

The Official Secrets Act 1951 and the Unauthorised Disclosure of Information

by

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I

The purpose of this paper is twofold. First, it is proposed to examine the operation and implications of the disclosure sections of the Official Secrets Act 1951, with reference to prosecutions, both real and threatened, under these sections and their counterparts within similar legislation in the United Kingdom. Secondly, the possibilities for reform in this area will be canvassed. References will be made to comparable legislation in other countries, particularly the United States of America, but most of the discussion in this part of the paper will centre round a report submitted to the United Kingdom Parliament in 1972 by the Departmental Committee on Section 2 of the Official Secrets Act 1911, known as the Franks Report.¹ This is an important document and must be carefully considered in any discussion of reform of the New Zealand legislation. It is not intended to offer a blueprint for reform in this paper, but some final comments and suggestions will be made as to the directions such reform might take.

It is impossible to understand the existence of such a peculiarly heavyhanded piece of legislation as the Official Secrets Act 1951 without reference to the history of official secrets legislation in the United Kingdom and in New Zealand. It is not within the scope of the present paper to give a detailed account of the background to the current New Zealand legislation, but some observations may be made. A common feature of all legislation in this field in both countries is

¹ Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (1972; Cmd. 5104).

that it was passed at times when governments were confronted with internal troubles and/or war or imminent war. Because of this there has been little or no attention paid to the important constitutional questions involved. Some hold the theory that the passing of the Official Secrets Act in New Zealand was a sequel to the waterfront strike of 1951, but the complete silence on the part of the Labour Opposition on the Act, which was passed four days after its introduction, seems to belie such a view. It must not be forgotten that the Act was also passed not long after the Second World War and at the beginning of the Cold War decade. Seen in this light, the proposals of the Franks Report to separate espionage provisions and penalties from those relating to disclosure have an historical as well as a logical significance.

II

The key section in the Official Secrets Act 1951 which relates to unauthorised disclosure of official information is Section 6 which is as follows:

6. Wrongful communication of information—(1) If any person, having in his possession or control any secret official code word or password, whether of New Zealand or of any other country, or any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in a prohibited place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or under the Government of any other country, or which he has obtained or to which he has had access owing to his position as a person who holds or has held such an office, or as a person who holds or has held a contract made on behalf of His Majesty or on behalf of the Government of any other country, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,—

- (a) Communicates the code word, password, sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it or a person to whom it is in the interest of the State his duty to communicate it; or
 - (b) Uses the information in his possession in any manner, or for any purpose, prejudicial to the safety or interests of the State; or
 - (c) Retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or
 - (d) Fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code word or password, or information—
- he commits an offence against this Act.

(2) If any person, having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, whether of New Zealand or of any other country, communicates it, directly or indirectly, to any person in any manner, or for any purpose, prejudicial to the safety or interests of the State, he commits an offence against this Act.

(3) If any person receives any secret official code word or password, or any sketch, plan, model, article, note, document, or information knowing or having reasonable ground to believe, at the time when he receives it, that the code word, password, sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of an offence against this Act, unless he proves that the communication to him of the code word, password, sketch, plan, model, article, note, document, or information was contrary to his desire.

The leading characteristic of this section is its catch-all quality. A close second is its obscurity and uncertainty. It may be thought that a section which catches all official information and all civil servants at least has the advantage of clarity of operation. But this is not the case.

Section 6 is a long and complex section, and its precise meaning is not clear. Also, the fact that the consent of the Attorney-General is needed before a prosecution means that it can never be clear what kinds of action involve a real risk of prosecution. In many if not most cases of unauthorised disclosure, internal discipline will be felt to be more appropriate. The evidence before the Franks Committee showed that criminal sanctions are seen by the Government as a "long stop or safety net".² Section 6 is also conspicuous by its inclusion in an Act mainly dealing with secrets and espionage. Some of the provisions of the section itself include phrases more often associated with spying.

The wrongful communication of information is the basic offence created by section 6. "Communication" must be taken to have its ordinary meaning of imparting information in any way, both written and oral. There could be a possible argument on the *eiusdem generis* rule that the information at its source must be written for there to be an offence. Nevertheless there would be very little information which the section would not cover. The Government has a system of security classification which grades information according to its need to be protected; but this could not be taken into account in a prosecution under the Act, except at the stage when the Attorney-General is deciding whether to prosecute. The types of information which the Act singles out for attention in section 6 are those relating to prohibited places and to munitions of war. These are questions of defence and no doubt merit special consideration by the Government.

Some would suggest that the section go no further than the protection of important questions such as these, and by any yardstick it must be admitted that the inclusion of all official information means a great

² Cmd. 5104, para 67.

risk of injustice. Advocates of the status quo maintain that this is effectively countered by the need to have the consent of the Attorney-General for prosecution. But an examination of the prosecutions themselves suggests that such a safeguard will not always be effective. In fairness it must be said that in most cases the charges were well-founded within the spirit of the law, but it is submitted that one or two border on the absurd, and others suggest that at times the discretion to prosecute may be exercised in an arbitrary manner.

In 1919 a War Office clerk passed information about contracts for army officers' clothing to the director of a firm of tailors. Both the clerk and the director were charged under the English equivalent of section 6. An early judicial attempt was made to limit the scope of the section, but a superior court ruled that it applied to any information, and was not limited to secret information.³ A sale of letters written by the first Duke of Wellington, who died in 1850, was discontinued almost a century later under threat of proceedings.⁴ These are obvious examples of the ludicrous results possible under a section such as this. An example of the arbitrariness involved concerns the son of a political leader and ex-Minister who was charged with receiving cabinet memoranda, which he had used in writing a book about his father. The father was recognised as having been the source of this information, but was not prosecuted.⁵

On the other hand, it may be argued that the only way to catch a person who is misusing official information may be under section 6, when there are no other offences with which he can be charged. This sort of situation seems to have existed in *R v. Simington*,⁶ where a former civil servant was charged with retaining official documents consisting of plans of buildings. There was evidence that the plans were made by the Office of Works so as to allow letting agents to have copies of them, but of course this could not be relevant to a charge under the section. If there was no more to this case it could perhaps be said to be just another example of the undue harshness of the section, but the undertones of sabotage and subversion create a strong suggestion that there was an abuse of position on the part of the accused. However, in an ordinary criminal trial, the prosecution needs more evidence than mere suggestion, and it is submitted that the proposition above is not compelling enough to make an exception in disclosure cases.

