Neutral Citation Number: [2026] EWHC 108 (Admin)

Case No: AC-2024-LON-003068

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2026

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimants**
on the application of	
(1) EPX	
(2) PGH	
- and -	
SECRETARY OF STATE FOR DEFENCE	**Defendant**

- -
- -

Oliver Sanders KC and Emma-Louise Fenelon (instructed by the **Centre for Military Justice**) for the **Claimants**
Charlotte Ventham KC and Robert Cohen (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 12 & 13 November 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 23 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimants (whose identities must not be disclosed by order of the Court), seek judicial review of three of the Defendant's policies governing communications by service personnel with the public, the media and Parliament:

   i) 'The Media DIN 2025': a Defence Instruction Notice ("DIN") titled 'Contact with the media and communicating in public', as amended on 6 February 2025;

   ii) 'Raising a Concern': Chapter 14 of Joint Service Publication 492 ('JSP 492'), published in March 2023, as amended in February 2025;

   iii) 'The Parliamentarian DIN 2024': a DIN titled 'Contact with Parliamentarians', as amended on 10 December 2024.

2. The First Claimant, EPX, is a serving member of the Armed Forces. The Second Claimant, PGH, is a former serving member. Both Claimants contend that the Defendant's policies impose an unjustified and unlawful restriction on service personnel (particularly women), communicating with the public, media and/or Parliamentarians about their experiences of rape, sexual assault, harassment and bullying, without prior authorisation by the Defendant.

3. The Claimants challenge the three policies set out above on the following grounds:

   i) **Ground 1**: The policies are *ultra vires* the Defendant's powers; an unjustified interference with the Claimants' common law rights to freedom of expression; and irrational.

   ii) **Ground 2**: The policies amount to a breach of Articles 8 and 10 ECHR.

   iii) **Ground 3**: In breach of Article 14 ECHR, read with Articles 8 and 10 ECHR, the policies constitute an unjustified difference in treatment between service personnel and civilians.

   iv) **Ground 4**: This is a claim of victimisation which the Claimants are no longer pursuing.

   v) **Ground 5**: The Defendant failed to comply with the public sector equality duty ("PSED") in section 149 of the Equality Act 2010 when making the Media DIN 2025 and the Parliamentarian DIN 2024. The Defendant has conceded this ground, and also that the 2020 Media DIN did not comply with the PSED. There is a dispute as to the appropriate relief.

4. The Claimants seek an order that the 2025 Media DIN and the 2024 Parliamentarian DIN should be quashed and that the Court should declare that they are unlawful. No freestanding relief was sought in respect of the Raising a Concern policy.

5. The Claimants seek the same relief in respect of the provisions of the King's Regulations, because they have not been updated to reflect the revisions made to the new policies.

Procedural history

6. I summarise below the main points in the lengthy procedural history as I do not consider it is necessary to set it out in full. From 2021 onwards, there was a lengthy period of pre-action correspondence between the parties, in which the Defendant stated that it intended to review the media and Parliament policies which were then in force. The claim was issued on 9 October 2024.

7. On 20 December 2024, Cavanagh J. granted permission to the Claimants to amend their claim, and granted permission to apply for judicial review of the 2020 Media DIN and the 2019 and 2023 Parliamentarian DINs. Those original policies have been superseded by new policies.

8. The Defendant failed to file Detailed Grounds for contesting the claim ("DGs"), in accordance with the permission order, and instead applied to the Court, on 25 March 2025, to set aside the grant of permission to challenge the original policies, as that claim had become academic, and to order the Claimants to amend their pleadings so as to challenge the new policies.

9. Following a hearing, Saini J. refused the Defendant's application and made an order on 23 May 2025, in which he directed:

    i) the Defendant to notify the Claimants of any admissions in connection with the original policies;

    ii) the Claimants to file a Re-amended Statement of Facts and Grounds directed at the new policies ("RSFG");

    iii) the Defendant to file DGs for contesting the amended claim.

10. By a letter dated 5 June 2025, the Government Legal Department ("the GLD") conceded on behalf of the Defendant that the original policies (the 2020 Media DIN and the 2023 Parliamentarian DIN) were unlawful in certain specific respects:

    i) A blanket restriction on service personnel speaking out in public without prior authorisation in respect of defence or government matters is incompatible with Articles 8 and 10 ECHR because it permits the unjustified curtailment of their freedom of expression, including in relation to matters within the sphere of, and affecting, their private life.

    ii) Such a restriction additionally breaches Article 14 (read with Articles 8 and 10) ECHR because it creates an unjustified difference in treatment between civilians and service personnel.

    iii) A restriction on the ability of service personnel to speak to their constituency parliamentarian on matters which may compromise the reputation of the Ministry of Defence ("MOD") is incompatible with Articles 8 and 10 ECHR because it permits the unjustified curtailment of their freedom of expression, including in relation to matters within the sphere of, and affecting, their private life.

iv) The 2020 Media DIN breached the PSED.

11. On 21 July 2025, Saini J. approved a consent order which set out the Defendant's concessions in respect of the original policies as follows:

> "(1) The 2020 Media DIN was unlawful pursuant to section 6 of the Human Rights Act 1998 by reason of incompatibility with:
>
> (a) the right to freedom of expression in Article 10 of the ECHR (in that it imposed an unjustified blanket restriction on service personnel speaking publicly without authorisation on "defence or government matters");
>
> (b) the right to respect for private and family life in Article 8 of the ECHR (insofar as the aforesaid blanket restriction applied to matters within the sphere of, and affecting, a service person's private life); and
>
> (c) the prohibition of discrimination in Article 14 of the ECHR read with Articles 8 and 10 (because the aforesaid blanket restriction created an unjustified difference in treatment between service personnel and civilians).
>
> (2) The 2020 Media DIN was also unlawful by reason of non-compliance with the public sector equality duty contained in section 149 of the Equality Act 2010.
>
> (3) The 2023 Parliamentarian DIN was unlawful pursuant to section 6 of the Human Rights Act 1998 by reason of incompatibility with:
>
> (a) the right to freedom of expression in Article 10 of the ECHR (in that it imposed an unjustified restriction on a service person's freedom to consult their constituency parliamentarian on matters which may compromise the reputation of the Ministry of Defence); and
>
> (b) the right to respect for private and family life in Article 8 of the ECHR (insofar as the aforesaid restriction applied to matters within the sphere of, and affecting, a service person's private life).".

Factual background

12. The claim has proceeded on the basis that the Defendant "would treat the Claimants' accounts of (a) their own experiences/circumstances, and (b) what they wish to communicate in public about, as the "assumed facts" (without any admission as to the same) and to respond to the policy challenge on that basis" (DG/11). The assumed facts also include the experiences of the anonymised individuals referred to in the witness statements. The Defendant considered that it was not feasible to investigate the specific allegations because disclosure of case details was confined to members of the

confidentiality ring. However, the assumed facts "do not extend to wide-ranging propositions/allegations made by [the Claimants] of systemic or cultural failings…" (see paragraph 6 of the Defendant's skeleton argument).

EPX's account

13. EPX is in the RAF. In 2017, during her initial training, when she was 19 years old, EPX was raped by a fellow serviceman following a work social event. She reported the offence to the service police, and her assailant was charged with rape. Other servicemen in her unit ostracised her and treated her badly. On one occasion, a senior serviceman accused her of making up the allegation of rape and grabbed her aggressively. He was charged with a service offence.

14. Her Commanding Officer told her that her name had been coming across his desk "too many times" and he directed her that, in future, she should not enter the male accommodation block or allow any of her male friends to enter her room in the female accommodation. Over Christmas, in breach of this command, EPX allowed a couple of her male friends into the female accommodation (but not her room) for drinks. As a consequence, she was charged with an offence, sent to military prison for 16 days and her graduation was delayed by nine months. No advice was sought from the medical team. Her male colleagues were punished by having to give a presentation to their class. EPX considers her punishment was disproportionate, and that she was not given the support she needed as a rape victim awaiting a trial.

15. During this time, members of EPX's unit were required to attend a briefing from the service police on the dangers of drinking, and issues around sex and consent. EPX found this humiliating, particularly as a fictional character in a training video had the same name as her. Her medical notes at this time showed that she was feeling low and suicidal. She was not given sufficient support.

16. Prior to the Court-martial, EPX was assured that, whatever the outcome, a "marker" would be placed on her file and that of her assailant, to ensure that they were not be posted to the same place in the future. At the Court-martial, EPX's assailant was acquitted of the charge of rape. Her request for compassionate leave was refused.

17. EPX made a formal service complaint about these matters, which was rejected. She found the rejection letter insensitive and hurtful. On appeal, her complaint was partially upheld, on the basis that there had been a failure to provide her with appropriate support. The complaint of sex discrimination was rejected. EPX's further appeal to the Service Complaints Ombudsman for the Armed Forces was rejected.

18. EPX said that her experience was not unusual. Women in the Armed Forces were more likely to suffer sexual assaults and harassment than civilians. They were surrounded by people who might be directly or indirectly involved in unacceptable behaviours. It was typical that her Commanding Officer considered that she was the problem, not the male servicemen. The rate of acquittals at Court-martials is far higher than at Crown Courts and they do not deliver justice for rape victims. The service complaints procedure is not effective or fair.

19. In 2021, the Defence Committee of the House of Commons held an inquiry into the experiences of women in the Armed Forces. In advance of the publication of the report, the MOD refused EPX's request to suspend the 2020 Media DIN so that she was not required to seek prior permission before speaking to the press about the report.

20. EPX objected to the Defendant's policies which prevented her from speaking out about her experiences, and the treatment of women in the Armed Forces, without getting the prior approval of the MOD, given that it is the very institution responsible for her ill treatment. It would also be an invasion of her privacy to have to disclose the details of the rape and her experience to her Commanding Officer, in order to make an application for approval.

PGH's account

21. Until recently, PGH was serving in the Royal Navy. She joined the Armed Forces soon after she left school, and she was a care leaver. From the start, she was subjected to unwanted sexual advances, sexual assaults, sexist name-calling and degrading comments about her appearance.

22. In 2022, she attended a social event at the training centre where she worked, where servicemen served extra measures of spirits in her drinks, to get her drunk. She was the only woman present. She was raped twice by one man, and once by another. She has very little first-hand recollection of what happened and learned the details from rumours circulating among the spectators.

23. PGH reported the rapes and her line manager referred the matter to the service police who delayed in investigating the matter and did not gather forensic evidence in time. They mismanaged the investigation, and aspects of her complaint were not properly investigated. They disbelieved her account and eventually the Service Prosecuting Authority ("SPA") decided not to bring charges. Her assailants remained in the Armed Forces. She believes that the servicemen who witnessed the assaults closed ranks and lied to the police.

24. PGH felt that those in her Chain of Command were mainly concerned to protect the reputation of the training centre. Her line manager made her feel as if she was to blame for what happened, for example, saying that she had been inappropriately dressed at the event and that she was intoxicated. She was advised that she had a drinking problem and should seek help. Her line manager assigned her with the task of uploading the results of competency tests on unacceptable sexual behaviour by individuals in her wing which she found humiliating.

25. Her line manager also advised her that it would not be possible to direct that her assailants should be posted elsewhere pending the outcome of the criminal investigation, and so she arranged her own transfer. She was not provided with any support as a victim, contrary to policy, and even though she was a care leaver.

26. PGH submitted a service complaint, a complaint to the Service Police Complaints Commissioner and a complaint to the SPA. Her complaints were not upheld.

27. PGH made a complaint of sex discrimination to the Employment Tribunal, in the course of which relevant information about her assailant's history became known to her for the first time. Her claim was settled. PGH was medically discharged on the ground that she suffers from post-traumatic stress disorder as a result of the sexual assaults upon her.

28. PGH said that she wanted to be able to speak about her experiences publicly in the future, in the media or with Parliamentarians to help to ensure that other women do not suffer the same ordeal. Her profile has been used to promote recruitment to the Armed Forces as a safe and positive place for care leavers but she is not allowed to challenge the positive impression that has been provided using her identity. The process of seeking approval would require her to disclose personal and sensitive details to her Chain of Command, in order to justify her request, which would be burdensome and intrusive.

Witnesses for the Claimants

29. The Claimants adduced witness evidence from:

i) Ms Emma Norton, the Claimants' solicitor, who is the founder and director of the charity Centre for Military Justice ("CMJ"), which provides legal support to members of the Armed Forces and their families. She gave a critique of the challenged policies and explained that the requirement to obtain authorisation for disclosure to the media (including pressure groups) and Parliamentarians has a chilling effect on servicewomen because of the concern that making the application may harm their careers, and doing so would require disclosure of highly personal information to people at their place of work. She also gave details about other cases she has worked on.

ii) Ms Lucy Baston, solicitor at the CMJ, is assisting Ms Norton in this case. She also gave details about other cases she has worked on. Among other matters she observed that harmful myths and stereotypes about victims of sexual abuse and violence were "amplified and facilitated in an incomparably closed culture" within the Armed Forces.

iii) Ms Paula Edwards, Chief Executive Officer of the charity 'Salute Her' which provides therapeutic services to female veterans, including victims of sexual assaults. She described the mental health impacts of sexual abuse and trauma; the response of the service authorities; and the policies and culture of the MOD.

iv) Lt. Col. (Ret'd) Diane Allen OBE was a serving army officer, and also served in the Reserves, between 1984 and 2019. She has published a book titled 'Forewarned – Tales of a Woman at War with the Military System' (2019). She described her experiences of sexism in the Armed Forces.

v) Ms Lara Whyte, a journalist, has been investigating and publishing articles on sexual assault and related issues in the Armed Forces since 2021. As a result of the Defendant's policies on communications with the media, she was unable to speak to serving personnel and she found that former service personnel were reluctant to disclose their experiences to her.

