principles are concerned with the protection of the freedom of expression and information in the area of national security. They are particularly relevant to two areas where we are constitutionally obliged to legislate - sedition and theft of state secrets.

Sedition

6. Some commentators have suggested that the proposed offence of sedition would not comply with Principle 6. A similar comment might be made in respect of those aspects of treason that touch upon expression. Principle 6 states that expression may be punished as a threat to national security only if a government can demonstrate that -

(i) the expression is intended to incite imminent violence;

(ii) it is likely to incite such violence; and

(iii) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

7. We consider that Principle 6 is unnecessarily restrictive.

8. First, there may be many situations where it would be consistent with international human rights standards, and also appropriate, to prohibit the incitement of non-violent acts. Examples of non-violent acts that have the potential of threatening a legitimate national security interest include -

(i) the disabling of a national defence computer system;

(ii) the use of biological or chemical weapons; and

(iii) broadcasting propaganda for the enemy during a state of war.

It should be possible to criminalise not only these acts but also the incitement of such acts. Principle 6 would seem to prevent this.

9. Secondly, Principle 6 provides that incitement to violence cannot be punished as a threat to national security unless the intention is to incite **imminent** violence.

10. However, where a person intentionally urges another to commit a crime of violence, there is no justifiable reason to distinguish between imminent violence and violence at a later date. Our general law of incitement makes no such distinction. For example, inciting someone to murder another person is an offence regardless of whether the murder being urged is immediate or in a few weeks' time.

11. The are three major difficulties in adopting the imminent violence test into our laws, namely -

(i) it is contrary to general principles of our criminal law;

(ii) it introduces great uncertainty into a serious offence, since "imminent" is a vague concept; and

(iii) most importantly, it appears to be illogical. For example, can a state not legitimately prohibit a terrorist group from inciting others to prepare for a secessionist war say six months in the future, by arming themselves with missiles and other weapons? The "imminent violence" test would seem to leave the state powerless to deal with such a threat.

12. Thirdly, Principle 6 states that incitement to violence can only be punished if it is likely to succeed. If a person intentionally incites violence, whether against an individual or the State, he has demonstrated behaviour that is unacceptable. Long established common law principles provide that the law can legitimately punish such behaviour, irrespective of its chances of success, in the same way that it punishes attempted crimes which may have had no chance of success.

13. The well-intentioned attempt to limit restrictions on freedom of expression in Principle 6 does not produce appropriate results in all cases. The prevailing tests as are now applied by the courts in respect of the ICCPR and the European Convention on Human Rights (ECHR) are that of balancing competing interests.

14. Weighing the competing interests in a candid and informed manner, the proposed offences of treason and sedition, i.e. -

(i) instigating foreign armed forces to invade the PRC;

(ii) assisting by any means a public enemy at war with the PRC, with intent to prejudice the position of the PRC in the war;

(iii) inciting others to commit the offences of treason, secession or subversion; and

(iv) inciting others to violent public disorder that seriously endangers the stability of the state,

are entirely justifiable restrictions on the grounds of national security. The fact that Principle 6 may not in all cases be satisfied would not prevent a court from upholding these offences as being consistent with the Basic Law or ICCPR. Nor should it be a valid ground for not enacting the proposed offences.

Theft of state secrets

15. The Official Secrets Ordinance largely fulfills our obligation to legislate against the theft of state secrets. The National Security (Legislative Provisions) Bill seeks to slightly amend the Ordinance to, inter alia, fill one loophole and to delineate the offences more clearly.

16. Principles 15 and 16 of the Johannesburg Principles are relevant. The first part of Principle 15 states that no person may be punished on national security grounds for disclosure of information if the disclosure does not actually harm, and is not likely to harm, a legitimate national security interest.

17. With regard to the unauthorized disclosure of protected information, with one exception, our proposed laws will fully comply with the first part of Principle 15. That is, an offence will only be committed if the disclosure was damaging, or was likely to be damaging, in the manner specified in the current law. The exception relates to unauthorized disclosures of security or intelligence information by members of the security and intelligence services. This is not consistent with the first part of Principle 15, but the British House of Lords has recently decided that such a restriction is consistent with the UK's Human Rights Act, and through it the ECHR, which is similar to the ICCPR in the relevant aspects.