The three recent publicised cases of disclosure in New Zealand, none of which went as far as a prosecution, cover quite different sorts

³ *Ibid.*, Appendix II, p. 116.

⁴ Parry, "Legislatures and Secrecy" (1954), 67 *Harvard Law Review* 737, 772.

⁵ *The Times*, March 21, 1934, p. 11, col. I.

⁶ [1921] 1 K.B. 451.

of official information. In the Sutherland case, the disclosed information was a Cabinet document, in the container port case⁷ it was a confidential report prepared within a Government Department, and, most recently, a copy of a police document of interrogation was involved. In only one of these cases was the idea of prosecuting dropped at once.⁸ The New Zealand Government seems to treat the disclosure of most kinds of official information as a matter involving the possibility of criminal sanctions.

As well as applying to all official information and all civil servants and former civil servants, section 6 covers several other categories of persons. Government contractors and their employees are treated for the purposes of the section in the same way as civil servants; that is, the nature of the official information with which they come into contact in the course of their job is irrelevant. All persons are forbidden to pass on information relating to prohibited places or to munitions of war. The recipient of an unauthorised disclosure commits an offence by the mere receipt of the information, though he has to know or have reasonable grounds to believe at the time of receipt that the information was communicated to him in contravention of the Act; and he has the defence that the information was communicated to him contrary to his desire.

These categories are fairly well defined; however, there are two other categories which are not so clear. The first of these is any person who has in his possession any information, etc., which has been made or obtained in contravention of the Act. Such information could thus relate to espionage as well as to disclosure. By section 3 of the Act, which is commonly accepted to apply to espionage, it is an offence to make or obtain certain information. But nothing in section 6 creates such an offence. It appears to follow from this that the category applies only to those in possession of espionage information. However, it has been commonly accepted, at least in Britain, that the information relates to all unauthorised disclosures. Thus the section may catch a whole chain of offenders who may in turn disclose information without authority. It is submitted that the only basis for such a proposition can be that this category would not have appeared in section 6 if it was only to apply to the espionage provisions of the Act; this in turn is based on the rule of statutory interpretation that parliament must not be assumed to use words idly. While this is no doubt a proper inference, it is suggested that this is one example of the bad drafting of the Act.

The second category to which some uncertainty attaches is that of a person having in his possession information which has been entrusted

⁷ *Auckland Star*, 10th June 1975.

⁸ The container port incident.

in confidence to him by a civil servant. There are many outside consultants and researchers who are allowed access to Government premises; they could perhaps be said impliedly to be taken into the Government's confidences. In practice, all these people would sign an Official Secrets Declaration, and the Franks Committee concluded that as long as it was made clear to a person that he was being entrusted with confidential information, the provisions of section 6 would probably apply.⁹ There are other persons who may have direct access to official information without being Government servants or contractors; for instance, voluntary social workers visiting prisons. It would seem that their position remains unclear.

It has been estimated that over two thousand differently worded charges could be brought under section 6.¹⁰ The basic offence is communication without authority. From the wording of this part of the section it appears that all disclosures are made *prima facie* illegal and then there follow certain exceptions. But the evidence from Government witnesses before the Franks Committee showed that civil servants see authority as flowing from the nature of each job.¹¹ The concept of implied authority is well established in public service. The Act provides no guidance on authorisation but it would seem that under the present legislation the concept of implied authorisation would be the criterion accepted by the courts.

Ministers of the Crown are generally thought of as being self-authorising and not fettered by the provisions of section 6. But it appears that this immunity will not extend to Members of Parliament in all situations. After Mr Duncan Sandys was threatened with the Official Secrets Act in 1938, a Select Committee was set up to inquire into the relationship between parliamentary privilege and the Act. It concluded that privilege could extend beyond the precincts of the House, but only in certain circumstances. It also thought there could be a duty of disclosure in exceptional cases. This latter conclusion has been criticised as being a misunderstanding of the provision of section 6 which allows communication without authority when that communication is made under a duty in the interests of the State.¹² It is argued that this duty is only related to a duty to give information to facilitate prosecutions. This seems logical, for otherwise one would be able to make disclosures whenever one believed it was one's duty to do so. The section is not worded in these subjective terms.

It is also an offence to retain a document without authority, or to fail to take reasonable care of, or so conduct oneself as to endanger,

⁹ Cmd. 5104, para 225.

¹⁰ *Ibid.*, para 225.

¹¹ *Ibid.*, para 217.

¹² Parry, *op. cit.* 778-779.

the safety of a document. The Franks Committee emphasised that there was no legal duty to protect information under section 6; it contained a negative restriction rather than a positive duty.¹³ However it is submitted that the offence of failing to take reasonable care of a document comes close to a positive duty. The Committee thought that endangering the safety of a document was an unnecessary inclusion in the section.¹⁴ It is suggested that another reason for removing it is that it has connotations of something more sinister than unauthorised disclosure. The same could be said for the offence of using the information in one's possession for a purpose prejudicial to the safety or interests of the State. The Franks Committee thought that the provisions about innocent possession of secret code words and pass words, information about prohibited places or munitions of war and the use of information for purposes prejudicial to the State were "unclear, outdated, and little if ever used in practice".¹⁵

The offence of receiving information communicated in contravention of the Act is the only one for which there is a clear defence, and for which the prosecution has clearly to prove *mens rea*. Although *mens rea* is an essential element of most criminal offences, the other provisions of section 6 contain nothing directly implying it. The question of the application of *mens rea* to the section remains uncertain. One of the basic difficulties of the Official Secrets Act is its relationship with the criminal law in general. Much criticism has been directed recently towards the provisions of the Act which reverse the burden of proof normally required by the criminal law, and deny persons their traditional right to silence before they have been charged with an offence.

This latter area is more important in a discussion of the disclosure provisions of the Act, and is embodied in section 11. It is difficult to understand why after a deliberate limiting of its provisions to espionage in Britain in 1939, the New Zealand Government did not see fit to follow suit. The state of the law in New Zealand means that cases such as *Lewis v. Cattle*¹⁶ could well occur here. What seems unjust about that case is that no attempt seems to have been made to investigate the identity of the police officer who presumably disclosed the information to the journalist. In New Zealand these powers of interrogation were recently used in the Sutherland case. Dr Sutherland was questioned once at his home, admittedly with a lawyer present, and then ordered under the Official Secrets Act to visit the police for a further interview.¹⁷ The change in the law in Britain in 1939 is

¹³ Cmd. 5104, para 207.