Claimants' submissions arising from the evidence

30. The experiences of EPX and PGH - in terms of both the index offences and the official responses - are not unusual and need to be understood within a wider context. There is ample evidence that women in the Armed Forces are much more likely to suffer sexual assaults than their civilian counterparts and that the men responsible are not likely to be convicted if prosecuted. Furthermore, women in the Armed Forces are much more likely than their male counterparts to make a service complaint and to suffer sexual assaults, harassment and bullying.

31. The Defendant has control over both the professional and private lives of service personnel, and the civilian world and external scrutiny are excluded. Ms Norton highlighted the intense and all-encompassing nature of service life where young men and women work, socialise and drink heavily together on a regular basis and while on service. This environment, with its blurred lines between work and social life, provides very particular opportunities for sexual harassment and assault to occur.

32. The House of Commons Defence Committee ("HCDC") Report titled 'Protecting those who protect us: Women in the Armed Forces from Recruitment to Civilian Life' opens with this summary:

> "Although the Forces generally welcome servicewomen today, it gravely concerns us that bullying, harassment and discrimination (BHD)—already affecting too many Service personnel—was experienced by nearly 62% of female Service personnel and veterans who completed our survey. These behaviours include sexual assault and other criminal sexual offences. Our inquiry received truly shocking evidence from female Service personnel of bullying, sexual harassment, sexual assault and rape they experienced, some of which—even more disturbingly—involved senior officers acting as wrongdoers. The MOD's representative statistics show that servicewomen were nearly twice as likely to experience BHD in 2020 as servicemen. In 2021, servicewomen were more than ten times as likely as servicemen to experience sexual harassment in the last 12 months.
>
> When things go wrong, they go dramatically wrong. The systems for responding to unacceptable behaviour are failing our service personnel, both male and female. The Service Complaints Ombudsman has never judged the military's internal complaints system, in which female Service personnel are overrepresented, as 'efficient, effective and fair'. Nearly 40% of 993 military women told us their experiences of the complaints system were "extremely poor". Too often, complaints are being brushed under the carpet and there is inadequate support. A lack of faith in the system contributes to 89% of both male and female personnel in the Regular Forces not making a formal complaint about BHD. In our survey, around six in 10 servicewomen and female veterans who had experienced BHD did not report it. The

> chain of command can be a direct barrier to reporting: a point of failure. There are also serious problems with how the Service Justice System handles criminal sexual offences—most of which (76% in 2020) involve female victims."

33. Ms Esther Wallington, Director General (People) at the MOD, responded to the Claimants' allegations in her witness statement as follows:

> "6. I fully acknowledge the severity of the allegations made by the Claimants, both as to their own personal experiences and as to the wider issues they raise about the treatment of women in the Armed Forces. The MOD recognises that sexual harassment, discrimination, and abuse have been and remain problems within the Armed Forces. Independent surveys, the Service Complaints Ombudsman's reports, and evidence from Service Personnel ("SP") themselves have highlighted that these behaviours are not isolated incidents but reflect cultural issues that have caused real harm and undermined trust in Defence. Noting that the issues we face are reflective of similar issues seen in wider society and other large institutions, Defence has begun to address these issues systematically through the Raising Our Standards ("RoS") programme ….., which seeks to tackle unacceptable behaviours, strengthen complaints processes, and promote a culture of respect, accountability, and zero tolerance for harassment, bullying, and discrimination. While progress has been made, the Department recognises that more work is required through this continuous improvement programme.
>
> 7. The RoS programme brings together multiple strands of reform, including improvements to both the Civilian and Service Complaints system, enhanced training and awareness on inappropriate behaviours, and stronger mechanisms for supporting victims of harassment, discrimination, or abuse. It also seeks to improve leadership accountability, embed cultural change at all levels of Defence, and provide clearer routes for SP and Civil Servants to raise concerns without fear of reprisal. The intention is not only to deal with individual cases but to change the underlying culture that has allowed such issues to persist. The RoS programme is not limited to sexism and misogyny but reflects the need to consider all aspects of bullying and harassment and ensure Defence is a place where people want to work.
>
> 8. The Department accepts that, for some personnel, aspirational statements of Service values may not align with lived experience, particularly in cases where individuals feel let down by the system. It is not sufficient to rely solely on ethos or value statements in the face of serious allegations or systemic concerns. Defence's commitment to cultural change must be demonstrated through credible action, transparency, and appropriate accountability. The RoS programme aims to respond

> directly to those lived experiences, restoring trust through delivery, not just aspiration.
>
> 9. I note that the Claimants' evidence includes considerable and wide-ranging criticisms of the MOD's systems/processes. Those matters are being considered and will be addressed as necessary as part of the ongoing review of policy and process that I describe further in paragraphs 38 – 45 below. However, I have sought to concentrate in this witness statement on the issues that I understand to be central to the question of the lawfulness of the policies being challenged."

34. At paragraphs 39 – 43, Ms Wallington set out areas which are currently under review by the MOD, namely:

    i) providing greater clarity on aspects of the policies on communications with the Media and Parliamentarians;

    ii) the Whistleblowing in Defence Review which was commissioned by the Minister for Veterans and People in August 2025, which will evaluate how effectively the Raising a Concern policy is communicated, consistency between military and civilian procedures, and whether legislative changes are needed to enhance the system;

    iii) considering concerns raised about the accessibility and dissemination of policies; and

    iv) review of policies governing conflict of interest, private life interests, conduct, data protection, social media and other matters.

35. At paragraph 43, Ms Wallington confirmed that the ongoing policy review will involve consideration of the King's Regulations and any necessary amendments to them, in the light of policy changes that have been made.

36. At paragraph 44, Ms Wallington described the forthcoming Armed Forces Commissioner role which has been introduced to investigate service welfare matters and to improve the day to day lives of serving personnel.

37. At paragraph 45, Ms Wallington indicated that the workstreams outlined in paragraphs 39 – 44 of her witness statement were already underway, and it was anticipated that initial drafts of revised policies will be ready before the end of 2025. There will then be a consultation procedure and a PSED analysis. New policies should be in place by the start of April 2026.

Content and meaning of the policies

The Media DIN 2025

38. The Media DIN 2025 is titled 'Contact with the media and communicating in public'. It was most recently amended on 6 February 2025.

39. The opening paragraphs of the DIN are as follows:

> "**Purpose**
>
> This Defence Instruction Notice (DIN) sets out the rules and authorisation procedures governing contact with the media and communicating in public for all Ministry of Defence (MOD) personnel, including armed forces personnel, civil servants, and contractors (collectively, "Personnel").
>
> Where Personnel wish to raise a concern using the whistleblowing protections provided by legislation or extended through MOD policy, this DIN does not apply and Personnel should instead consult the Raising a Concern policy *(hyperlink). (emphasis added)*
>
> Private correspondence with parliamentarians, whether verbal or written, is not considered communicating in public under this policy and Personnel should instead consult the Contact with Parliamentarians DIN *(hyperlink)*."

40. Contrary to the Claimants' submissions, I consider that the second paragraph underlined above clearly and unequivocally states that the Media DIN 2025 does not apply to personnel who wish to raise a concern using the whistleblowing protections. Such persons are told to consult the Raising a Concern policy and a hyperlink is provided.

41. This key amendment was added in February 2025. It expressly excludes from the ambit of the Media DIN persons such as the Claimants who wish to raise a concern about wrongdoing at their workplace. This amendment was made in response to the criticism of the earlier 2020 Media DIN to the effect that it required all personnel to seek prior authorisation before communicating with the media. The Defendant conceded in the Consent Order dated 21 July 2025 that the 2020 Media DIN was incompatible with the rights in Articles 8 and 10 ECHR (as well as discriminatory under Article 14 ECHR) because it imposed an unjustified blanket restriction on service personnel speaking publicly without authorisation on defence or government matters. In light of the amendment, the Defendant contends that there is no longer a breach of the Human Rights Act 1998 as there is no blanket ban on communications with the press or in public. Only necessary and proportionate restrictions are imposed on external communications in line with the legitimate interests in Articles 8 and 10. The Claimants submit that, despite the amendments, the new policies continue to breach Articles 8 and 10 ECHR.

42. The opening paragraphs of the Media DIN 2025 also state clearly that private correspondence with Parliamentarians falls outside the scope of the Media DIN 2025 and is governed by the Parliamentarian DIN.

43. The final paragraph of the Media DIN 2025 makes an exception for personnel who are representatives or officers of a recognised trade union. They need not seek permission before publicising union views on matters directly affecting members' conditions of

service. Civil servants in the MOD are entitled to join a trade union, though military personnel are not.

44. The provisions in the Media DIN 2025 apply fully to personnel in all other circumstances and read as follows:

> "**General**
>
> The MOD undertakes to communicate with the public in a way that is clear and honest, enabling transparency and trust in the government's actions. By articulating our story and mission, we strengthen our international standing, attract dedicated professionals, and deliver a clear message of resolve to our partners and those who challenge us.
>
> The strategic benefits set out above must be balanced against any associated risks. To mitigate these risks, all contact with the media and communication in public relating to Defence or Government matters must be authorised in accordance with the rules and procedures set out in this DIN, subject to the exception set out in the final paragraph of this DIN.
>
> Unauthorised contact with the media or communication in public relating to Defence or Government matters could undermine the MOD's operational capability or endanger lives. Such actions may result in disciplinary or administrative measures being taken.
>
> For the purposes of this DIN, "Defence or Government matters" means any information or experience connected to the work or workplace of MOD Personnel. This encompasses, but is not limited to, all official and classified information.
>
> Where Personnel are authorised to communicate with the media or in public, they must ensure that they do not undermine, compromise, or put at risk:
>
> - national or operational security,
> - the personal security of individual Personnel,
> - international relations,
> - political impartiality,
> - public accountability,
> - compliance with commercial, contractual, and intellectual property obligations,
> - adherence to other legal obligations and liabilities, and

- the operational effectiveness of the MOD.

> Personnel do not need authorisation to communicate with the media or in public about matters unrelated to Defence or Government matters, as defined in this DIN. Before communicating, Personnel should carefully assess whether the communication is related to Defence or Government matters and seek advice from the Directorate of Defence Communications (DDC) or their local media and communications team where there is any uncertainty….
>
> Individuals retain the responsibility to comply with the Official Secrets Act 1989 when communicating in public.
>
> ….."

45. Thus, the general provisions in the Media DIN 2025 require authorisation for communications with the media or in public if they relate to defence or government matters (as defined). The Media DIN 2025 amended the list of factors which personnel were required to ensure were not compromised when they made authorised public communications by deleting the factor "would the service or departmental reputation or departmental reputation be compromised?". It also deleted another reference to "departmental reputation" which was in the Introduction to the 2020 Media DIN. As Ms Wallington explained at paragraph 32 of her witness statement, the Defendant accepted that this provision in the 2020 Media DIN gave rise to an unjustified interference with rights under Articles 8 and 10 ECHR.

Raising a Concern

46. The Raising a Concern policy is part of a more extensive Joint Service Publication which addresses other matters. It was issued in March 2023, so it post-dates the events described by the Claimants. It was amended in February 2025 as part of the Defendant's policy review.

47. Its objectives are set out as follows:

> "**Overview**
>
> 1. Everyone who works for Defence has a responsibility to speak up if they are faced with or suspect wrongdoing and/or malpractice in the course of their work. It is important that they know what to do if they come across something that they think is fundamentally wrong, illegal or endangers others within Defence or the public.
>
> 2. Defence promotes a positive raising a concern culture, so that issues can be raised and dealt with promptly, professionally and in accordance with the law. Everyone should report their concerns immediately when they believe someone has done, is

doing, is going to do, is asking them to do, fails to do something, or is covering up something that:

a. is contrary to the Civil Service Code, or goes against the Values and Standards expected of His Majesty's Armed Forces, or is illegal;

b. endangers others or places the health and safety of people at risk; or

c. places Defence's property, assets, or money at risk through theft, fraud, or negligence.

3. Defence is committed to:

a. ensuring that anyone who has a concern understands their responsibility to speak up when they see something that doesn't feel right, is aware of how to raise it, and ensuring everyone is made aware of this policy and procedure upon joining Defence as part of their induction, with suitable training provided.

b. listening to those who raise a concern and treating them seriously and with respect, handling concerns responsibly, professionally, and lawfully, ensuring those raising a concern are afforded protection in accordance with its duty of care, with appropriate action taken consistently to tackle any mistreatment or victimisation, supporting those involved by fully investigating their concerns and escalating and taking action as appropriate.

c. maintaining the Department's Confidential hotline as the primary reporting route for whistleblowing concerns.

d. having sufficient Nominated Officers and Raising a Concern TLB Focal Points as alternative avenues and sources of advice and support to encourage individuals to feel safe to speak up, and a Board-level Whistleblowing Champion (2nd Permanent Under Secretary) to oversee and champion the process.

e. providing training for Nominated Officers on how to progress complaints and support those raising a concern.