18. The second part of Principle 15 provides that no person may be punished on national security grounds for disclosure of information if the public interest in knowing the information outweighs the harm from disclosure. Principle 16 contains a similar principle in respect of disclosures by public servants.

19. Neither our current law, nor the National Security (Legislative Provisions) Bill, incorporate such a principle. Our law is based on the UK's Official Secrets Act 1989. During the debate on the Act in the UK Parliament, a "public interest defence" was rejected for two reasons. First, a central objective of the reforms to the Act was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. It was considered that no one should be allowed to disclose information which he knows may, for example, lead to loss of life, simply because he has a general reason of a public character for doing so.

20. The enactment of the UK's Human Rights Act in 1998 enabled defendants in the UK (as in Hong Kong) to challenge criminal offences as

contravening the guaranteed rights. Questions were raised as to whether offences relating to unauthorized disclosure could be reconciled with the guarantee of freedom of expression. The concern was focused, on the perceived need to allow "whistleblowers" to reveal public wrongdoing, on the grounds that this would be in the public interest.

21. Those concerns were answered by the House of Lords in its decision in *Shayler* in 2002. The relevant offence was held to be consistent with the Human Rights Act. The court considered that the law provides sufficient protection for a "whistleblower" to reveal wrongdoings in appropriate cases.

Conclusion

22. The Johannesburg Principles are in no way binding on the HKSAR. While we do not propose to implement a few of the principles on grounds of policy and consistency with other laws, our proposals are broadly in line with the principles. As required, they are consistent with the Basic Law and the ICCPR. We therefore consider our present proposals strike the right balance between the protection of national security and the freedom of expression and information.

Security Bureau
March 2003

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Annex II

National Security (Legislative Provisions) Bill - Proposed Removal of Time Limits for Prosecution

This paper sets out the background to the existing time limits for prosecution under sections 4(1) and 11(1) of the Crimes Ordinance (Cap 200), and explains the reasons for the proposed removal of these limits.

The existing time limits for prosecution of treason and sedition offences

2. Section 4(1) of Cap. 200 has its origins in section 5 of the UK Treason Trials Act 1696. The latter provides that -

> "… noe person or persons whatsoever shall bee indicted tried or prosecuted for any such treason as aforesaid or for misprison of such treason that shall be committed or done within the kingdome of England dominion of Wales or towne of Berwick upon Tweed …. unless the same indictment bee found by a grand jury within three years next after the treason or offence done and committed …."

3. From the available commentaries on the 1696 Act, it is clear that the set of procedural safeguards introduced by the Act were meant to address a serious imbalance in the treason trial procedure that favoured the prosecution over the defence.[1] Prior to 1696, it was claimed that because the treasonous act directly threatened the safety and legitimacy of the king and because a covert conspiracy was especially difficult to prove, treason trials were strongly biased in favour of the prosecution.[2]

4. However, these commentaries did not discuss the rationale for the prosecution time limit. Moreover, none of the local libraries has in its collection old records of the UK Parliamentary debates[3].

The rationale for removing time limits for prosecution

5. The time limit for the prosecution of treason has been criticised by the Canadian Law Reform Commission as lacking in principle. It said[4],

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[1] Alexander H. Shapiro, "Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696", Law and History Review 1993, Vol. 11, at p. 215.

[2] Ibid, at p 217.

[3] The first semi-official reports of the UK Parliament's debates were published in 1803 (see Jean Dane and Philip A. Thomas, *How to Use a Law Library: An Introduction to Legal Skills* (London: Sweet & Maxwell, 3rd ed., 1996), p 95.

[4] Law Reform Commission of Canada, *Working Paper 49: Crimes against the State*, at pp. 36 – 7.