¹⁴ *Ibid.*, para 222.

¹⁵ *Ibid.*, para 237.

¹⁶ [1938] 2 K.B. 454.

¹⁷ Auckland *Star*, 20th May 1974.

widely thought to have been as a direct result of the decision in *Lewis v. Cattle*, but one suspects that it also had something to do with the fact that the threat of interrogation was used against Mr Sandys in 1938.

The home of Dr Sutherland was also searched under a warrant issued pursuant to section 13 of the Act. The grounds for a warrant are not unique to the Official Secrets Act, and are found in several other statutes. However, the Franks Committee recommended that the emergency powers given to a commissioned officer of police to issue a warrant should not apply in cases of disclosure.¹⁸ The subsection which deals with these powers talks about immediate action in the interests of the State, and is probably more appropriate to cases of espionage. Moreover, the police have powers to arrest under section 12 of the Act which it is submitted would amply cover most situations.

Section 10 of the Act, which deals with attempting, soliciting, inciting, and aiding and abetting, also creates an offence which was previously only known in some wartime regulations; that of doing an act preparatory to the commission of an offence against the Act. The Franks Committee felt that this had no place in unauthorised disclosure, and that the general criminal law on aiding and abetting, etc., was enough to cover such offences. In *Regina v. Oakes*¹⁹ the words of the Act were "aids or abets and does any act preparatory" but the Court held that the word "and" was a misprint and should be read "or", thus creating the offence of an "act preparatory". The Court pointed out that this concept was not unknown to the law, as it had long ago been distinguished from an attempt, and had existed in defence regulations.²⁰ Counsel for the appellant argued strenuously in favour of the general principle of strict construction of the actual words of a statute²¹ but the Court felt that this would lead to an absurd result.²² It is indeed difficult to disagree with this decision, especially in view of the fact that the New Zealand Act is worded in the same way as the corrected version in *Regina v. Oakes*, and that case was decided long after the New Zealand Act was passed. Such an offence may well have its place in cases of espionage, and may have been justified in the *Oakes* case, which was a prosecution under the espionage section of the British Act, but there is no reason why the general criminal law should not be sufficient in disclosure situations.

There are several provisions of the Official Secrets Act which from their wording appear to apply only to espionage. Section 9 is misleadingly headed "Harbouring Spies" but it is obvious from the

¹⁸ Cmd. 5104, para 258.

¹⁹ [1959] 2 Q.B. 350.

²⁰ *Ibid.*, per Lord Parker, C. J. 335-336.

²¹ *Ibid.*, 351.

²² *Ibid.*, per Lord Parker, C. J. 356.

section itself that the offence of harbouring covers any offence under the Act. Once again the Franks Committee felt that the general criminal law was sufficient here in disclosure cases.²³ The British section has the same heading and although no significance can be attached to headings if the meaning of the section is clear, it is submitted that such headings show that the primary concern of the Act is with espionage, and that its provisions are unnecessarily heavy-handed in including disclosure where the general criminal law would be quite adequate.

Common to sections 3, 4, and 5 of the Act is the phrase "purpose prejudicial to the safety or interests of the State". Section 7 defines what is required for proof of such a purpose, and has been the subject of much comment and criticism recently in New Zealand and over a longer period in Britain. Although section 3 is headed "Spying" subsection (1)(c) could well apply to disclosure, since no weight is to be given to headings. If that section did apply to disclosure, then the oppressive provisions of section 4 would also apply. However, prosecutions for disclosure of information are much more likely to be brought under section 6, as proof of a purpose prejudicial to the safety or interests of the State is not required for the basic offences under that section. A discussion of sections 3 and 4 requires a paper to itself and is not within the scope of the present paper. Section 5 is to do more with the unlawful use of documents, etc., and the accidental finding of documents than with the unauthorised disclosure of information, and will not be discussed.

However, the phrase "purpose prejudicial to the safety or interests of the State" does appear in one provision of section 6, and therefore merits some consideration. The Franks Committee thought this phrase should disappear from section 6 altogether as the offence within which it was contained did not appear to have any relevance to the basic purpose of the section.²⁴ The phrase was discussed at length in *Chandler v. D.P.P.*²⁵ The Defendants in that case had an honest belief that their purpose was not prejudicial to the safety or interests of the State, and their attempts to call expert evidence to show this were frustrated by the Court, which ruled such evidence inadmissible. The case reached the House of Lords, but the appeal was dismissed, the House ruling that while the opinion of the Crown as to what constituted the interests of the State was no more admissible than that of the defendants, an officer of the Government could show what in fact those interests were, and that in defence matters, it was presumed that it was contrary to the interests of the State for a person to interfere

²³ Cmd. 5104, para 258.

²⁴ *Ibid.*, para 237.

²⁵ [1964] A.C. 763.

with a prohibited place. The word "purpose" was subjective, and was used in the normal criminal law sense as an object which a person knows will probably be achieved by his actions, whether he wants it or not. The term "State" was interpreted to mean the Government of the day. Section 7 allows the prosecution to prove a purpose prejudicial to the safety or interests of the State by circumstances, conduct and character alone, without having to prove specific actions by the accused. Whether or not the provisions of section 7 should be applied to cases of espionage, it is submitted that they should certainly not be connected with unauthorised disclosure, and that all reference to the phrase "purpose prejudicial to the safety or interests of the State" should be omitted from the section. Its inclusion transforms section 6 into a kind of disclosure/spying hybrid, thus underscoring one of the basic shortcomings of the Act.

The two opposing views on the requirement of the Attorney-General's consent to a prosecution under the Official Secrets Act are neatly put by the opposing counsel in *Chandler's* case, and show the difficulties inherent in the dual role of the Attorney-General as the Crown's senior law officer and a Minister in the Government of the day. In one view his consent is a "safeguard dependent on the will of the executive";²⁶ in the other, it is a "safeguard against oppressive action".²⁷ The Home Office in its report to the Franks Committee stated the reasons for the control over the institution of proceedings by the Attorney-General:²⁸

... to secure consistency of practice or to prevent abuse, where an offence is drafted in wide terms, or is open to misuse; to enable account to be taken of mitigating factors which cannot easily be defined by statute; to provide central control over the use of the criminal law in sensitive areas such as race relations or censorship; and finally to ensure that decisions on prosecution take account of important considerations of public policy or of a political or international character.