4. Individuals who raise a concern often do so out of a sense of duty and a desire to 'do the right thing'. It is not always easy to come forward, so leaders, both Service and civilian at all levels within Defence should welcome and actively encourage open dialogue. This will help to create a culture where individuals feel safe to speak up when they need to, and when they do, feel confident that they are listened to and supported.

5. This document has been designed to ensure that individuals' concerns are addressed and resolved at the right level and as

> quickly and effectively as possible and reassure individuals of protection from victimisation when raising concerns.
>
> 6. Defence strives to maintain a positive culture for raising a concern because it has numerous advantages. For example, it can:
>
> a. encourage an open culture, where individuals feel confident that concerns can be raised and dealt with quickly and that they will be appropriately protected for doing so.
>
> b. detect and deter wrongdoing.
>
> c. provide managers with the information they need to make decisions and control risk.
>
> d. save and/or protect lives, the environment, property, jobs, money and both personal and organisational reputations.
>
> e. minimise the chance of anonymous or malicious unauthorised disclosures of official information (including to the media).
>
> f. reduce the likelihood of legal claims against Defence.
>
> g. improve staff trust, engagement, and effective delivery of business.
>
> h. foster an inclusive environment in which all forms of unlawful discrimination are outlawed."

48. In this context, the reference to minimising unauthorised disclosures at paragraph 6(e) above refers to disclosures which do not comply with the terms of the Raising a Concern policy. As Ms Wallington explained at paragraph 23 of her witness statement, it is not intended to discourage lawful protected disclosures, but rather to reduce the risk of inadvertent breaches of security, confidentiality or trust.

49. The scope of the policy is very broad, as explained at paragraphs 26 to 28, as follows:

> "**Types of concerns that may be raised under this policy**
>
> 26. Raising a concern is a generic term relating to the internal (within the organisation) or external (outside of the organisation) disclosure of information to expose past, present, or future planned potential wrongdoing in an organisation. This policy and process explains how to report concerns internally, and externally for Civil Servants if raising a concern under the Civil Service Code with the Civil Service Commission.
>
> **What can be raised under this policy?**
>
> 27. If an individual is asked to do something, or is aware of the actions of others, which they consider to be fundamentally

wrong, illegal, have the potential to endanger others or breach the Services' Ethos, Values and Standards, or the values of the Civil Service Code, or the Official Secrets Act 1989, they should raise a concern using this policy. The policy refers to this as 'wrongdoing'.

28. The potential wrongdoing should be something that affects a wider group, such as work colleagues, customers, or the public. Examples of the type of concern that might be raised under this policy include:

a. threats or risks to national security, such as failure to follow security vetting procedures, falsifying documentation, or failure to disclose contacts with persons from, or travel to, Tier 1 and Tier 2 Restricted Countries on the Restricted Countries List.

b. actions that place Defence property, assets, and funds (public funds), at risk through theft, corruption, fraud, or waste.

c. misuse of Defence assets, dishonest or fraudulent conduct relating to payments, falsifying documents, or creating inaccurate records.

d. failure to comply with legal obligations such as not protecting personal data as required by data protection legislation.

e. endangering others or placing the health and safety of others at risk.

f. not controlling the keeping and use of dangerous substances and materials, including explosives and highly flammable materials as required by Health and Safety regulations, or any other relevant legislation.

g. danger to the environment such as improper disposal of hazardous materials.

h. danger to people such as hate speech or crime, abuse or mistreatment of children or vulnerable people, including concerns that a member of the Defence community has behaved in a way that has harmed, or may have harmed, a child or vulnerable / at risk adult.

i. deceiving, or knowingly misleading Ministers, Parliament, or others.

j. being influenced by improper pressure from others for the prospect of personal gain.

k. ignoring inconvenient facts or relevant considerations when providing advice or making decisions.

> l. frustrating the implementation of policies once decisions are taken – this could be through declining to take, or abstaining from, actions which flow from those decisions.
>
> m. acting in a way that unjustifiably favours, or discriminates against, particular groups of individuals or interests.
>
> n. acting in a way that is determined by party political considerations, or using official resources for party political purposes.
>
> o. where someone else is allowing their personal political views to determine any advice they give, or their actions.
>
> p. acting in a way that goes against the values and standards of the Services or the Civil Service Code or is illegal.
>
> The above list is not exhaustive."

50. I consider that the criminal conduct and sexist behaviour which the Claimants wish to publicise falls within the scope of "wrongdoing", which is described in paragraph 27 of the policy as "fundamentally wrong, illegal, have the potential to endanger others and breach the Services' Ethos, Values and Standards". The wrongdoing identified by the Claimants falls within paragraph 28 as it was "something that affects a wider group, such as work colleagues". Widespread sexist attitudes and behaviour towards servicewomen are at the heart of the Claimants' concerns. The examples listed are illustrative only, but potentially sub-paragraphs (e), (h), (k), (m) and (p) are applicable to the Claimants' concerns. The Claimants' submission that complaints of sexual assaults/abuse, bullying and harassment ought to be specifically referenced in the list in paragraph 28 is a disagreement with the manner in which the Defendant has chosen to draft the policy, rather than its content.

51. Under the heading "What cannot be raised under this policy?", paragraph 29 states:

> "29. This policy cannot be used to raise individual/personal complaints about management decisions or concerns about individual treatment, such as complaints of bullying, harassment, discrimination, or victimization. Concerns of this sort should be raised using the policy relevant to the individual's terms and conditions of service, such as JSP 831 - Redress of Individual Grievances: Service Complaints, the Civilian Grievance and Dispute Resolution policy and procedure, JSP 763 - Behaviours and Informal Complaints Resolution Policy or the Civilian Formal Bullying, Harassment, Discrimination and Victimisation Complaints policy and process."

52. The MOD has comprehensive policies and procedures for processing individual complaints. Policy JSP 831, which applied to the Claimants, sets out the provisions of the Service Complaint System, Service Complaints Appeals, the Service Complaints Ombudsman for the Armed Forces. The Claimants appropriately pursued these procedures at an early stage. Obviously, as they alleged that they were the victims of

criminal offences, the matter was reported to the service police for investigation and potential prosecution, in the first instance.

53. In my view, the Claimants' submission that complaints of bullying, harassment, discrimination and victimisation are excluded from the ambit of the policy by reason of paragraph 29 is an incorrect reading of the policy. Individuals such as the Claimants who come within the scope of the policy are not rendered ineligible to raise a wider concern because they also have an individual complaint such as bullying, harassment etc which is subject to other policies and procedures. That would be a drastic curtailment of the scope of the policy as set out at paragraphs 27 - 28. The correct interpretation is that the policy does not intend to duplicate the existing policies and procedures, listed in paragraph 29, which enable individuals to pursue individual complaints, so it is not intended for use by a person who is only making an individual complaint, without wider concerns. Rather, the policy is designed to provide an additional or alternative means of redress to the individual complaints procedures by giving "individuals the confidence to speak up if they have a concern about wrongdoing or malpractice at work and be assured that it is safe and acceptable to do so" (paragraph 16). The individual may be a victim of wrongdoing or merely an observer of wrongdoing. In either case, the policy envisages that the wrongdoing should be something that affects a wider group, not just an individual, and that is the distinction between concerns which can be raised under the policy (paragraphs 27 - 28) and those that cannot (paragraph 29). For the reasons I have set out above, I consider that the Claimants would have been eligible to raise their concerns under the Raising a Concern policy, had it existed at the relevant time.

54. Paragraph 31 informs individuals that if they are unsure whether their concern can be raised under this policy, they are encouraged to speak with the appropriate person in their Chain of Command, or contact the Confidential Hotline Team or Nominated Officer. Individuals are also reminded that "unauthorised disclosure of sensitive official information outside of Defence can constitute a criminal offence". This is a reference to the Official Secrets Act 1989, which I consider below.

55. Paragraphs 41 - 43 emphasise that the MOD will not tolerate any form of victimisation against an individual for raising a concern under the policy, and advises individuals to report any concern about victimisation immediately. Where victimisation or unfair treatment has occurred, those responsible will be sanctioned.

56. The Confidential Hotline is the primary point of contact for raising concerns. It is also a source of authoritative and impartial advice and guidance. Nominated Officers in the department can also offer impartial support and advice outside of the Chain of Command. The Hotline team will advise on whether a concern falls under this policy, and alternative channels to follow if it does not. It will identify the appropriate channels available to individuals to raise their concerns and advise on "next steps" (paragraph 59). The Hotline team will review and triage concerns raised and identify the most appropriate route to resolve them. Paragraphs 99 – 111 sets out the procedures that will be followed by the Hotline team. The Hotline team may take a concern forward with other organisations, as appropriate (paragraph 101). An individual who is dissatisfied with the outcome may refer the matter to the Service Complaints Ombudsman.

57. Under the heading "Unauthorised disclosures" (paragraphs 131 – 133), the policy emphasises that concerns should be raised internally, or with prescribed bodies or

persons, as early as possible. It explains that "[t]his will allow Defence the opportunity to address and resolve any concerns quickly and by the most appropriate means. Defence is confident that there are sufficient internal avenues available to deal with any concerns raised." (paragraph 131).

58. Paragraph 132 warns individuals that raising a concern outside the prescribed routes listed in the Raising a Concern policy (for example, with the media or Parliamentarians) may result in disciplinary action being taken, unless the disclosure is protected by the Public Interest Disclosure Act 1998 ("PIDA") or permitted under the Parliamentarian DIN. Disclosure of official or classified information may be a breach of the Official Secrets Act 1989. Contrary to the Claimants' submission, this statement was not "wrong"; it did not purport to set out the provisions of the Official Secrets Act 1989, it was merely flagging it, for completeness.

59. Paragraph 132 was amended in 2025 by deletion of a cross-reference to the Media DIN. The purpose of the deletion was to reinforce the point that the Media DIN did not apply to matters within the scope of the Raising a Concern policy.

60. The protection afforded in the policy is set out as follows:

> "**Protection**
>
> 44. No-one who raises a genuine concern (one made in good faith that they reasonably and honestly believe to be true) in line with this policy and procedure should suffer a detriment because of raising that concern. This includes where further enquiries or an investigation subsequently finds there has been no wrongdoing.
>
> …..
>
> 47. The Public Interest Disclosure Act 1998 (PIDA) also serves to protect 'workers' who make a 'qualifying disclosure' in one of the permissible ways set out in the Act from detriment or dismissal. In order to be protected, the procedure set out in the Act must be followed.
>
> PIDA is not drafted in a manner which includes Service Personnel within its scope. However as a matter of policy, Defence has decided to extend the principles of PIDA to Service Personnel. Defence has an equal duty to protect all its personnel and as long as you have reasonable belief that your concern is true and have followed the procedures set out in this guidance, you will be protected from any unfair or negative treatment (victimisation) due to raising the concern. If you are victimised for raising a concern, Defence will take appropriate disciplinary action against those responsible in accordance with their terms and conditions of service.
>
> …..

Relevant legislation

49. PIDA protects workers who 'blow the whistle', in certain circumstances. Defence also extends the principles of the PIDA to Service personnel (who are not protected automatically because PIDA only applied to 'workers' and they would not fall within that category).

50. PIDA protects workers who make a disclosure from unfair dismissal and other adverse action on the part of their employer in response to the disclosure. To be covered by PIDA, the disclosure must be a "qualifying disclosure". For a qualifying disclosure to be protected, it must be made by a worker by one of the permitted methods of disclosure set out in PIDA. A "qualifying disclosure" is any disclosure of information which, in the reasonable belief of the worker making the disclosure tends to show that one or more of the following:

a. that a criminal offence has been committed, is being committed or is likely to be committed.

b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

c. that a miscarriage of justice has occurred, is occurring or is likely to occur.

d. that the health or safety of any individual has been, is being or is likely to be endangered.

e. that the environment has been, is being or is likely to be damaged.

f. that information tending to show any matter falling within any one of the preceding categories has been, is being or is likely to be deliberately concealed.

51. PIDA encourages disclosure to the worker's employer (internal disclosure) as the primary method of raising a concern. Disclosure to third parties (external disclosure) may be protected under PIDA but only if more stringent conditions are met. Disclosures to a 'responsible' third party, or a 'prescribed person' are also likely to gain protection. However, wider disclosures, such as to the police or to the media, will only qualify in very limited cases. See GOV.UK for information on 'Whistleblowing: list of prescribed people and bodies'. Individuals may wish to seek their own legal advice before reporting a concern externally.

52. PIDA provides protection to workers from suffering any detriment on the grounds that they made a protected disclosure.

> It also provides protection against dismissal as a result of making a protected disclosure. The extension of the principles of PIDA to Service Personnel means that the fact that they are not workers is disregarded for the purposes of the definition of a 'qualifying disclosure' and a 'protected disclosure' and they also have the right not to be subjected to any detriment on the ground that they have made a protected disclosure.
>
> 53. Defence has an equal duty to protect all its personnel. As long as you have reasonable belief that your concern is true and have followed the procedures set out in this guidance, you will be protected from any unfair or negative treatment (victimisation) due to raising the concern. If you are victimised for raising a concern, Defence will take appropriate disciplinary action against those responsible in accordance with their terms and conditions of service."