> "One instance of this problem is the imposition of time limitations of sixteen days for the prosecution of treason when evidenced by spoken words and three years for the prosecution of treason committed by using force to overthrow the government (*Code*, s. 48). **Presumably one of the original purposes of the sixteen-day limitation was to avoid the difficulties of witnesses trying to recollect treasonable words that they had overheard**, but with today's electronic means of recording speech, this justification loses much of its force; and anyway, there is no similar rationale for the three-year time-limit. With this possible justification now obsolete, the continued existence of these provisions seems to suggest one of two things: either the conduct (that is, treason) is not really criminal at all because, unlike other serious crimes, it loses its reprehensibleness merely by the passage of a little time; or treason is a political crime that loses its criminality when the political winds change. …. But surely if something is worth criminalizing at all, and especially if it is considered to warrant punishment by life imprisonment, as is treason, it should not lose its criminal character either because time has passed (certainly not so brief a time as sixteen days), or because the political leaders have changed." (emphasis added)

6. While we have been unable to find any reference material directly on the point, we believe that the shorter time limit for prosecution of sedition (i.e. 6 months) was enacted for the same reason, i.e. to avoid the difficulties of witnesses trying to recollect the verbal seditious words. In its discussion of the 16th century treason statutes, the author of *History of English Law*[5] mentions that -

> "Of these provisions made to secure a fair trial of the prisoner there were two. Firstly, for the treasons which could be committed by **spoken words** a short period of limitation was in many cases provided. …" (emphasis added)

7. At common law there are no time limits imposed on the institution of indictable offences.[6] Similarly, time limits for indictable offences are rare in the laws of Hong Kong. It should be noted that many time limits in our legislation were enacted with a view to extend the prescribed 6 month period for prosecuting summary offences (which is laid down in section 26 of the Magistrates Ordinance (Cap. 227)), rather than to impose a time limit which would otherwise not exist.

Security Bureau
June 2003

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[5] Vol. VI, at pp. 498 – 9.
[6] *Halsbury's Laws of Hong Kong*, Vol. 9, para 130.560.

Annex III

National Security (Legislative Provisions) Bill : unauthorized disclosure of protected information and the public interest

This paper explains why the Administration does not consider it appropriate to introduce a public interest defence in respect of the offence of unauthorized disclosure of protected information.

UK Background

2. Hong Kong's law in this area is based on legislation enacted in the UK in 1989, which does not include such a defence. The UK legislation followed a White Paper, published in 1988, which expressly considered and rejected the idea of a public interest defence (see annex 1).

3. There were two reasons given for rejecting such a defence. First, a central objective of the reforms was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. No person should be allowed to disclose information which he knows may, for example, lead to loss of life simply because he has a general reason of a public character for doing so.

4. The issue was also discussed during the Parlimentary debates preceding the enactment of the English legislation. Some of the reasons why such a defence was rejected by Parliament are set out in annex 2.

Hong Kong law

5. Hong Kong's laws on this subject were enacted in 1997. The question whether a public interest defence should be provided was discussed in the Bills Committee and in the debates in the full Council. Eventually, no such defence was provided. Some of the reasons given for rejecting the defence are set out in annex 3.

Human rights

6. In the UK, following the enactment of the Human Rights Act in 1998, questions were raised as to whether offences relating to unauthorized disclosure could be reconciled with the guarantee of freedom of

expression. The concern was focused, in particular, on the restrictions that applied to security personnel, who can commit an offence of unauthorized disclosure even if the disclosure is not damaging. It was also focused on the perceived need to allow "whistleblowers" to reveal public wrongdoing.

Whistleblowers

7. Those concerns were answered by the House of Lords in its recent decision in *Shayler*. The relevant offence was held to be consistent with the Human Rights Act. The judgment contained a very detailed account of the need to balance freedom of expression and national security. The court considered that the law provides sufficient protection for a "whistleblower" to reveal wrongdoings in appropriate cases.

8. It is considered that a similar result would be achieved if Hong Kong legislation were challenged on human rights grounds. As a result, it is not considered that even a limited form of "whistleblower" defence is needed.

9. Some commentators have recommended a limited form of defence along the lines of section 30(3) of the Prevention of Bribery Ordinance (Cap 201). Section 30(1) makes it an offence for someone, "without lawful authority or reasonable excuse", to disclose the identity of a person who is being investigated in respect of an offence alleged or suspected to have been committed under Part II of Cap 201. Subsection (3) provides that –

> "Without affecting the generality of the expression 'reasonable excuse' in subsection (1) a person has a reasonable excuse as regards disclosure of any of the descriptions mentioned in that subsection if, but only to the extent that, the disclosure reveals –
>
> (a) any unlawful activity, abuse of power, serious neglect of duty, or other serious misconduct by the Commissioner, the Deputy Commissioner or any officer of the Commission; or
>
> (b) a serious threat to public order or to the security of Hong Kong or to the health or safety of the public."