As the Committee itself pointed out, the main objection to the role of the Attorney-General under the present law is the width of his discretion, but such an objection would lose much of its force if the scope of the legislation was narrowed.²⁹ Suggestions that the authority of the Attorney-General be delegated by the legislation were considered by the Committee, but it was thought that the change would be more apparent than real, as the Attorney-General would still be ultimately accountable to parliament.³⁰ The Committee accepted that there was widespread public unease about the nature of the Attorney-General's role, but felt there was no satisfactory alternative for making decisions

²⁶ [1964] A.C. 763, 780.

²⁷ *Ibid.*, 781.

²⁸ Cmd. 5104, para 243.

²⁹ *Ibid.*, para 250.

³⁰ *Ibid.*, para 252, 253.

of a fundamentally political nature, as someone with both political experience and constitutional accountability was needed to decide questions of public interest.³¹ If consent to prosecutions was dispensed with altogether, the legislation even when narrowed could operate oppressively in some cases, and prosecutions may go forward which would not be in the public interest.³² The Committee concluded that the consent of the Attorney-General should continue even under more limited legislation, as it was a safeguard which would operate to reduce rather than increase the number of prosecutions.³³ But as has been pointed out by another commentator, “. . . the discretion of our prosecutors is no substitute for properly limited law.”³⁴

In practice it is the police who do the ground work in amassing the evidence needed for a prosecution. During the recent storm over whether or not to prosecute a former security intelligence officer accused of leaking a confidential document, the Prime Minister of New Zealand said in Parliament that “. . . it is entirely proper that the police, completely removed from political or other considerations, should be the authority to make the determination as to whether the prosecution should be pursued.”³⁵ It is submitted that this statement would be valid for a document which was not damaging to national security but merely embarrassing to the Government, as was the case here, but that in more sensitive areas political, though not party political, considerations must lead the Attorney-General to make the final decision.

When the Attorney-General was making his decision to prosecute Dr Sutch, he stated that the Official Secrets Act was “. . . undeniably a restrictive, even an oppressive Act. . . . It imposes a heavy burden on a defendant and one that may be difficult to discharge, and I must bear that in mind in granting or withholding my permission to proceed.”³⁶ This is in line with the first of the reasons for the Attorney-General's control stated by the Home Office before the Franks Committee. However, permission was given for proceedings to commence against Dr Sutch, and at least one commentator has suggested that the consent of the Attorney-General may operate in a different way from that which the Franks Committee suggested:³⁷

How hard would it be for an Attorney-General to refuse permission in respect of an unpopular controversial figure who had been arrested in a suspicious circumstance, even though the information he may have imparted . . . was either harmless or something which the Government

³¹ Cmd. 5104, para 255.

³² *Ibid.*, para 247.

³³ *Ibid.*, para 255.

³⁴ Parry, *loc. cit.*, 772.

³⁵ Auckland Star, 21st August 1975.

³⁶ Quoted in “Talking Back” by Bruce Christopher, Auckland Star, 8th March 1975.

³⁷ *Ibid.*

should not have suppressed? (The Attorney-General may be) unconsciously under some pressure to authorise a prosecution because failure to do so would draw political fire. An Attorney-General, despite all the efforts he may make to act judicially, is an elected person and cannot possibly exclude a political viewpoint from his decisions. To ask him to do so is unreasonable.

Nevertheless, this commentator had no concrete alternatives to suggest, and concluded that the law itself should be looked at, which was the solution the Franks Committee proposed.

III

Before discussing its proposals for reform, the Franks Committee outlined the three broad possibilities in relation to section 6.³⁸ The present section could be amended, so that a catch-all provision would be retained, but drafted in clearer terms; or the section could simply be removed without replacement; or the section could be repealed and replaced by narrower provisions. Those in favour of the first possibility argued from a rather negative viewpoint; they did not suggest that there was a real need for section 6 to apply to all official information, but that any attempt to define the sorts of information which needed protection would lead to as many drawbacks as under the present section. They also argued that section 6 could not be seen as a serious evil in itself without regard to its operation in practice. In sum, they would retain the present section as the lesser of two evils.³⁹ The Prime Minister of New Zealand recently stated of the Official Secrets Act that "... there was a need for revision. It had been introduced at a time of considerable unrest, but having been invoked only once in 25 years, it was hardly a burden on society."⁴⁰

It is submitted that there are several flaws in these arguments. Apart from their dubious validity in relation to constitutional questions, the recent "chain reaction" to the Official Secrets Act in New Zealand shows that the assumption that such an Act will be rarely used or even thought of cannot be made in confidence. Parliamentarians are now well aware that there is "... legislative machinery to enforce secrecy."⁴¹ The remarks made by the Leader of the Opposition in 1951 may be recalled with particular force in this context.⁴² If one looks at the section from a constitutional viewpoint, it is difficult not to agree with the remark that it is "... one of the most serious infringements

³⁸ Cmd. 5104, para 90.

³⁹ *Ibid.*, paras 91-93.

⁴⁰ *Auckland Star*, 11th March 1975.

⁴¹ *Auckland Star*, 10th June 1975, Sir Basil Arthur's reaction to the container port disclosure.