61. The relevant provisions of the PIDA are set out in Annex 1 to this judgment. PIDA amended the Employment Rights Act 1996 ("ERA") by inserting a new Part IVA. It created the concept of a "protected disclosure". An employer cannot subject a worker to a detriment as a consequence of making such a disclosure. A protected disclosure is a "qualifying disclosure" made by a worker in accordance with sections 43C to 43H ERA. That is to say, it is any disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show a criminal offence, a breach of legal obligations, a miscarriage of justice, health or safety dangers, environmental damage, or deliberate concealment of any of these matters.

62. In the first instance, PIDA applies to several types of disclosure:

    i) to an employer (section 43C ERA);

    ii) to a legal adviser (section 43D ERA);

    iii) to a Minister of the Crown, where the person's employer is "an individual appointed under any enactment …. by a Minister of the Crown, …. or a body any of whose members are so appointed" (section 43E ERA); and

    iv) to a person prescribed for that purpose by the Secretary of State (section 43F ERA).

63. Thereafter section 43G ERA provides that a worker may make a disclosure more widely and still receive protection if:

    i) they make the disclosure in good faith; and

    ii) they reasonably believe that the information disclosed, and any allegation contained in it, are substantially true; and

    iii) they do not make the disclosure for the purposes of personal gain; and

    iv) one of the following conditions is satisfied:

a) they reasonably believe that they will be subjected to a detriment by their employer if they make a disclosure to their employer, or;

b) no person is prescribed to receive a disclosure and the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if they make a disclosure to their employer, or;

c) they have previously made a disclosure of substantially the same information to their employer or a prescribed person;

v) and in all the circumstances of the case, it is reasonable to make the disclosure.

64. It follows that the regime introduced by PIDA usually requires a worker first to speak to their employer, but permits wider dissemination in prescribed circumstances.

65. By section 47B ERA, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by their employer done on the ground that the worker has made a protected disclosure. This right has been applied to service personnel under the policy and so it protects an individual from any detriment such as disciplinary action. Unlike civilians, service personnel do not have a right to present a complaint to an employment tribunal that they have been subjected to a detriment in contravention of section 47B ERA.

66. I accept Ms Wallington's description of the Raising a Concern policy, as amended in February 2025, in paragraphs 26 and 27 of her witness statement:

> "26. The RAC policy makes clear that individuals who report wrongdoing—whether misconduct, harassment, abuse, or other serious issues—are protected from victimisation and unfair treatment. Concerns can be raised confidentially, anonymously if necessary, and with support mechanisms in place, enabling the MOD to address problems swiftly while maintaining discipline and security. The amendments made in February 2025 (especially at paras 47, 49 and 51-52 …. make it explicit that the protections enjoyed by [Civil Servants] under PIDA are extended, through policy, to [Service Personnel] giving them in effect the same statutory safeguards as civilian colleagues. There is an expectation, based on and consistent with the provisions in PIDA, that concerns will be raised internally in the first instance via the appropriate procedure (which may be a specific procedure depending on the nature of the issue/concern that is raised). However, if an individual makes a disclosure externally that would be treated as a protected disclosure under PIDA, they will be protected from censure.
>
> 27. So far as the Claimants are concerned, and based on the "assumed facts" of this case, the effect of these amendments is to disapply the requirement that they seek permission before communicating with the media or otherwise in public: in short, the 2025 Media DIN does not apply to them. The MOD has

> already confirmed this to the Claimants in writing …. In the same letter, the MOD outlined the PIDA (or PIDA equivalent) protections that appeared to be applicable to the Claimants based on their accounts of what they had experienced and the attempts they had made to resolve their complaints internally."

67. The letter to which Ms Wallington referred was sent by the GLD to the Claimants' solicitor, Ms Norton on 22 April 2025. The Claimants queries are set out in italics and the GLD's response follows. I have added the sub-headings. I found it to be helpful guidance, and I do not agree with the Claimants that the GLD should have advised the Claimants on the application of PIDA to them in absolute rather than provisional terms, as that was not the purpose of the letter. The letter stated:

> **Queries**
>
> *"(1) whether it [the SSD] considers that JSP 492 altogether disapplies the prior authorisation requirement mandated by the new media policy or simply means that unauthorised disclosures will not be sanctioned;*
>
> *(2) the specific sub-provisions of s43G and/or s43H Employment Rights Act (as amended by s1 PIDA) which it considers applicable and how and why these protect the Claimants;"*
>
> *(3) whether it considers that acceptance by either Claimant of payment in connection with a public disclosure of the relevant kind, e.g. an advance, fee or royalty in connection with a media interview, talk or memoir would remove any such protection and, if so, the reasons for this;*
>
> *(4) the specific passages within the new media policy and JSP 492 which make it clear to the Claimants that they do not need authority to engage with the media;*
>
> *(5) the mechanism by which a third party (including a lawyer or journalist) could know and advise an individual on each of (1)-(4) above given that the incorporation of JSP 492 into the new media policy makes it confidential."*
>
> **Response**
>
> "a. In response to your question (1), please note as follows. Our client considers that the Media Policy does not apply to 'whistleblowing' cases – i.e. cases where someone wants to raise a concern – at all. That is why the Media Policy explicitly provides "Where Personnel wish to raise a concern using the whistleblowing protections provided by legislation or extended through MOD policy, this DIN does not apply and Personnel should instead consult the Raising a Concern policy". In turn, the Raising a Concern Policy extends Public Interest Disclosure Act 1998 ('PIDA') type protection to personnel. It follows that if, in

an individual case, someone was protected by PIDA when making a disclosure to the media or other external bodies, then no prior authorisation would be required. If the disclosure would not be protected by PIDA, then any unauthorised disclosure could be dealt with under disciplinary procedures.

b. In response to your question (2), please note as follows. The essence of the Raising a Concern chapter in JSP 492 is to ensure the principles of PIDA apply to Service Personnel even though, by statute, they would not usually fall within the ambit of the amendments which PIDA made to the Employment Rights Act 1996 (ERA). Our client considers that s.43G ERA – either subsection (2)(a) or (c) may apply. Subsection (a) seems the most relevant. However, if an individual has already raised the matter internally, then subsection (c) may apply. Whether a certain disclosure would be protected is a fact specific question – as it would involve considerations as to reasonableness, which in turn may depend on whom the disclosure is made to. That said, and from a general standpoint, our client considers that disclosure to journalists or groups who have campaigned on comparable issues in the past, or the Defence Select Committee is likely to be reasonable in the circumstances of the cases the Claimants wish to raise. If the disclosure is protected, then the Ministry of Defence (MoD) would not subject the individuals making the disclosure to any detriment – such as disciplinary action or any other action that would potentially amount to victimisation (and anyone in the MoD or the Armed Forces that tried to do so would potentially open themselves to be disciplined). The JSP explicitly states that victimisation is not tolerated to ensure that individuals (e.g. a CO) does not victimise a whistleblower. In order to rely on s.43H the disclosure must be of an exceptionally serious nature. It seems to our client that it is less likely that the Claimants could rely on this ground, although our client considers that potential allegations about the inability of CM panels to act properly may bring the allegation about the CM within the scope of this section.

c. In response to your question (3), please note as follows. Both s.43G or s.43H ERA specify that a disclosure is a qualifying disclosure if not made for personal gain. This appears to include all the types of financial reward/payment set out in the question. Generally, our client is not persuaded that a memoir for general publication would fall within the scope of PIDA. PIDA relates to raising a concern with a specific person or body. For the avoidance of doubt, this does not appear to be different from the position applicable to workers or employees of other public bodies or private companies.

d. In response to your question (4), please note as follows. As noted above, the Media Policy is explicit that it does not apply if

> someone wants to raise a concern. The requirement to seek authority before engaging with the media is in that policy. As the policy does not apply to raising a concern the requirement to seek authority also does not apply. It is our client's understanding that what the Claimants wish to do by raising their particular cases as evidence of a wider problem within the military is raising a concern. Their cases therefore appear to fall within the JSP relating to raising a concern, which incorporates the way that PIDA works (i.e. raising a concern internally, but with scope to raise it externally if that is reasonable in all the circumstances of the case). There is no requirement in PIDA for a disclosure to an external body to be authorised by the employer for someone to make a protected disclosure under PIDA (including as extended by MoD policy to service personnel)."

Parliamentarian DIN 2024

68. The Parliamentarian DIN, which was amended on 10 December 2024, sets out the rules and authorisation procedures governing contact with Parliamentarians, including members of both Houses of Parliament.

69. It is made clear at the outset that this DIN "does not preclude those having employment with the MOD or Armed Forces from raising a concern in line with the Department's whistleblowing policy or contacting an appropriate employee support hotline" (paragraph 3).

70. By paragraph 4, the DIN does not preclude those employed by the MOD acting in their role as an elected representative of a trade union from contacting Parliamentarians on issues relating to their trade union role.

71. The key provisions are at paragraphs 5 – 7, as follows:

> "**Overall Approach - Ministerial Accountability**
>
> 5. Ministers are accountable to Parliament for the policies, decisions and actions of their Departments. Parliamentarians have direct access to Ministers, and any information they require from the Department should be provided by Ministers (such as in answer to Parliamentary Questions). This guidance is intended to ensure that only accurate and releasable information is provided to Parliament and that Ministers can assure themselves of that before it is released.
>
> 6. Those having employment with the MOD or Armed Forces are accountable to Ministers, not to Parliament (with the exception of the special rules applying to the Accounting Officer). They should not contact parliamentarians or their staff about Defence or Government Matters without Ministerial authorisation; this DIN defines "Defence or Government Matters" as any information or experience reasonably connected

> to the work or workplace of anyone related to their employment by the MOD, encompassing all classified information and responsibilities directly resulting from their position of employment. They may, however, contact their constituency MP and/or MDL on matters that relate to service or employment if it has affected them personally. This covers matters arising from an individual's lived experience while serving, where issues of a personal nature may overlap with or engage Defence business. This covers issues related but not limited to: recruitment and training; career management; terms and conditions of service; discipline; housing; and healthcare. This is not an exhaustive list. They may also contact them in relation to personal matters not related to service or employment. This includes: family access to healthcare or schooling; hobbies or interests such as sports, hill walking, bird watching etc., spousal or partner employment, etc. There is no requirement for confidence in this case unless requested by the individual(s) affected.
>
> 7. It includes instances where an issue of Defence business would also be considered a personal matter as the effects would directly involve the personal circumstances of those having employment with the MOD or Armed Forces. For example, it would not be permissible to contact a constituency parliamentarian to complain about a policy in general (Defence business) but it would be acceptable to contact them about how that policy affects the individual involved (as it is a personal matter). Similarly, it would not be permissible to contact a parliamentarian with a complaint about the closure of a facility or removal/sale of a capability, but it would be acceptable to contact them about the impact of such a closure/removal on the individual involved and their dependants. Further examples can be found in Annex A."

72. Annex A repeats the advice given at paragraph 8 of the DIN, namely, that when discussing matters with their constituency MP, no sensitive details or any information that may compromise operational effectiveness, national security, international relations or legal obligations are provided. "Departmental reputation" was removed from the above list as part of the 2024 amendments for the reasons already explained.

73. Annex A concludes as follows:

> "Those having employment with the MOD or Armed Forces should consider prior to contacting their constituency parliamentarian if it is the most suitable way to find a resolution to an issue.
>
> They should consider raising an issue through their chain of command in the first instance before doing so. Those who raise a concern through the Whistleblowing & Raising a Concern process should aim to follow that process in its entirety before contacting their constituency parliamentarian."

74. Ms Wallington, at paragraph 28 – 29 of her witness statement, explained that the policy affirms the principle (enshrined in the Ministerial Code) that the ministers of the Crown appointed to a Government Department are accountable for the policies, decisions and actions of their Department. Those employed within the Department are in turn accountable to their Ministers rather than to Parliament, whether they are civilians or military personnel.

75. This is in line with Osmotherly Rules which provide the official basis of Government policy for engagement with Parliament. They confirm that committees have power to send for people, but also that civil servants are accountable to ministers and give evidence as representatives of their ministers.

76. Accordingly, the central objective of the DIN is to ensure that contact with Parliamentarians on Defence or Government matters does not (subject to certain clearly defined exceptions) occur without specific authorisation from Ministers. This is to ensure that information provided to Parliament regarding Defence is accurate. Official communications with Parliament, including its functional bodies such as select committees (paragraph 30), must be approved centrally within the MOD by Ministers. This includes formal Government Responses to Committee Reports, the answering of Parliamentary Questions, responses to communications from Parliamentarians and formal statements made to Parliament on the business of the Government. Prior approval is also required for communications with informal groups of MPs in All-Party Parliamentary Groups (paragraphs 34 - 36).