10. The offence under section 30 of Cap 201 differs from offences of unauthorized disclosure under the Official Secrets Ordinance in that an offence under section 30 can be committed even if it has no damaging effect. In those circumstances, it may be reasonable to allow a "whistleblower" defence to mitigate the strictness of the offence.

However, offences of unauthorized disclosure generally involve a damaging test which ensures that an offence is only committed where the public interest is harmed. Even in a case like *Shayler*, where an unauthorized disclosure by a member of the security and intelligence services can be an offence even if it is not damaging, the courts have held that the law provides sufficient protection for whistleblowers.

Proposed amendments

11. It is proposed to leave the Official Secrets Ordinance largely as it is. The two material changes in respect of unauthorized disclosures are –

    (1) to plug the loophole in respect of the unauthorized disclosure of protected information acquired by means of illegal access; and

    (2) to narrow the type of information relating to the relationship between Hong Kong and the Central Authorities that is protected from unauthorized disclosure.

12. Neither amendment would create justifications for a public interest defence that were not previously considered and rejected.

13. It is emphasized that a person who makes an unauthorized disclosure of protected information would only commit an offence if he knows, or has reasonable grounds to believe, that –

    (1) it is protected information;

    (2) it has been acquired by means of illegal access or had been the subject of an unauthorized disclosure; and

    (3) the disclosure by him is "damaging" as defined.

14. In the case of information relating to Hong Kong affairs that is within the responsibility of the Central Authorities, a disclosure is only damaging if it endangers, or would be likely to endanger "national security" i.e. the safeguarding of the territorial integrity and the independence of the PRC.

15. The Administration does not believe that it can ever be in the public interest to make a disclosure that is damaging in that way.

Department of Justice
April 2003

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Annex 1

Extract from

Reform of Section 2 of the Official Secrets Act 1911

Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
June 1988

Cm 408

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A Public Interest Defence

58. Suggestions have been made that the law should provide a general defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it was likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

59. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives—though these may be a factor to be taken into account in sentencing—but on the nature and degree of the harm which their acts may cause.

60. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

61. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.

Annex 2

Reasons for rejecting a public interest defence

UK Hansard

1. "The Bill provides that the jury shall consider whether such public interest tests have been met in respect of an individual case. The public interest will be at the heart of the case. The defendant will be able to argue that his disclosure either did not satisfy any relevant harm test or that he had no reason to know that it did. ... Many supporters of a public interest defence have argued that a person may make a disclosure which does good and not harm, or that any harm done may be so modest as not to merit a criminal sanction. The Bill invites Parliament to establish the few areas and the few cases in which a disclosure always causes harm and, in all the other areas, provides a harm test which allows the defendant to make precisely these points. That is what a harm test is all about and that is why we have included it in the Bill. ... If people think that such arguments should be allowed, that the court should be left to balance some sort of competing interest, that it is all right that lives should be lost, or the national interest endangered, so long as one public servant's perception of maladministration, wrongdoing or misconduct can be aired in the press, we are close to saying that these are not matters which can be regulated by the criminal law. We would be close to saying that it is more properly a matter of dispute between the Government and one of their employees whether a disclosure is in the public interest and that it is a matter that should be settled by a civil court on the balance of probabilities."

2. "In the area of defence, because of the harm test, the prosecution would have to prove that the disclosure was likely to prejudice the capability of the armed forces and that the defendant knew that that was likely. ... I believe that no responsible person should argue that, while he knew that his disclosure would prejudice the capabilities of the armed forces to defend us, it was justified on other grounds - that he believed, for example, that it was in the public interest that the misconduct of a Minister should be exposed or that the Government's defence policy should be reversed. That is the nature of the overarching public interest defence which some people propose."

3. "Does the right hon. and learned Gentleman agree that one major problem with the public interest defence is that a defendant can agree that he has caused positive harm to the national interest, but claim that he has done so in the public interest? He may argue that the harm he has done should be considered in the light of the good that he has achieved.

However, if positive harm is done to the public interest, the public interest is not being served."