⁴² Ante note 13.

of civil liberties in New Zealand.”⁴³ The same commentator quotes Mr Edward Heath, former leader of the British Conservative Party as stating that “. . . there is no case for an Act more honoured in the breach than the observance.”⁴⁴

The second possibility outlined by the Franks Committee if followed would introduce a situation into Britain and New Zealand very much like that in the United States. Naturally the press was in the forefront of the advocates of the removal of criminal sanctions except for espionage. Constitutionally, this would be the possibility which would interfere least with the freedom of the subject. It is argued that the Government should use its internal discipline to protect official information, just as the private sector must. Restrictions on the press should be voluntary only as it has a public function too and would act responsibly in the interests of the nation.⁴⁵

It is difficult to quibble with the Committee’s answer to these arguments, unless one is prepared to sweep aside at one stroke a few centuries of constitutional law in Britain and New Zealand. “The constitutional responsibilities of the Government and Parliament for protecting the nation cannot be abdicated on the basis that a failure to exercise them will be made good by the responsible behaviour of others.”⁴⁶ Still, it is arguable that such a system works fairly well in practice in the United States, and cannot totally be discounted in formulating legislation on the subject.⁴⁷ Most of those in favour of the removal of criminal sanctions thought that section 1⁴⁸ adequately covered all matters of importance to national security. But the Committee considered that what counted was the result of an unauthorised disclosure, not whether there was an intention to harm the nation, the latter being an element in offences under section 1.⁴⁹

The Franks Committee therefore came to the conclusion that the many unsatisfactory features of the present section 6 presented an overwhelming case for change, and did not consider it a practical impossibility to formulate new provisions.⁵⁰ But it did not merely confine itself to recommending a new section within the Official Secrets Act. Many witnesses were concerned at the idea that the Act could catch persons who had no thought of harming their country and brand them as traitors or spies.⁵¹ Therefore the Committee proposed that the new provisions be contained in a separate Act, the title of

⁴³ Ante note 37.

⁴⁴ *Ibid.*

⁴⁵ Cmd. 5104, paras 95, 96.

⁴⁶ *Ibid.*, para 97.

⁴⁷ See discussion on U.S. situation post.

⁴⁸ Section 3 (N.Z.).

⁴⁹ Cmd. 5104, para 98.

⁵⁰ *Ibid.*, para 94.

⁵¹ *Ibid.*, para 89.

which should not include any suggestion of espionage. This Act should be called the Official Information Act.⁵²

From the evidence before the Committee there emerged four areas of possible protection of official information by the use of criminal sanctions. The Committee listed these as the security of the nation and the safety of the people, the internal processes of government, the confidences of the citizens, and the prevention of the use of information for private gain.⁵³ The first of these is in effect the Committee's redefinition of the vague term "national security", and was used by the Committee to cover the maintenance of law and order, as well as defence, foreign relations, and crucial economic questions.⁵⁴ The Committee concluded that criminal sanctions should operate in this area, but only where an unauthorised disclosure would cause "serious injury to the nation".⁵⁵

In all the fields which the Committee included in its phrase "the security of the nation and the safety of the people" it felt the need to balance openness and secrecy. It did this by defining the fields themselves and leaving the Government to decide which information should be protected within these definitions. In this way the Committee was precluding a challenge to Government policy from taking place in the Courts, a notion foreign to British and New Zealand constitutional law. The Committee defended this line of approach by stating that in relation to these basic functions of Government, the question of injury to the nation was essentially political, and that any different approach would remove a vital element of constitutional accountability.⁵⁶ However, it imposed a further limitation upon the Government in its comprehensive proposals on security classification.⁵⁷ It considered that the only satisfactory method of classification would be "... for each individual item of information to be identified and marked by the Government in a way which enables those who come into possession of it to recognise that it is covered by the provisions of the new law."⁵⁸ Before a prosecution under the Official Information Act, there should be a review of the classification of the information which had allegedly been disclosed without authority such review to be carried out by the Minister responsible and with reference to the time of the actual disclosure.⁵⁹ The Committee also proposed that there be constant review of classified information in general, to prevent the possibility of over-

⁵² Cmd. 5104, para 103.

⁵³ *Ibid.*, para 111.

⁵⁴ *Ibid.*, para 116.

⁵⁵ *Ibid.*, para 117.

⁵⁶ *Ibid.*, para 145.

⁵⁷ *Ibid.*, paras 144-169.

⁵⁸ *Ibid.*, para 144.

⁵⁹ *Ibid.*, para 161.

classification.⁶⁰ Such review is of course already part of administrative practice, but under the Committee's proposals it would be a more frequent occurrence. The Committee felt that any tendency to over-classify under the new law would be balanced by the inconvenience and expense of including too much information in a security classification system.⁶¹ Finally it was proposed that a kind of non-statutory liaison committee be set up between the Government and outside interests and including members of both to foster understanding of the operation of the security classification system.⁶²

In defining the fields within the area of the "security of the nation and the safety of the people" the Committee confined defence matters in a detailed list which includes most matters commonly accepted as falling within that field.⁶³ It included home defence only, the Government's obligation to protect defence information of allies coming within its category of foreign relations. The latter category was limited to "... matters dealt with between governments, and not (the) wider range of trade and consular affairs when these are not being handled by governments".⁶⁴ Crucial economic questions were limited to the currency and the reserves, other economic matters being considered by the Committee as damaging to the Government of the day rather than to the national security.⁶⁵

The Franks Committee considered the question of the maintenance of law and order as a function just as basic to the Government as those previously considered.⁶⁶ But it could not be dealt with in the same way, as a classification system would not be appropriate in this area. "It would be unusual for any single disclosure of official information covering the maintenance of law and order to cause serious damage to the nation as a whole."⁶⁷ The Committee proposed that criminal sanctions should apply to official information which was likely to be helpful in the commission of offences, or in facilitating an escape from legal custody or other acts prejudicial to prison security, or information the disclosure of which would be likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders.⁶⁸ It is arguable that the general criminal law is adequate in this connection, but the Committee felt that there would be cases when it would not cover a disclosure which may be useful for such purposes and so serious enough to deserve criminal

⁶⁰ Cmd. 5104, para 157.

⁶¹ *Ibid.*, para 158.

⁶² *Ibid.*, paras 165, 166.

⁶³ *Ibid.*, para 124.

⁶⁴ *Ibid.*, para 132.

⁶⁵ *Ibid.*, paras 135-139.

⁶⁶ *Ibid.*, para 170.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, para 175.

sanctions under the Official Information Act.⁶⁹ It is submitted that this conclusion is inconsistent with the Committee's desire to avoid a catch-all provision, and that a combination of administrative measures and the general criminal law would be sufficient protection in this area.