77. In conclusion, service personnel are required to seek authorisation for communications with Parliamentarians, save in the following circumstances. First, the Parliamentary DIN recognises the right of all service personnel to communicate with their constituency MP without authorisation. Second, as stated in paragraph 3, the Parliamentary DIN "does not preclude those having employment with the MOD or Armed Forces from raising a concern in line with the Department's whistleblowing policy". Thus, the PIDA protections in the Raising a Concern policy are applicable to contact with Parliamentarians. Third, trade union representatives may contact Parliamentarians on issues relating to their role.

Grounds of challenge

Ground 1: The policies are *ultra vires* the Defendant's powers; an unjustified interference with the Claimants' common law rights to freedom of expression; and irrational.

Claimants' submissions

78. The Claimants submitted that the policies effectively prevent the Claimants from engaging with the media and Parliamentarians in order to expose mistreatment and failings; facilitate greater public awareness; and encourage reform of MOD culture and practices. The authorisation process necessitates sharing private and sensitive personal information with senior personnel in the services. This would be traumatising for them. They should be able to speak out on their terms and control what happens to their private information.

79. The restrictions on contact with the public deprive journalists, Parliamentarians and the wider public of valuable public interest information, and stifles reform and improvement. See *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, per Lord Bingham at [21] and *Guja v Moldova* (2011) 53 EHRR 16 (ECtHR, GC) at [74].The fundamental importance of journalistic and media freedom is well-established and political discussions with Parliamentarians "are at the top of the hierarchy of free speech, as they constitute political communications" (*R (Lord Carlile) v Home Secretary* [2014] UKSC 60, [2015] AC 945, per Lord Neuberger at [61]).

80. The Defendant's power to formulate and issue policies governing the conduct of service personnel, is circumscribed by ordinary public law principles and does not extend to the imposition of unjustified restrictions or interferences with fundamental constitutional rights. Service personnel retain the same rights and duties as other citizens (*Halsbury's Laws of England*, vol.3 "Armed Forces" (2025), paragraph 203; *Burdett v Abbot* (1812) 4 Taunt 401 (Ex Ch), per Mansfield CJ at 449-450). The common law protects their freedom of expression (*Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109 (HL) ("*Spycatcher No.2*"), per Lord Goff at 283E-G).

81. In *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL), a blanket ban on face-to-face contact between prisoners and journalists which did not make an explicit exception for interviews about whether a prisoner had been wrongly convicted was overturned on the grounds that it represented an unjustified interference with common law rights to freedom of expression.

82. Members of the armed forces are subject to various common law, equitable, fiduciary and statutory confidentiality obligations in connection with information acquired during or relating to their service. Section 2 of the Official Secrets Act 1989 prohibits "damaging" unauthorised disclosures of information relating to "defence" (both terms are narrowly defined). Sections 1 and 17 of the Armed Forces Act 2006 ("AFA 2006") prohibit disclosures which would assist or be useful to an enemy. Sections 1 to 3 of the National Security Act 2023 prohibit disclosures of "protected information", "trade secrets", and assisting a foreign intelligence service. These obligations are circumscribed and qualified in their scope and none of them imposes a blanket ban on or brightline rule against any disclosure of any information without prior authority. This reflects a recognition by the courts and Parliament that restrictions of this kind are ordinarily unjustifiable and contrary to fundamental rights and the public interest.

83. The law of confidence cannot be used to "cover up wrongdoing" or prevent disclosures required in the public interest (*Spycatcher No.2*, per Lord Keith at 256H-257A, Lord Griffiths at 268G-269B and Lord Goff at 282C-283B) and can only be invoked by public authorities if they can also demonstrate "damage to the public interest" (*Spycatcher No.2*, per Lord Keith at 256C-F and 258H, Lord Griffiths at 270G-H and Lord Goff at 283C).

84. In both the civil and criminal contexts, it is well-established that a brightline rule can only be justified exceptionally in the national security context, i.e. in connection with the intelligence services and national security information: *Spycatcher No.*2, per Lord Griffiths at 269F; *Lord Advocate v The Scotsman Publications Ltd* [1990] 1 AC 812 (HL), per Lord Jauncey at 828C; *Attorney General v Blake* [2001] 1 AC 268 (HL), per

Lord Nicholls at 286G; and *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, per Lord Bingham at [25] – [26] and [36], Lord Hope at [68] and Lord Hutton at [98] – [100].

85. The only armed forces personnel subject to a brightline rule against unauthorised service-related disclosures are those "notified" under section 1 of the Official Secrets Act 1989 and members of the special forces who are required to sign a confidentiality contract (modelled on that provision) as a pre-requisite to their service (*"R" v Attorney General* [2003] UKPC 22, [2003] EMLR 499, per Lord Hoffmann at [9] –[10], [18], [36]; *R (Craighead) v Defence Secretary* [2023] EWHC 2413 (Admin), per Steyn J. at [23] - [24]).

86. The Defendant only has power to restrict the freedom of expression of service personnel if and to the extent that this is a necessary incident of their service and/or necessary for the discipline, morale or effectiveness of the Armed Forces. To the extent that they prohibit the unauthorised disclosure of information relating to experiences of rape and sexual assault, harassment and bullying in the Armed Forces, the new policies cannot be said to meet any of these objectives. If the Claimants were to speak to the media or Parliament about their experiences without authority, there would be no damage to the Defendant or the public interest, the discipline, morale or effectiveness of the Armed Forces or national security, and no breach of any confidentiality obligation.

87. While express references to MOD's reputational interests have been carefully removed from the new policies, they continue to remain part of the King's Regulations.

88. The Claimants accepted that the rights of service personnel to communicate publicly through the media and Parliament could and should be subject to public interest limitations designed to protect sensitive information and the operational effectiveness of the Armed Forces. However, they contended that the policies impose unjustified blanket constraints which do not differentiate between the purpose or subject matter of the disclosures they prohibit. As a matter of substance and effect, the new policies continue to impose what amounts to a *de facto* blanket ban on and brightline rule against communicating with the media or Parliamentarians about experiences of rape or sexual assault, harassment or bullying in the Armed Forces. The Claimants contended that the policies, in particular the Raising a Concern policy, should expressly state that service personnel are permitted to publicise experiences of rape or sexual assault, harassment and bullying to the media, Parliamentarians and any other third party, as and when they wish, without any requirement for prior authorisation.

Conclusions

89. The Defendant and the Defence Council have legal duties and discretionary powers to administer and regulate service personnel.

90. *Halsbury's Laws of England* vol.3 "Armed Forces" (2025) states, at paragraphs 201 - 202:

> "**201 Authority for and over the armed forces in general**
>
> ….. The supreme government and command of all forces by sea, land and air, and of all defence establishments is vested in the

> Crown by prerogative right, and, although most matters relating to the forces are now primarily regulated by statute, many wide and important powers are still retained by the Crown and are exercised by the Defence Council and through it by the Admiralty Board, the Army Board and the Air Force Board. Thus, in relation to the administration of the armed forces, there is a wide measure of administrative discretion, with which the courts will not interfere and which they will not seek to control.
>
> **202 Government and command of the armed forces**
>
> The Secretary of State for Defence is charged with general responsibility for defence and for the establishment of a Defence Council to exercise on behalf of the Crown its powers of command and administration over the armed forces and of Admiralty, Army and Air Force Boards …."

91. By Letters Patent issued from time to time the King's authority is vested in the Defence Council. The Defendant is the most senior member and Chair of the Defence Council. The Letters Patent also give the Defence Council authority in relation to such aspects of the administration of the Armed Forces as the Defendant directs.

92. The MOD has a dual structure. It contains both a conventional Department of State and the command and administration of the Armed Forces. The functions of the MOD as a headquarters, and therefore those in relation to the command and administration of the Armed Forces, are exercisable by the Defence Council. The Defendant is responsible for the MOD as a Department of State. He is also responsible to Parliament.

93. Sections 328 and 329 AFA 2006 provide that the Defence Council may make regulations in respect of the enlistment and terms and conditions of service personnel. The Defence Council is also responsible for issuing King's Regulations in respect of each branch of the Armed Forces. King's Regulations have been described as in effect "a species of delegated legislation" (*Gunn v Service Prosecuting Authority* [2019] EWCA Crim 1470, at [17]). They do make provision for restrictions on service personnel contact with the media or the public, and cross-refer to DINs where appropriate. The process of amending the King's Regulations to reflect the current Media and Parliamentarian DINs is currently underway.

94. There is a duty on service personnel to serve and obey. For officers, the basis of the duty is the receipt of a Commission which is a command by the Sovereign. For other ranks, the basis of the duty is the oath of loyalty and obedience.

95. Service personnel are not employees and do not have contracts of employment with their service or the MOD. However, upon enlisting, they sign a Service Agreement, which is comparable to a civilian contract of employment in its content. The example I was shown provided that the member of service personnel was subject to service law, under the AFA 2006, and "required to carry out whatever duties may be ordered by those in authority over you". It included an oath or affirmation to be taken, swearing allegiance to Her Majesty Queen Elizabeth, and promising to "observe and obey all orders of Her Majesty…. And of the …Officers set over me".

96. Service personnel are also required to sign, upon appointment, an "Official Secrets Act and Confidentiality Declaration" (MOD Form 134). The 2008 version, which was in force when EPX enlisted, stated:

> "**Introduction**
>
> The Official Secrets Act (1911 – 1989) provide for the protection of official information (whether protectively marked (classified) or not) which may have been entrusted to you by the Ministry of Defence. You remain subject to these Acts at all times both while in Crown service and after termination of such service. You are liable to prosecution and imprisonment if found to be in breach of the Acts (either in the UK or overseas).
>
> You are further advised that under civil law you also have a Duty of Confidentiality to the Ministry of Defence and are bound by Crown copyright where it relates to official information. Where applicable, you are subject to the confidentiality and disclosure provisions of either the MOD Personnel Manual (for civil servants) or Queen's Regulations (for Service personnel). A breach of which can be a disciplinary offence.
>
> This form draws your attention to your obligations which continue after termination of Crown service and are lifelong.
>
> **Obligations**
>
> I am aware of the Official Secrets Acts and that I am subject to them and that there are serious consequences if I am found to be in breach of them.
>
> I understand that I have a Duty of confidentiality to the Ministry of Defence and that I may be in breach of that duty and of Crown copyright if I disclose any official information without prior permission of the Ministry of Defence.
>
> I understand that where I gain access or am entrusted with official information, in whatever form and by whatever means, it is my duty to continue to protect that information.
>
> I understand that I cannot retain official information, documents or other material, other than for the purpose of official duty….
>
> Any official information gained by me which may be subject to the Official Secrets Act, the Duty of Confidentiality and Crown copyright, will not be disclosed to a third party …. without prior permission of the Ministry of Defence. This includes commenting on other official information that may require protection.
>
> **Declaration**

> I have read MOD Form 134 ….."

97. MOD Form 134 was amended in April 2020. The content remained substantially the same. The date of PGH's enlistment has not been provided and so I do not know which version of Form 134 she signed.

98. Section 12 AFA 2006 provides that service personnel commit an offence if they fail to comply with lawful commands. Section 367 AFA 2006 confirms that every member of the regular forces is "subject to service law at all times". Service law is the body of law comprising the AFA 2006 and the orders and instructions which provide for the conduct of the Armed Forces.

99. DINs are issued under the authority of the Defence Council. They set out policies, expectations and requirements for service personnel and civilians in the MOD. Where they place restrictions on service personnel, their authority is derived from the general command authority delegated to the Defence Council by the Monarch's Letters Patent, as expressed in the King's Regulations and the obligation placed on service personnel to obey orders, arising from the AFA 2006.

100. In view of the legal framework outlined above, I conclude that the policies under challenge were properly made by the Defence Council in the exercise of its wide powers and duties to administer and regulate service personnel, under the Royal Prerogative and service law, and to give effect to the duty of confidentiality. Neither the Royal Prerogative nor service law lend any support to the Claimants' submission that the Defence Council lacks power to restrict communications between service personnel and those outside the Armed Forces, as provided for in the policies. Therefore I reject the submission that the policies are *ultra vires* the enabling powers.

101. I turn now to the Claimants' submissions that the policies are an unjustified interference with the Claimants' common law rights to freedom of expression and/or irrational.

102. The Defendant submitted that the Court should consider whether the policy represents a lawful expression of legal rights and obligations, applying *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931.

103. In *R (A),* the policy under challenge was the Child Sex Offender Disclosure Scheme Guidance ("the Guidance"), issued by the Secretary of State to explain the approach police forces should adopt when faced with requests by members of the public for information about persons dealing with children. The appellant argued *inter alia* that the Guidance was unlawful because its failure to reflect the importance of consulting people about whom a disclosure might be made meant that there was a significant and/or unacceptable risk of a breach of Article 8 and/or the common law. Thus, the basis for alleging unlawfulness was grounded, as in this case, in both the ECHR and the common law.