4. "However, a defendant could not argue that, although his disclosure did cause a degree of harm, because it also did some good the harm did not matter. That has never been a principle of English criminal law, so the Bill is consistent with legal history. ... On the question of prior publication, under the harm test a defendant could argue that he had caused no harm beyond that created by the earlier publication. It would be for the prosecution to prove otherwise, and the standard of proof would have to be such that a jury was certain that an offence had been committed. The prosecution must overcome these hurdles."

5. "No one could be convicted of repeating information on security, intelligence, defence or international relations unless the prosecution could prove that the disclosure was likely to cause specified harm to the public interest and that the defendant knew it. It is a formidable test that the prosecution has to overcome. ... Similarly, no one could be convicted for disclosing information that would be useful to criminals unless the prosecution could show that the information was still likely - this is important - to be useful despite its prior publication. The defence of prior publication is therefore subsumed within the test of harm."

6. "There is a genuinely held view that disclosure in the public interest is a valid argument and that the Bill falls short of a public interest defence. I do not agree. There are two important matters to be considered on the question of the public interest. The first is where the greater public interest lies and the second is the burden of proof when cases are brought to court. The greater public interest is best served by discouraging through criminal sanctions a disclosure that may be damaging or is likely to be damaging. The Bill puts the onus of proof the right way round, so that Crown servants are discouraged from disclosing information for fear that damage or harm may occur, rather than encouraged to disclose it by a public interest defence."

7. "The burden of proof in such a public interest defence would be on the prosecution which would have to establish, first, that no crime, fraud, abuse of authority, neglect of official duty or other misconduct had occurred and, secondly, that the discloser had acted unreasonably. It might well be impossible to prove that misconduct had not taken place without releasing other important, confidential information which the public interest might require to be kept secret. The prosecution or the Crown would be on the horns of a dilemma. A Crown servant may have

made an allegation of misconduct which on the face of it looks convincing. Public opinion, perhaps reacting to a front-page headline in one of the daily newspapers, would demand that record be put straight. But to do that, the Crown might have to reveal information which ought to be kept secret. That is the real reason why it would not be valid to include in the Bill a public interest defence. The alternative approach is the one in the Bill. The discloser can reveal information provided that he does not cause harm and there is no reasonable likelihood of damage. The burden of proof is on the prosecution to prove harm. Equally, the discloser knows that, however altruistic his motives, if he causes damage he will be guilty of an offence. Therefore, there is a general discouragement. The right balance must be to err on the side of caution. A public interest defence runs the risk of causing more damage to the national interest than the discloser may be seeking to protect. He may be acting only on a narrow appreciation or knowledge of the matters abut which he makes his disclosures. An actual harm requirement, such as that in the Bill, reduces the risk of accidental disclosure. At the end of the day, it cannot be said to be in the public or national interest to disclose information which damages the national interest or is reckless as to whether such damage might occur."

8. "That agent betrays the special trust which has been placed in him or her and undermines confidence in the ability of the services to carry out their vital work. ... It is not just the confidence of the public which is damaged but, equally important, the confidence of those who provide or may provide information to the services, and the confidence of others who necessarily co-operate with them. When a member of the service breaks the necessary silence in which we believe and assert the services must work, he also undermines the confidence of his colleagues in each other."

9. "In the light of the relevant harm tests, the defendant is free to introduce such evidence as he chooses to support his argument that the disclosure was not likely to cause that harm or that he had no reasonable cause to know that it would. He can argue that the prosecution's application of the test of harm is mistaken and that on a proper application of the test his disclosure was not likely, for example, to damage the capability of the armed forces. He may say, on the contrary, that as he was revealing deficiencies his disclosure could not possibly have harmed the forces and could only have enhanced their capability."

10. "Many hon. Members have ignored the pillar of the Bill, which is the harm test. The prosecution must prove that harm has come from disclosure. It is a defence for a Government official who made a

disclosure to show that it caused no harm to the public interest. He can also argue in court that the result of his disclosure was beneficial and that, therefore, there was no harm. ... The public interest decision is taken by the person making the disclosure. He has to decide whether something is worthy of disclosure. If he is wrong, untold harm will be done to the public interest purely and simply on the subjective judgment of that individual."