In refusing to give general protection to the internal processes of Government, the Committee stated that its "... acceptance of the view that certain aspects of the entire range of Government business should remain within the scope of the criminal law would be inconsistent with the Committee's main aims".⁷⁰ However on constitutional grounds it proposed to give total protection to Cabinet documents. Privacy for the internal deliberations of the Cabinet, it considered, was an essential condition of the principle of collective unity.⁷¹ This protection should operate irrespective of the subject-matter of Cabinet documents, but should not extend to accurate guesswork or gossip.⁷²

It is unlikely that any Government in Britain or New Zealand would allow its Cabinet to "operate in a fishbowl". When the Attorney-General Dr Finlay was informed of the possession of a Cabinet document by Dr Sutherland, he reacted in very strong terms:⁷³

It is well-known and universally accepted that papers of this kind bear the stamp of extreme confidentiality and go to the very root of Cabinet Government. It is not too much to say that the whole basis of parliamentary government would be undermined if Cabinet could not consider various proposals that come before it in the certain and secure knowledge that those proposals were made in complete candour and were for the eyes of that body alone.

The reaction to this incident by the Auckland Council for Civil Liberties that "... the Government appeared to be using the Official Secrets Act to silence its own critics.",⁷⁴ appears to be directed more towards the powers of search and interrogation than to the nature of the document, but if it is directed towards the latter as well, then it is submitted that the Council failed to take into account an important constitutional principle.

However, Cabinet documents can only be an exception to the ordinary processes of Government. National security cannot be equated in every respect with the political security of the Government of the day. Had it not been for the fact that the document received by Dr Sutherland was a Cabinet document, it would certainly not have been protected under the Franks Committee criteria. It was a document dealing with Governmental decisions on a duty solicitor scheme which if made public would have done no more than to provoke disagreement and criticism in some circles. Similarly the report involved in the

⁶⁹ Cmd. 5104, para 171.

⁷⁰ *Ibid.*, para 181.

⁷¹ *Ibid.*, para 183.

⁷² *Ibid.*, paras 184, 187.

⁷³ Auckland Star, 20th May 1974.

⁷⁴ Auckland Star, 21st May 1974.

container port incident was a confidential document prepared by the Economics Division of the Ministry of Transport, which was only part of all the information being prepared on the question of the siting of a container port in the South Island. The publication of extracts from it created a misleading report which embarrassed the Government. Again, in the most recent incident, the effect was to indicate signs of dissent within the Government Party, and when asked why no proceedings were taken, the Prime Minister quoted the police view that to do so would be "to use a sledgehammer to crack a nut", and that the matter was "too trivial" to warrant a prosecution.⁷⁵ In practice it appears that prosecutions are not proceeded with if the unauthorised disclosures are merely embarrassing to the Government. But the threat is used, as in the container port case, and it is submitted that any new law must effectively preclude the use of a weapon out of proportion to the size of the battle.

The remaining areas in which the Franks Committee felt protection by criminal sanctions was needed were the confidences of the citizen and protection against the use of official information for private gain. While these areas did not relate primarily to the interests of the nation as a whole, they involved "... the integrity of the relationship between the Government and the governed."⁷⁶ The Committee made a distinction between information entrusted to the Government and information obtained directly by Crown servants in the course of their jobs concerning confidential information about private citizens.⁷⁷ It considered that protection should be along the lines of existing statutes which require the giving of information and which expressly prohibit unauthorised disclosures of information obtained under them. It would extend this to all information given to the Government whether or not it was compulsory.⁷⁸ The Committee put forward a powerful argument in favour of protection by criminal sanctions in this area. "There is no tension in this sphere between Government and citizen—the citizen wants secrecy, and openness is no advantage to the Government. Any breakdown in trust between the Government and the people could have considerable adverse repercussions on the government of the country."⁷⁹ The Committee was well aware that this would mean some information that was relatively trivial would have the protection of criminal sanctions whereas some government information which was much more important would not have this protection.⁸⁰ But it is submitted, with respect, that the Committee was

⁷⁵ Auckland *Star* Editorial, 21st August 1975.

⁷⁶ Cmd. 5104, para 191.

⁷⁷ *Ibid.*, para 195.

⁷⁸ *Ibid.*, para 196.

⁷⁹ *Ibid.*, para 197.

⁸⁰ *Ibid.*, para 199.

taking the proper approach here. More openness in Government does not mean more openness everywhere. The workings of Government should be made as public as possible in order to foster understanding between it and the governed, but in the interests of the freedom of the subject, the lives of the governed should be made as private as possible.

It was proposed that in one area the existing law be tightened up to cover the case of a civil servant who himself uses information for private gain.⁸¹ The law on corruption at present covers those cases where a gift or consideration is offered, and section 6 of the Official Secrets Act would cover cases where a civil servant passed on information to a friend so that he in turn could make a private gain. But the Committee considered that "... in terms of criminality, both the use and the communication stand on a par, and the law should cover both."⁸² It was also proposed that the recipient of information for these purposes should be caught, even though the general offence of mere receipt should in other circumstances be abolished.⁸³ But the recipient must know that he should not have been given the information.⁸⁴ It is submitted that it may be inconsistent to abolish mere receipt for some purposes and retain it for others. The Committee itself noted that since World War Two simple receipt charges have always been combined with charges of incitement or of unauthorised communication.⁸⁵

Having defined the categories of information to which the Official Information Act should apply, the Franks Committee went on to consider who should be liable to prosecution under it, and for what offences.⁸⁶ The Committee placed the primary duty not to disclose information upon Crown servants and former Crown servants and persons employed by or serving under their direction or control. A comprehensive list was given of those who should be considered as Crown servants for the purposes of the Act, so as to avoid difficulties of interpretation experienced by the Courts in Britain.⁸⁷

The definition of "Office under Her Majesty" is somewhat more clear in the New Zealand Official Secrets Act than in the present British legislation, and would probably not lead to the problems experienced in Britain. In New Zealand, many more public functions are centrally controlled, and boards and corporations are included in the section 2 definition. An interesting question which has recently appeared in New Zealand as a result of the disclosure of a document

⁸¹ Cmd. 5104, para 204.

⁸² *Ibid.*

⁸³ *Ibid.*, para 233.

⁸⁴ *Ibid.*, para 204.

⁸⁵ *Ibid.*, para 233.

⁸⁶ *Ibid.*, Part IV.