104. The Supreme Court (Lord Sales JSC and Lord Burnett of Maldon CJ, with whom the other JJSC agreed), applied the test formulated in *Gillick v West Norfolk and Wisbech AHA* [1968] AC 112, and held (as summarised in the headnote):

> "(1) that, in broad terms, there were three types of case where a policy might be found to be unlawful at common law by reason

> of what it said or omitted to say about the law when giving guidance for others, namely (i) where the policy included a positive statement of the law which was wrong and which would induce a person who followed the policy to breach their legal duty in some way, (ii) where the authority which promulgated the policy did so pursuant to a duty to provide accurate advice about the law but failed to do so, either because of a misstatement of law or because of an omission to explain the legal position, and (iii) where the authority, even though not under a duty to issue a policy, decided to promulgate one and in doing so purported in the policy to provide a full account of the legal position but failed to achieve that, either because of a specific misstatement of the law or because of an omission which had the effect that, read as a whole, the policy presented a misleading picture of the true legal position; that, in the first type of case, the policy guidance would only be unlawful if it sanctioned, authorised or positively approved unlawful conduct by those to whom it was directed, there being no freestanding principle that policy guidance would be unlawful if it created an unacceptable risk that an individual would be treated unlawfully;…"

105. As the Claimants submitted, there is a distinction between the policy in *R (A)* which gave guidance and the policies in this case which are framed as instructions and include mandatory rules and authorisation procedures. However, the Defendant correctly submitted that the policies proceed on the basis that the Defendant is empowered to place restrictions on the contact which service personnel have with others. They then establish the framework within which those restrictions operate. To that end they are comparable to the type of policy considered in *R (A).* In that case, the Guidance was the framework within which the obligations of police to disclose information was to operate. The Guidance also placed obligations on those within its ambit, and set out procedures.

106. Essentially, the *Gillick* principle, as adopted in *R (A)*, applies where the ground of challenge is that the policy authorises or encourages unlawful conduct by others. It was common ground that some legal challenges to policies do not turn on the *Gillick* principle, for example, a submission that a policy is *ultra vires* the enabling powers.

107. The Claimants' submission that the policies are a breach of their common law right to freedom of expression and/or irrational is based upon the premise that the policies prevent the Claimants from speaking to the media or Parliamentarians about their experiences of rape and sexual assault, harassment and bullying in the Armed Forces, without authorisation. As I have explained above, this is a mis-reading of the Media DIN 2025 and the Raising a Concern policy, which applies the PIDA protections for whistleblowing to service personnel. I refer to the evidence of Ms Wallington and the GLD's letter to the Claimants' solicitor, dated 22 April 2025, set out at paragraphs 67 – 68 of my judgment.

108. The Claimants appear to have overlooked or misinterpreted the Parliamentarian DIN which confers a right for service personnel to raise matters of concern with their constituency MP or Member of a Delegated Legislature without prior authorisation. As Ms Wallington states at paragraph 31 of her witness statement:

> "31. The 2024 DIN also makes specific provision (at para 6 …) for the right of all to raise issues with their elected political representatives. I understand from my colleagues in Parliamentary Branch that previous iterations of the DIN since well before the 2019 version have made provision for this. In its current formulation, the DIN makes clear that where an SP/CS *[service personnel/civil servant]* wishes to consult their MP …. about a personal issue which arises in connection with their work/workplace (e.g. a Defence policy that affects them, or – as in the case of the Claimants in this case – a culture/practice within the MOD that they are aggrieved by, or indeed any form of wrongdoing in their workplace), then they are at complete liberty to do so. The only restriction on this is that they are required to ensure that "no sensitive details … nor any information that may compromise operational effectiveness, national security, international relations or legal obligations are provided during this contact" (see para 8 of the DIN…..)."

109. The Claimants also relied on the prohibition on unauthorised communications in public by service personnel which is contained in the King's Regulations, by reference to the superseded 2020 Media DIN. Also, the reference to the MOD's reputational interests which has been removed from the new policies, but remains in the King's Regulations. As the Claimants are aware, the Defendant has explained that the King's Regulations are in the course of being amended to reflect the changes introduced by the revised policies. I have no reason to doubt the genuineness of this explanation for the discrepancy. In my view, it would be contrary to the overriding objective for me to decide this ground on the false basis that the King's Regulations represent the Defendant's current policy.

110. Service personnel have a unique status. Upon enlisting, service personnel sign a Service Agreement, swear an oath of allegiance, accept that they are subject to service law, and any orders given, and make a declaration of confidentiality. Service law includes codes of discipline which are binding upon service personnel. Whilst enlistment does not deprive service personnel of their common law rights as a citizen, including their right to freedom of expression, it does impose additional responsibilities and constraints, which include a duty of confidentiality, as service personnel may have access to highly sensitive information. Breach of that duty may result in sanctions. Loyalty and discretion is expected.

111. The rationale behind the new policies was helpfully described by Ms Wallington in her witness statement at paragraphs 10 – 20. She correctly pointed out that the policies must cater for all possible scenarios, not just the Claimants and those in similar circumstances to them. She expressed concern at the Claimants' submission that the policies should include an express provision permitting disclosures to the media about experiences of rape or sexual assault as this might disadvantage others who wished to make similarly pressing disclosures of public interest (for example, in respect of other protected characteristics) for which express provision was not made. It was unrealistic for policy to make specific provision for each and every context in which it might fall to be applied.

112. Ms Wallington distinguished between (1) communication in an official capacity where MOD personnel were speaking on behalf of the MOD, or purporting to do so, or where they were likely to be perceived as doing so; and (2) communication in a non-official/personal capacity about the MOD.

113. Ms Wallington stated, at paragraph 13:

> "The distinction between official and non-official communication is conceptually important as a matter of principle and because it has legal and practical implications:
>
> a. The need to control, restrict and centrally oversee the content of the MOD's official communication with the media/in public and/or with parliamentarians is considered to be entirely justified having regard to a range of legitimate and inter-connected interests. These include operational and personal security, the operational effectiveness of the Armed Forces, morale, political impartiality, consistency, effective governance, parliamentary convention and maintaining coherence of the Department's public narrative.
>
> b. It is relatively straightforward to create a system of internal mechanisms/procedures for personnel to obtain the requisite authority to engage in official communication (albeit this becomes more challenging in circumstances where the fact or extent of the official communication is not foreseen and/or where non-official communication may unintentionally stray into official communication).
>
> c. Different considerations apply to non-official communication. By its nature, such communication is not subject to official MOD lines, is inherently subjective and may be more likely to be critical of/adverse to the MOD.
>
> d. Both the variety of scenarios in which non-official communication may occur, and the need to balance legitimate restrictions/control of such communication against individuals' rights to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR") and other Convention rights, makes it much more difficult to be prescriptive in policy terms about the type of communication that personnel are permitted/entitled to engage in and in what circumstances."

114. At paragraph 16, she gave examples of the challenges that may arise from non-official communications:

> "The following are some realistic examples that reflect real-life instances:

> a. The SP who posts photographs on social media of his military housing inadvertently reveals the security arrangements on a military base.
>
> b. The SP expresses his opinions about the government's investment in military housing in overtly political terms (and his comments are picked up by, and re-published in, the national press).
>
> c. The SP/CS engaging in non-official communication has not raised their concerns internally in the MOD beforehand (not therefore giving the Chain of Command the opportunity to address those concerns).
>
> d. The SP/CS may wish to engage in non-official communication on an anonymous basis.
>
> e. The SP speaking about their personal experience of being raped/sexually assaulted:
>
> i. deliberately or inadvertently reveals the identity of their alleged assailant; and/or
>
> ii. compromises an ongoing criminal investigation/prosecution;
>
> and/or
>
> iii. makes allegations that are false/malicious and/or which they have not previously reported to the police.
>
> ……"

115. Ms Wallington explained, at paragraph 17, that these examples disclosed some of the legitimate concerns that the MOD considers to justify a degree of restriction or control being placed on public communications. Some concerns were obvious e.g. the unauthorised disclosure of operational locations, timings, movements; the sharing of tactics, techniques and procedures that may compromise operational advantage; commentary on sensitive international partnerships that could affect diplomatic relations or allied confidence. All of these would be liable to undermine national security, international relations and the operational effectiveness of the Armed Forces.

116. Communications may also compromise personal security, e.g. by naming other serving personnel in the context of sensitive incidents; revealing identifying details or sharing imagery that could expose individuals to harassment, reprisals or targeting.

117. Ms Wallington also explained that the political neutrality of the Armed Forces and the Civil Service is a long-standing constitutional principle. It is codified through the Civil Service Code, the Values and Standards of the Armed Forces, the King's Regulations and the AFA 2006, which collectively prohibit service personnel from engaging in political activity and ensured the military remains subordinate to civilian authority. These provisions safeguard public trust, cohesion, and impartiality, particularly during politically sensitive periods, and reflect the expectation that the Armed Forces serve the

government of the day loyally without seeking to influence political debate or outcomes.

118. Ms Wallington concluded, at paragraph 19, that drafting policy in this area therefore represents a complex balancing act between operational and personal security, organisational effectiveness (including issues such as morale and discipline), and individual rights. The MOD acknowledges that such issues engage the right of its personnel to respect for private and family life under Article 8 ECHR and that their freedom of expression on such issues is protected by Article 10 ECHR. It is also acknowledged that any interference with those rights (in the form of restrictions on their ability to communicate) can only be justified if they are lawful, necessary and proportionate in pursuit of legitimate aims.

119. In conclusion, in view of the legal framework outlined above, I conclude that the policies were properly made by the Defence Council in the exercise of its powers and duties under the Royal Prerogative and service law. In my judgment, the Claimants have failed to establish that the policies, when read correctly, are unlawful at common law, or that they misstate the law. The restrictions on communications by service personnel arise from the obligations under their service agreements and service law, and the duty of confidentiality. They are justified by the legitimate concerns about non-official communications. Furthermore, there is no blanket ban on communications outside the Armed Forces. Service personnel are entitled to seek authorisations for such communications, which will be granted in appropriate cases. The PIDA protections, which have been approved by Parliament, provide a safe route for whistleblowers to disclose matters in the public interest, even without authorisation. The unrestricted access to a service personnel's constituency MP is an added safeguard. Finally, I consider that the Defendant and the Defence Council have a wide discretion as to the appropriate formulation of policy in this sphere, and their exercise of judgment as to how best to strike the balance between the competing factors, cannot be characterised as irrational.

120. For these reasons, Ground 1 does not succeed.

Ground 2: Breach of Articles 8 and 10 ECHR

121. Article 10 ECHR provides:

> *"Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national

> security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

122. Article 8 provides:

> "*Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Claimants' submissions

Article 10

123. Freedom of expression is one of the "core rights" protected by the ECHR and the exceptions in Article 10(2) must therefore be "construed strictly and the need of any restrictions must be established convincingly" (*R (Lord Carlile) v Home Secretary* [2014] UKSC 60, [2015] AC 945, per Lord Sumption at [13]). By section 12 of the Human Rights Act 1998 ("HRA 1998"), if a court is considering granting relief which might affect the Convention right to freedom of expression, it must have particular regard to the importance of the Convention right, and in the case of journalistic, literary or artistic material, the extent of any public interest in publication.

124. The Article 10 analysis turned on the answer to four questions conveniently set out in *R (Craighead) v Secretary of State for Defence* [2023] EWHC 2413 (Admin) per Steyn J. at [88]:

i) Does the decision constitute an "interference" with the Claimants' rights to freedom of expression within the meaning of Article 10(1)?

ii) Is the interference "prescribed by law"?

iii) Does the interference pursue any of the legitimate aims set out in Article 10(2)?

iv) Was the interference necessary in a democratic society?

125. The Claimants submitted that the policies were an interference with their rights to freedom of expression, which was not prescribed by law, did not pursue legitimate aims, and which was not necessary in a democratic society.

126. **Interference**. The Claimants submitted that the authorisation requirements, coupled with the absence of any exemption for disclosures of sexual abuse and assault, constituted a significant adverse interference with their Article 10 rights. The fear of sanction has a chilling effect (*R (Miller) v College of Policing* [2021] EWCA Civ 1926, [2022] 1 WLR 4987, per Sharp P at [70] and [75]; *Ayuso Torres v Spain* (App No 74729/17, 8 November 2022) (ECtHR), at [43] and [58]).

127. **Prescribed by law**. In support of their contention that the policies were not prescribed by law, the Claimants relied upon their submissions under Ground 1, to the effect that the policies were *ultra vires*. Alternatively, the policies failed to satisfy the principle of legality and, in particular, the need to be "sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law" (*Shayler*, per Lord Hope at [56]; *Miller*, per Sharp P at [84] – [85]). The Claimants cannot reasonably anticipate whether or when they might be exempt from the Media DIN 2025 by virtue of the Raising a Concern policy or anticipate the basis on which authorisation decisions might be taken or their likely outcome.

128. **Legitimate aim.** The Media DIN 2025 does not contain a clear statement of its purpose other than a reference to the mitigation of risks to: national or operational security; personal security; international relations; political impartiality; public accountability; commercial, contractual and intellectual property obligations; adherence to other legal obligations and liabilities, and operational effectiveness. The purpose of the Parliamentarian DIN 2024 is framed in terms of ministerial accountability to Parliament, ensuring that only "accurate and releasable information" is provided to Parliament. None of these interests is served by the restriction of public comment about complaints such as those made by the Claimants.

129. **Necessary in a democratic society:** In *Shayler*, Lord Bingham said, at [36]: "it is plain that a sweeping, blanket ban, permitting of no exceptions, would be inconsistent with the general right guaranteed by Article 10(1) and would not survive the rigorous and particular scrutiny required to give effect to Article 10(2)".