11. "There is one stark, glaring and serious problem with such a specific defence, which appears to have been missed in all the discussions that I have heard. If the defence fails and the jury says that the accused is culpable, that what he did was not in the public interest, it is too late - the harm has been done and nothing can correct it. The secret is unjustifiably out. The agents are dead. There is no hauling back. That is what is wrong with a specific public interest defence. By having such a defence, we will encourage the unsuitable person to leak. We will encourage the person who wants to make money out of his book to leak and then to claim that what he did was in the public interest. What is wrong with such a defence is that it encourages leaks and there is no going back, if the jury should say that it is an unwarranted defence, because the harm has been done."

12. "The main principle which we are trying to adhere to in the Bill involves harm and whether disclosure was harmful. That principle runs through all our arguments, even when we argue that there is an absolute offence because all forms of disclosure in that category would be harmful. It is not a matter of great principle whether the information has been published before. The central issue is whether the disclosure was harmful. It may well be that in many cases, perhaps even in most cases, the question whether there has been prior publication is relevant in assessing harm. No one denies that. The question is whether it must always be the governing consideration, whatever other arguments might be produced about harm or likely harm."

13. "To return to the main point, which is extremely important, in many examples second publication would do no harm because, if there was any harm, it had been caused by the first publication. In the unlikely event that the prosecuting authorities decided to mount a case, the defence would argue precisely that: it would argue that no damage had been done. Moreover, the prosecution would have to prove that the defendant knew or had reasonable cause to know that such damage would be caused. That is a very high hurdle for a prosecution which was trying to show that, although something had been published elsewhere, there had been

damage on secondary publication which met the test of harm. ... There is no question of there being no prior publication defence. The question is whether that defence should be absolute and should sweep the board in all circumstances, and whether it should trump all other arguments before they are made."

14. "Therefore, it should be open to the prosecution not to make any assumptions but to argue before a jury that the second publication had caused the harm. As I said, it will be a high hurdle that it will have to pass. It will have to prove not only that harm had been done but that those who published it knew that harm was likely to be done. They are two high hurdles."

15. The Bill protects, quite properly, information that needs to be protected from disclosure. If that protection fails, or anyone is given cause or encouragement to believe that the protection is in some way a paper tiger, the Bill would fail in one of its two main purposes. It would give a signal of encouragement, not of deterrence. It would say that as long as some allegedly serious misconduct, or any neglect at all, in the performance of official duties can be identified and can be argued to have been reported to no effect, it is all right to disclose that information whatever damage has been done."

16. "The argument of the Opposition and the proponents of a public interest defence - ... is that it should be allowable for somebody to make a disclosure, however great the damage that might result from that, provided that the information disclosed gave him reasonable cause to believe that it showed some form of serious misconduct or any neglect of official duty."

Annex 3

Reasons for rejecting a public interest defence

HK Hansard

1. "Given the nature of the information concerned, any unauthorized disclosure would of itself be likely to harm the public interest. To provide statutorily for a "public interest" defence for disclosing information relating to matters under one of these areas set out in the legislation would be contradictory."

2. "Evidence of prior disclosure will be relevant in deciding whether a particular disclosure does, in fact, cause harm of a kind specified in the legislation. Where there has been a prior disclosure it will be open for a defendant to argue that the disclosure, which is the subject of the prosecution, has done no further harm. This may not always be the case, however, as there may be circumstances in which the timing and placing of a fresh disclosure may cause harm which an earlier disclosure had not."

3. "We have deliberately defined these areas [of protected information] in narrow terms, so that the unlawful disclosure of information concerning one of these areas would, in itself, cause or be likely to cause substantial harm to the public interest."

4. "We also do not accept that there is any justification for the proposed public interest and prior disclosure defences. The six areas of protected information prescribed under the Bill are narrowly defined on the basis that any disclosure of such information would, of itself, be damaging to the public interest. To therefore include a defence allowing that such a damaging disclosure is in the public interest is self-contradictory. Similarly, we consider the proposed prior disclosure defence to be unjustified. Any disclosure, in its particular circumstances, of the prescribed types of information could have the potential of damaging the public interest. Consequently, every such disclosure should be judged by the Courts within its own circumstances, and not by whether or not there has been prior disclosure."