⁸⁷ *Ibid.*, paras 214, 215.

from the Security Intelligence Service is whether a catch-all provision should apply to sensitive branches of the civil service. The main objections to the decision not to prosecute appeared to centre not on the nature of the document but on the fact that there was a disclosure from the Security Intelligence Service.⁸⁸ The Franks Committee felt that it would be inconsistent with its aims to extend a blanket protection over certain areas of government business,⁸⁹ and it is submitted that it would also be unfair to impose heavier duties on some civil servants than on others.

The basic offence under section 6 of unauthorised communication of information was redefined by the Franks Committee to become communication by a Crown servant contrary to his official duty.⁹⁰ This the Committee felt was in line with the concept of authorisation as seen by the civil service, and would make it clear that it was for the prosecution to establish that the communication was contrary to the accused's official duty.⁹¹ This would of course clearly establish the element of *mens rea* in offences of this kind. The Committee considered that the accused should have several defences, including the defence that he believed, and had reasonable ground to believe, that he was not acting contrary to his official duty, or that he did not know, and had no reason to believe, that the information in question was classified, or was of a kind specified in the Official Information Act.⁹² At first sight, this appears to be inconsistent with the Committee's belief that it was the result of a disclosure that counted and not the intention of the accused.⁹³ But these defences must be seen in the light of all the Committee's proposals. Under the new Act, all information the disclosure of which would cause serious harm to the nation would be or should be classified as such, and failure to classify must be a concern of those responsible for classification, not of those who merely handle the documents. The offences of failing to take reasonable care of an official document, failing to comply with directions for its return or disposal, and retaining a document contrary to official duty were retained by the Committee.⁹⁴

The Committee considered that it was an obvious corollary of its definition of Crown servants that Government contractors should be covered by the Official Information Act, but that in view of its restriction of the kinds of information to be covered by the new Act,

⁸⁸ See especially Auckland *Star* Editorial, 14th August 1975, and remarks made in the House by the Leader of the Opposition, reported in the Auckland *Star*, 17th August 1975.

⁸⁹ Cmd. 5104, para 181.

⁹⁰ *Ibid.*, para 217.

⁹¹ *Ibid.*

⁹² *Ibid.*, para 221.

⁹³ *Ibid.*, para 98.

⁹⁴ *Ibid.*, para 222.

most Government contractors would not be so covered. Whether persons other than Crown servants would be subject to the new Act would then depend on what kinds of information they handled rather than their status. It is submitted, with respect, that this is a much more logical approach to take, and would be a solution to the problems of interpretation discussed earlier in this paper. As an additional safeguard, the Committee felt that the provisions of the Official Information Act should be drawn to the attention of Government contractors before they should be liable, and that they should have the same kinds of defences available to them as those proposed for Crown servants. These additional safeguards should also be applied to persons entrusted with information in confidence.⁹⁵

Finally, the Committee dealt with the question of the duty of the ordinary citizen under the Official Information Act.⁹⁶ It felt that there was "... no justification for the view that a citizen should be free to compound the failure of a civil servant, and to harm the nation, by passing on a secret as he pleases."⁹⁷ However, the Committee recognised that the duty of a citizen was not as heavy as that of a Crown servant, and that to be liable he must know or ought to know that he has come into possession of a secret.⁹⁸ Moreover, the liability of the citizen should not extend to information dealing with the confidences of the citizen, both because of practical difficulties in keeping track of such information once it is disclosed, and because the citizen would find it hard to recognise such information.⁹⁹

Where other categories of information have passed through several hands before coming into the possession of the citizen charged under the Act, the clear introduction of *mens rea* into all offences means that it would not matter whether each intermediary was aware that the information was covered by the Act, as long as the accused was so aware.¹ He should have the defence that he communicated the information reasonably believing he had the authority to do so, and it should not be an offence to communicate the information to the authorities.² Once again it must be mentioned that the Committee proposed to abolish the general offence of mere receipt.³

The effect of the recommendations in the Franks Report would be to maximise openness in Government and the privacy of the citizen within the British constitutional framework. Recently the British Government indicated that it wished to bring down legislation along

⁹⁵ Cmd. 5104, paras 226-228.

⁹⁶ *Ibid.*, paras 229-239.

⁹⁷ *Ibid.*, para 230.

⁹⁸ *Ibid.*, para 231.

⁹⁹ *Ibid.*, para 234.

¹ *Ibid.*, para 235.

² *Ibid.*, para 236.

³ *Ibid.*, para 233.

the lines of these recommendations.⁴ The Franks Report is an important document and must be considered carefully if and when there is an attempt made to reform the law in New Zealand. It is submitted that any reform must at the very least limit the kinds of information to which the disclosure provisions apply, completely separate any disclosure provisions from those on espionage, and apply the usual rights and duties under the general criminal law to prosecutions for unauthorised disclosure of official information.

The remaining question to consider is whether the reforms proposed by the Franks Report go far enough. It has already been mentioned that there would be constitutional difficulties in removing criminal sanctions except in cases of espionage.⁵ An attempt is made below to examine judicial attitudes in the United States to discover whether the justification for such a position is made only in constitutional terms. But there is another approach to take in considering the question of reform in this area. Up until now, the discussion has been couched in negative terms, that is, what information should be secret and what should not. In positive terms, the issue becomes; should there be some information which the public has a right to see? The Franks Committee deliberately chose not to approach the question of reform in this way, because it saw its terms of reference as limited by the British Constitution. But there may not necessarily be any constitutional incompatibility between parliamentary responsibility and legislation conferring a right on the public to have access to certain kinds of information.

Some support for this argument can be found in the recent discussion in Australian governmental circles on the idea of introducing a Freedom of Information Act along the lines of the Act of the same name in the United States.⁶ This would let Government officials allow various public documents to be seen by people on demand. That such a concept can be aired in a country whose constitutional law is similar to that of New Zealand tends to suggest that there are no basic obstacles to its introduction other than practical or political ones. It is submitted therefore that this idea should be fully considered by any Committee or other body which may be set up to consider the reform of the New Zealand law.

The Franks Committee considered two versions of this kind of legislation; those in Sweden and in the United States.⁷ The Swedish measure is entitled the Freedom of the Press Act. Public access to official documents is defined in a Chapter of this Act. Sweden has a written constitution, and both the principles of public access and

⁴ *Auckland Star*, 21st August 1975.

⁵ *Ante*.

⁶ *Auckland Star*, 14th March 1975.