130. The policies cannot be justified as a necessary or proportionate means of serving any Article 10(2) interest. Less restrictive and harmful measures are plainly available. The Claimants referred to the following authorities, among others.

131. In *Grigoriades v Greece* (1999) 27 EHRR 464 (ECtHR), where a serviceman was disciplined for sending a critical letter to his commanding officer, the ECtHR found a breach of Article 10, and held, at [45]:

> "… it must be open to the State to impose restrictions on freedom of expression where there is a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it. It is not, however, open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution …Although it is open to the state to impose restrictions where there is a real threat to military discipline or

> operational effectiveness, national authorities may not rely on such rules to frustrate the expression of opinions, even if these are directed against the army as an institution."

132. In *Guja v Moldova* (2011) 53 EHRR 16 (ECtHR), where the head of the press department of the Prosecutor-General's Office was dismissed for leaking letters which disclosed political interference, the ECtHR found a breach of Article 10. It held, at [70] – [73], that employees owed a "duty of loyalty, reserve and discretion", particularly in the case of civil servants who are "bound by a duty of loyalty and discretion". Therefore disclosure of information should usually be made to the employee's superior or other competent authority. It is only where that is clearly impracticable that the information could be disclosed to the public as a last resort. However, signalling of illegal conduct by civil servants should in certain circumstances (e.g. corruption cases) enjoy protection to enable them to alert their employer or the public, in the public interest.

133. At [74] – [76], the Court said that in determining proportionality, particular attention should be paid to the public interest in the disclosed information; there was little scope for restrictions on debate on questions of public interest. On the other side of the scales, the Court must weigh the damage suffered by the public authority and assess whether such damage outweighed the interest of the public in disclosure. The Court found, in this case, the public interest in the disclosure of wrongdoing in the Prosecutor-General's office outweighed the interest in maintaining public confidence in the institution (at [91]). There was no effective alternative channel for making the disclosure and in the circumstances of that case, external reporting to a newspaper could be justified (at [80] – [84]).

134. In *Bucur and Toma v Romania* (App No 40238/02, 8 January 2013) (ECtHR), the applicant, who worked in military intelligence, publicly disclosed recordings and records revealing unauthorised and irregular telephone tapping. He was subsequently convicted of a criminal offence. The ECtHR acknowledged that it was in the general interest to maintain the confidence of citizens in a public institution, but the general interest in the disclosure of unlawful acts committed within the institution prevailed (at [115]).

135. External reporting can be justified where it is shown that the available internal channels are ineffective *Heinisch v Germany* (2014) 58 EHRR 31 (ECtHR) at [73] – [74] and/or where they are likely to lead to retaliation or the information "pertains to the very essence of the activity of the employer concerned" (*Halet v Luxembourg* (2023) 55 BHRC 348 (ECtHR, GC) at [122]).

136. In *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1995) 20 EHRR 56 (ECtHR), the Court found a breach of Article 10 where the army refused to allow a critical magazine to be distributed in the barracks, and held, at [38], that the discussion of ideas, including service reform, must be tolerated within the Armed Forces.

Article 8

137. The concept of private life in Article 8 ECHR embraces physical, psychological or moral integrity, dignity and well-being (including mental health), privacy, identity and autonomy: *Bensaid v UK* (2001) 33 EHRR 10 (ECtHR), at [47].

138. Sexual offences and bullying and sexual harassment in the workplace interfere with Article 8 ECHR rights. In *Filippovy v Russia* (App No 19355/09, 22 March 2022) (ECtHR), a breach of Article 3 was found where military authorities had failed to protect a conscript from violence, extortion and insults (at [101-103]).

139. The impact of the policies on the Claimants is severe, and incompatible with their Article 8 ECHR rights.

140. **Interference**. The authorisation requirement and process imposed by the policies, coupled with the absence of any exemption for disclosures of the relevant kind, would require the Claimants to disclose the most intimate aspects of their private lives and lived experiences to strangers (Chain of Command, civil servants and possibly ministers); relive deeply traumatic events; and reveal these to employees of the institution which should have protected and supported them and has failed to redress the original wrongs. The authorisation requirement and the silencing of victims is plainly a gross interference with their Article 8 ECHR rights. By silencing victims, the policies exacerbate the harm done and inhibit their prospects of recovery. They are deprived of the benefit of taking control of their own narrative, and sharing their experiences on their own terms, and speaking out to bring about change.

141. **In accordance with the law & legitimate aim.** The Claimants repeated the submissions made under Article 10 ECHR.

142. **Necessary in a democratic society**. The Claimants repeated their submissions under Article 10 ECHR to the effect that the aims being pursued by the policies were unrelated to any consequence flowing from the public sharing of sexual assaults, harassment or bullying, and so their terms meant that they were incompatible with Article 8 ECHR.

143. In *Norris v Ireland* (1991) 13 EHRR 186 the ECtHR held that criminalisation of homosexuality was not justified under Article 8(2) ECHR and observed at [46] that, as the restrictions concerned "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before they can be justified under Article 8(2) ECHR.

144. In *Smith v Grady* (1999) 29 EHRR 493, the ECtHR held that investigations into the applicants' sexual orientation and subsequent dismissal from the Armed Forces were not justified under Article 8(2) ECHR.

145. The unnecessary rehearsal of private information can also violate Article 8 ECHR. In *C v Romania* (2023) 77 EHRR 2, the ECtHR held that a failure to investigate adequately the applicant's complaints of sexual harassment at work was a violation of Article 8 ECHR. In addition, the decision of the prosecutor included a detailed account of insensitive insinuations made by the alleged perpetrator which stigmatised the applicant, in breach of her Article 8 rights (at [83]).

Conclusions

146. The difficulty with the Claimants' case on Ground 2 is that it is based on the false premise that the policies prevent the Claimants communicating publicly, in particular, to the media or Parliamentarians, about their experiences of rape and sexual assault, harassment and bullying in the Armed Forces, without prior authorisation, and that they are excluded from the PIDA protections for whistleblowing afforded by the Raising a Concern policy to service personnel in the circumstances of the Claimants. I have addressed the Claimants' submissions on the interpretation of the policies at paragraphs 41, 51, 54, 70, 78 of my judgment. I also refer to the evidence of Ms Wallington and the GLD's letter to the Claimants' solicitor, dated 22 April 2025, set out at paragraphs 67 – 68 of my judgment. My judgment is based upon what I have held to be the correct interpretation of the policies.

147. The prohibition on unauthorised communications in public by service personnel which is contained in the King's Regulations, by reference to the superseded 2020 Media DIN, is shortly to be amended, so as to be consistent with current policy. The focus of this claim is on the current policies, and therefore I was not addressed on specific provisions of the King's Regulations by the parties.

148. The Claimants also appear to have overlooked or misinterpreted the Parliamentarian DIN which confers a right for service personnel to raise matters of concern with their constituency MP or Member of a Delegated Legislature without prior authorisation.

149. In their submissions on Ground 2, the Claimants at times strayed impermissibly from the proper focus of the challenge, namely, the lawfulness of the policies on service personnel communicating in public, with the media, and with Parliamentarians. The issue under Ground 2 is not whether Convention rights were breached by the rapes, sexual assaults, harassment and bullying which the Claimants experienced, nor by the inadequate response of the authorities when the Claimants reported these events.

150. Furthermore, because of the unusual way in which this claim has proceeded, as a challenge to policies which have only recently come into force, no decisions have been made under these new policies in respect of the Claimants' wish to publicise their experiences. Therefore unlike most of the Convention cases cited, there is no allegation that a specific act or decision amounted to a violation of Articles 8 and 10 ECHR.

151. As the Defendant submitted, the approach in *R (A)* applies. In *R (A)* the Guidance was challenged on the ground that it gave rise to an unacceptable risk of a breach of Article 8 ECHR. The Supreme Court concluded that the Guidance was not incompatible with Article 8 ECHR. The Claimants must demonstrate that the policies are unlawful applying the *Gillick* test, set out in *R (A)* at [41]:

> "It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations."

152. By way of further explanation of the test, the Supreme Court reiterated that a policy need not take the form of a detailed and comprehensive statement of the law (at [39]), nor is it necessary to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope (at [42]).

Convention law

153. By section 6(1) HRA 1998, the Defendant, as a public authority, is obliged to act in a way that is compatible with the Convention rights of individuals. Articles 8 and 10 are engaged. I remind myself that, by section 12 HRA 1998, if a court is considering granting relief which might affect the Convention right to freedom of expression, it must have particular regard to the importance of the Convention right, and in the case of journalistic, literary or artistic material, the extent of any public interest in publication.

154. I agree with the Defendant's overview of the relevant Convention case law, which references the main authorities referred to by the Claimants. The cases demonstrate that:

i) A range of legitimate interests amongst those provided for in Article 10(2) ECHR may be engaged by the curtailment of freedom of expression in this context, depending on the subject matter of the disclosure and all the surrounding circumstances. These include national security or public safety, the prevention of disorder (within the Armed Forces), the protection of the reputation or rights of others and preventing the disclosure of confidential information.

ii) In the military context, the "route" to engagement of one or more of these legitimate interests is frequently said to be the particular characteristics of military life, the duties and responsibilities of members of the Armed Forces and/or the need to maintain discipline/order or political neutrality (and ultimately operational effectiveness). See *Engel v The Netherlands* (1979-80) 1 EHRR 647 at [54], [98] and [100]; *Erdel v Germany* (2007) 44 EHRR SE23 at [1]; *Vereinigung Demokratischer Soldaten Österreichs v Austria*, at [32]; *Grigoriades v Greece,* at [41].

iii) In some instances, those distinctions (between the conditions of civil and military life) have been found, not only to provide a *prima facie* legitimate basis for interfering with the right to freedom of expression, but also to justify the interference, such that there is no violation of Article 10, taken alone or together with Article 14 (see *Engel* at [101-103]); and for a similar approach being taken to public communications made by a police trade union representative, (see *Szima v Hungary* (App No 9723/11, 9 October 2012) at [31-33]).

iv) But in other cases, the threat to discipline and the effectiveness of the army will not be sufficient to justify the interference (see *Vereinigung* at [38]; *Grigoriades* at [47-48]).

v) In other instances, an interference (for example in the form of a prosecution or disciplinary sanction) has been found to be justified having regard to the damage

> caused by an external disclosure to the reputation (and Article 8 rights) of another person. In *Soares v Portugal* (App No 79972/12, 21 June 2016), the applicant, a chief corporal in the National Republican Guard was convicted of aggravated defamation for reporting an allegation of misuse of money by a senior officer. The allegation was based on rumour which the applicant had made no attempt to verify. A determining factor in the Court's conclusion that the applicant's conviction was not a violation of Article 10 was that, in failing to report the matter via internal channels, "he did not comply with the chain of command and denied his hierarchical superior the opportunity to investigate the veracity of the allegations" (at [48]).

155. In the context of so-called "whistleblowing" disclosures, the Court's case law consistently reiterates that employees owe to their employer a duty of loyalty, reserve and discretion, particularly so in the case of civil servants. I refer to my summary of the leading case of *Guja v Moldova*, at paragraphs 133 - 134 of my judgment. In *Guja* the ECtHR said at [71]:

> "Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically-elected government, the duty of loyalty and reserve assumes special significance for them. In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one."

156. These principles informed the Court's conclusion, at [73], that where a civil servant wished to raise concerns:

> "…disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public."

157. The Court then identified, at [74] – [78], five criteria for assessing the proportionality of an interference with whistleblowers' freedom of speech: (i) the significance of the public interest involved; (ii) the authenticity of the information disclosed; (iii) the damage, if any, suffered by the public authority as a result of the disclosure; (iv) the motive/*bona fides* of the reporting employee; and (v) the severity of the sanction imposed on the employee.

158. The Court found in *Guja* that the public interest in the disclosure of wrongdoing outweighed the interest in maintaining confidence in the institution (at [91]). There was no effective alternative channel for making the disclosure and in the circumstances, external reporting to a newspaper could be justified.

159. The principles and approach set out in *Guja* have been consistently applied in the Strasbourg case law, including in the intelligence and military context. In *Bucur and Toma v Romania*, the Court found a violation of Article 10 in relation to the prosecution

of an employee in a military unit of the Romanian Intelligence Service (the SRI) who held a press conference in relation to illegal phone tapping carried out by the state. In relation to the damage suffered by the SRI as a result of the disclosure, the Court observed that "the general interest in the disclosure of information reporting unlawful acts committed within the SRI is of such importance in a democratic society that it prevails over the interest in maintaining the public's confidence in that institution" (at [115]). However, that consideration did not automatically prevail to render the interference unjustified. Equally important to the Court's conclusion was whether the employee had other effective means of making the disclosure; in this regard, the Court was "unconvinced that any internal complaints lodged by the applicant would have led to an inquiry and brought the unlawful acts complained about to an end" (at [97]).

160. Similarly, in *Heinisch v Germany*, the ECtHR observed, at [73], that external reporting can be justified where internal channels could not reasonably be expected to function properly.

161. The Strasbourg jurisprudence on Article 10 ECHR has developed in line with its jurisprudence on Article 8 ECHR. Moreover, the scope for a whistleblowing case engaging the Article 8 rights of the reporting employee (or indeed other third parties) is obvious and wide-ranging. In *Heinisch*, for example, the relevant disclosure concerned the provision of sub-standard care to the elderly by a state-owned company.