⁷ Cmd. 5104, Appendix IV.

freedom of the press are enshrined in it. But there are exceptions to the right of public access set out in another measure, the Secrecy Act. These exceptions and the period for which the secrecy is to apply are defined in detail and cover most of the areas which the Franks Committee proposed to include in the Official Information Act. The offences created under the Secrecy Act are also very like those proposed by the Franks Committee. It can thus be seen that the resulting situation in Britain and Sweden would in practice be similar, apart from the fact that information not covered by the proposed Official Information Act would be "not secret" rather than "public". It is suggested that the further step of making it public would not be an impossibility in theory in Britain, nor, for that matter, in New Zealand. Admittedly the constitutional processes by which this occurred would be completely the reverse of those in Sweden and the United States, but the result would be the same. One could go further and suggest that both the practice and the theory should be the same, but this involves the issue of a written constitution for New Zealand, which is a completely different topic.

The comparable measure in the United States, officially known as the Public Information Act, is a fairly recent measure. The United States Constitution has no right of public access as such, but the freedom of speech and of the press are embodied in the First Amendment. The United States Freedom of Information Act requires certain governmental information to be made public, but the United States too has exceptions; every Government requires some measure of secrecy in its operations. However, these exceptions are not nearly as wide-ranging as those in Sweden or those proposed by the Franks Committee. Further, they are not all protected by criminal sanctions.

Such sanctions as there are in the United States Criminal Code cover national defence and espionage only. They are contained in Chapter 37 of Title 18 of the Code, are headed "Espionage and Censorship" and together are popularly known as the Espionage Act. Section 793 relates to the unauthorised communication of information relating to the national defence. The term "national defence" has been given wide judicial interpretation.⁸ Under this section it is also an offence to obtain or receive such information, and also to commit an act of gross negligence which results in the removal, or destruction of documents relating to the national defence. However, an essential ingredient of these offences is intent or reason to believe that it is to be or could be used to the injury of the United States or to the advantage of any foreign nation. The Government must prove that the information in fact relates to the "national defence" and the fact that it has been classified is not conclusive. Section 798 relates to classified information

⁸ Cmd. 5104, para 219.

relating to communications intelligence, and it is an offence knowingly or wilfully to communicate or publish such information without authority, or to use it in any manner prejudicial to the safety or interests of the United States, or for the benefit of any foreign government to the detriment of the United States. The Espionage Act is not restricted to government servants, but applies to all persons.

In order to examine the judicial pronouncements on these United States provisions, the case of *New York Times Co. v. U.S.*⁹ will be considered. This was not a prosecution under the Espionage Act, but proceedings for an injunction to enjoin publication. But it is submitted that an understanding of the United States situation emerges clearly from this decision. The United States Executive applied to the Courts for an injunction to prevent the New York Times and others from publishing information disclosed from the Pentagon concerning United States foreign and diplomatic relations, in particular confidential information concerning the war in Vietnam. Although several of the Supreme Court judges felt that such disclosure would harm the nation and that although the Executive could not be given an injunction to prevent publication, this was not to say that it would not succeed in criminal proceedings, the majority thought that the freedom of the press should be paramount.

Although some general statements were made which might be thought to be applicable to the British and New Zealand situation, such as:¹⁰

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health . . .

the basis of both the majority and minority views was referable to the Constitution and to the separation of powers. The main point of divergence between the two views concerned the definition of the scope of the national security exception to the doctrine of prior restraints embodied in the First Amendment. Although the majority appeared to take an absolute view of the Amendment, it appears that a very narrow exception in war would be recognised, and there is an implication that had the Executive been able to rely on a statute or an executive regulation the Courts might have looked more favourably on its claim. The basis of the majority view appears to be that the Executive has no inherent power to impose censorship.

The minority judges deplored the fact that the case had been hurried through the Courts, and thought that there were difficult questions to consider which should have been given careful attention.

In these cases, the imperative of a free and unfettered press comes

⁹ 29 L.Ed (2d) 822 (1971).

¹⁰ *Ibid.*, per Douglas, J. 830.

into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive.¹¹ They thought that the doctrine prohibiting prior restraints did not prevent the Courts from preventing publication long enough to "... act responsibly in matters of national importance."¹² One of the dissenting judges defined the scope of the judicial function in relation to Executive policy on foreign affairs in a manner which comes very close to the British and New Zealand position with regard to all government policy:¹³

... the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Moreover the judiciary may properly insist that the determination that disclosure of the subject-matter would irreparably impair the national security be made by the head of the Executive Department concerned ... (b)ut in my judgement the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

This of course has not yet been accepted in the United States, and this passage has been criticised as tending to tempt officials into opposing disclosure of embarrassing or politically damaging information.¹⁴

It is submitted that this case shows the difficulties of transplanting legislation such as the Espionage Act into a different constitutional situation. Moreover the difficulties experienced by the dissenting judges perhaps show that there are natural limits to openness in government which cannot be fully catered for by United States constitutional law.

IV

Carefully considered and drafted legislation on official secrets and information is long overdue. The main shortcomings of the present disclosure provisions are that they are too wide, badly drafted, too bound up with espionage, and supported by police powers that are out of proportion to the nature of the disclosure offences.

The most logical method of reform appears to be separate legislation for disclosure. The reforms proposed by the Franks Committee are important, but as the Committee's terms of reference were limited to the British equivalent of section 6 of the Official Secrets Act, these proposals would need to be extended and adapted to New Zealand conditions.

The complete removal of criminal sanctions for the unauthorised disclosure of official information would appear to be constitutionally

¹¹ *Ibid.*, per Burger, C. J. 844.

¹² *Ibid.*, per Harlan, J. 850.

¹³ *Ibid.*, per Harlan, J. 849.

¹⁴ 85 *Harvard Law Review*, 199, 202.

unacceptable. There are also strong practical and ethical arguments for retaining them as long as they are clearly defined and as long as accused persons are entitled to the full protections given them under the general criminal law. The general preoccupation at present with the privacy of the individual would also be supported by the application of criminal sanctions in certain limited fields.

Some consideration should be given to the introduction of complementary legislation along the lines of the Freedom of Information Act in the United States and the similar legislation in Sweden. There appear to be no constitutional barriers to such an innovation, and it could only serve to strengthen democratic processes.