The policies

162. Applying these principles to this case, I consider that the duty of confidentiality, which is part of the duty to serve and obey that service personnel accept upon enlisting, may interfere with the right to freedom of expression under Article 10 ECHR, and the right to respect for private life under Article 8 ECHR, depending upon the circumstances of the individual case.

163. In my view, any such interference is prescribed by law, namely, the Royal Prerogative, the AFA 2006 and service law. I have rejected the Claimants' submissions, under Ground 1, that the policies are *ultra vires* and unlawful at common law.

164. I do not accept the Claimants' submission that the policies are not "in accordance with the law" because of a lack of clarity, accessibility and precision.

165. This argument was raised in *R (A)* and rejected by the Supreme Court for reasons which are apt in this case too. Lord Sales and Lord Burnett held, at [50], that the Guidance did not purport to replace the underlying law which governs the circumstances in which a disclosure to the public may be made. At [51], they stated that the concept of "law" in the ECHR, including in Article 8(2) "does not imply a requirement that the domestic law should be free from doubt as to its application and effect in particular cases. No system of law could possibly achieve that and the ECtHR does not require it." At [52], they added:

> "There is a good deal of case law of the House of Lords, this court and the Strasbourg Court regarding the effect of the "in accordance with the law" requirement in article 8(2). ….. The most cursory review shows that they do not support the

> submission Mr Southey makes that the Guidance is incompatible with article 8 by reason of the fact that there is a limited degree of imprecision in it. The "in accordance with the law" rubric in article 8(2) does not require the elimination of uncertainty, but is concerned with ensuring that law attains a reasonable degree of predictability and provides safeguards against arbitrary or capricious decision-making by public officials. Judged even on its own terms, the Guidance meets those standards."

166. In my judgment, the three policies meet the standard of "a reasonable degree of predictability and …. safeguards against arbitrary or capricious decision-making by public officials" required under Article 8(2) ECHR, for the reasons given in *R (A)*. Ms Wallington's acknowledgment that the clarity and accessibility of the policies could be improved, in her witness statement at paragraphs 39 and 40 - 44, falls far short of a concession that they are defective by reference to the concept of law in the ECtHR.

167. The case law demonstrates that public communications by service personnel and civil servants engage legitimate interests in Article 8(2) ECHR and Article 10(2) ECHR. In my view, these policies engage legitimate interests under Article 8(2) (namely, national security, the prevention of disorder (within the Armed Forces), the protection of the rights and freedoms of others) and legitimate interests under Article 10(2) (namely, national security, the prevention of disorder (within the Armed Forces), the protection of the reputation or rights of others and preventing the disclosure of confidential information).

168. For an interference to be necessary in a democratic society, it must fulfil a pressing social need and be proportionate to the legitimate aim relied upon. As Lord Sumption explained in *Lord Carlile*, at [19], citing his judgment in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700, the question is:

> "19…..(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

169. I accept the Defendant's submission that drafting policy in this area represents a complex balancing act between operational and personal security, organisational effectiveness (including issues such as morale and discipline), and individual Convention rights.

170. Policies must cater for all possible scenarios, not just the Claimants and those in similar circumstances to them. It is neither possible nor desirable for policy to make specific provision for each and every context in which it might fall to be applied. The Claimants' submission that the policies should include an express provision permitting disclosure to the media about experiences of rape or sexual assault creates the obvious risk that

others who wished to make similarly pressing disclosures of public interest (for example, in respect of other protected characteristics) might be disadvantaged.

171. Ms Wallington, in her witness statement at paragraphs 16 and 17, gave examples of the challenges that may arise from non-official communications in public. She said, and I accept, that they disclosed some of the legitimate concerns that the MOD considers to justify a degree of restriction or control being placed on public communications. Some concerns were obvious e.g. the unauthorised disclosure of operational locations, timings, movements; the sharing of tactics, techniques and procedures that may compromise operational advantage; commentary on international matters that could affect diplomatic relations. Communications may also compromise personal security or ongoing criminal investigations and prosecutions, by identifying other service personnel in the context of sensitive incidents or allegations.

172. Public communications may also engage constitutional principles. Ms Wallington referred, at paragraph 18 of her witness statement, to the political neutrality of the Armed Forces and the civil service which is a longstanding constitutional principle, codified in service law and the Civil Service Code. It prohibits service personnel from engaging in political activity, and reflects the expectation that the Armed Forces serve the government of the day loyally, without seeking to influence political debates or outcomes.

173. Ms Wallington also referred, at paragraphs 28 and 29 of her witness statement, to the Osmotherly Rules that provide the official basis of Government policy for engagement with Parliament. Civil servants are accountable to ministers when communicating with select committees and Parliamentarians, and the same principle applies to service personnel. Accordingly, contact with Parliamentarians will generally only occur with specific authorisation from Ministers.

174. However, the Parliamentarian DIN 2024 recognises the right of all service personnel to communicate with their constituency MP on matters which affect them personally. This would include the issues raised by the Claimants in this case. No prior authorisation is required and "departmental reputation" has been removed from the list of sensitive factors that should not be compromised.

175. Furthermore, the Parliamentarian DIN 2024 does not preclude service personnel from utilising the whistleblowing rights under the Raising a Concern policy. Thus the PIDA protections in the Raising a Concern policy are applicable to contact with Parliamentarians.

176. In respect of disclosure to the media and the public, the Media DIN 2025 excludes from its scope circumstances where personnel wish to raise a concern using the whistleblowing protections provided by legislation (for civilians) or extended through MOD policy (for service personnel). The effect is to disapply the requirement in the Media DIN 2025 to obtain prior authorisation before communicating with the media or in public.

177. Whistleblowing concerns are addressed in the Raising a Concern policy. In its overview, the policy clearly sets out its objectives (see paragraph 48 of my judgment). The policy makes provision for service personnel to report wrongdoing, confidentially and anonymously if necessary, with support mechanisms in place. It extends the

protection for whistleblowers under PIDA, to service personnel. There is an expectation, based on and consistently with PIDA, that concerns will usually be raised internally in the first instance. However, if an individual makes a disclosure externally that would be treated as a protected disclosure under PIDA, they will be protected from any detriment (e.g. disciplinary action).

178. The Defendant submits, and I accept, that the PIDA regime and the Strasbourg case law are broadly congruent in their approach to assessing the availability in law of protection to whistleblowers, including members of the Armed Forces. Accordingly, the PIDA regime is, in principle, compliant with Article 10 (read, as applicable, with Articles 8 and 14 ECHR). That conclusion is reinforced by the Supreme Court's decision in *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 5905, which was a claim by a judge who had been denied whistleblower protection. The Court held that a judge is not a "worker" within the meaning of the relevant provisions in the ERA. The exclusion of judges from the PIDA protections was in breach of their rights under Article 14 ECHR, read with Article 10 ECHR. The remedy was to read and give effect to the ERA so as to extend those protections to judges. The effect of that conclusion is an acknowledgement that the PIDA regime is sufficient, of itself, to protect a person's Convention rights.

179. In my view, the potential interference with rights under Article 8 ECHR and Article 10 ECHR, envisaged by the policies, is justified and proportionate to the legitimate aims pursued. The policies strike a fair balance between the rights of service personnel and the interests of the Defendant.

180. For these reasons, applying the test in *R (A)*, I conclude that the policies do not direct service personnel to act in a way which is in breach of Article 8 ECHR or Article 10 ECHR.

181. Therefore Ground 2 does not succeed.

Ground 3: Breach of Article 14 ECHR, read with Articles 8 and 10 ECHR

182. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Claimants' submissions

183. The Claimants submitted that a policy is contrary to Article 14 ECHR if (1) it falls within the ambit of another Convention right; (2) there is a difference in treatment between people or groups of people on the grounds of one or more protected statuses; (3) those people are in an analogous situation; and (4) the difference in treatment is not justified.

184. The Claimants submitted that each of these criteria was satisfied, and the policies were therefore incompatible with Article 14 ECHR.

185. The Claimants' submissions were premised on their interpretation of the policies, in particular, that the Claimants were required to obtain prior authorisation to communicate their concerns publicly, and that they were not eligible for PIDA protection under the Raising a Concern policy.

186. The Claimants submitted that the policies fell within the ambit of Articles 8 and 10 ECHR, for the reasons they gave in Ground 2.

187. The policies created a difference in treatment:

i) between (1) service personnel, such as the Claimants, who were required to obtain prior authorisation for public communications; and (2) civilians who were not required to obtain prior authorisation for public communications; and

ii) between (1) persons, such as the Claimants, with protected characteristics of sex, race, disability, and sexual orientation, which made them more vulnerable to rape, sexual assault, harassment and bullying, and so more likely to be affected by, and to campaign about, the MOD's treatment of these issues; and (2) persons without those protected characteristics, who were less likely to have the need to speak out about such matters.

188. Members of the Armed Forces have a protected status under Article 14 (*Engel v Netherlands (No. 1)*). Protected status also arises on the basis of sex, race, disability and sexual orientation.

189. Those affected by sexual violence, harassment and bullying in the Armed Forces were in an analogous situation to civilians affected by such issues, insofar as they had an equally important interest in campaigning and speaking to the media about their experiences. Those of different sexes, races etc were analogous in their interest to be free from violence, harassment, and bullying in their employment and otherwise.

190. Whether an interference was justified was to be answered by reference to the principles set out in *R (Tigere) v Business, Innovation and Skills Secretary* [2015] UKSC 57, [2015] 1 WLR 3820, per Baroness Hale, at [33]:

> "33 With those considerations in mind, I turn to the issue of justification. It is now well-established …. that the test for justification is fourfold: (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

191. The state is required to show particularly convincing and weighty reasons to justify discrimination on the grounds of sex, race or sexual orientation and no such reason

existed in this case (*Abdulaziz v UK* (1985) 7 EHRR 471 (ECtHR), at [78] – [80]; *DH v Czech Republic* (2008) 47 EHRR 3 (ECtHR), at [196]; *R (Steinfeld) v International Development Secretary* [2018] UKSC 32, [2020] AC, [20]).

192. Under Article 14, what had to be justified was not the policies themselves, but the decision to give effect to them in a way which had disproportionate adverse effects on protected groups. There was no justification for not making an exception to the authorisation requirement insofar as communications related to complaints about sexual violence, bullying, harassment and the MOD's handling of these issues (*R (JS) v Work and Pensions Secretary* [2015] UKSC 16, [2015] 1 WLR 1449, per Baroness Hale, at [188]).

Conclusions

193. The Defendant did not dispute that the policies fell within the ambit of Articles 8 and 10 ECHR. The Defendant also accepted that members of the Armed Forces have a protected status under Article 14 ECHR, as do persons with protected characteristics of sex, race, disability and sexual orientation.

194. The Defendant took issue with the Claimants' submission at paragraph 8.8 of the RSFG which stated that the Defendant accepted the applicability of the Claimants' analysis in connection with the (now superseded) 2020 Media DIN when admitting its incompatibility with Article 14, on the ground that it created "an unjustified difference in treatment between civilians and service personnel" and that the Media DIN 2025 was no better than its predecessor. The Defendant explained, at paragraph 66 of the DGs, that its admission was made on the basis that:

i) The 2020 Media DIN failed to exclude from its ambit circumstances in which MOD personnel wished to raise a concern/whistleblow and failed to signpost the Raising a Concern policy for those purposes.

ii) Furthermore, the Raising a Concern policy (i) lacked the clarity it now has in respect of the extension of the protections under PIDA to service personnel, and (ii) contained a cross reference to the 2020 Media DIN in the context of external whistleblowing disclosures being made to the media.

iii) The 2020 Media DIN, read with the previous iteration of the Raising a Concern policy, thereby created an unjustified difference in treatment as between civilians wishing to raise a concern/whistleblow (to whom the protection in PIDA would automatically apply by law, irrespective of the provisions of the policies) and service personnel, in relation to whom the application of the PIDA protections relied upon the clarity of the policies.

195. In this challenge to the current policies, which amended the previous policies, I agree with the Defendant's submission that the Claimants have failed to establish the difference in treatment which they rely upon to establish a breach of Article 14 ECHR. Ground 3 is based on the false premise that the policies prevent the Claimants communicating publicly, in particular, to the media or Parliamentarians, about their experiences of rape and sexual assault, harassment and bullying in the Armed Forces, without prior authorisation, and that they are excluded from the PIDA protections for

whistleblowing afforded by the Raising a Concern policy to service personnel in the circumstances of the Claimants. This is incorrect. I have found that the Claimants' interpretation of the policies and their effect is mistaken – see paragraphs 41, 51, 54, 70, 78 of my judgment. I also refer to the evidence of Ms Wallington and the GLD's letter to the Claimants' solicitor, dated 22 April 2025, set out at paragraphs 67 – 68 of my judgment.

196. For these reasons, Ground 3 does not succeed.

Ground 5: Public sector equality duty

Legal framework

197. The Defendant is a public authority, pursuant to schedule 19 to the Equality Act 2010 ("EA 2010"), and he is subject to the PSED in section 149 EA 2010 which provides:

> "149 (1) A public authority must, in the exercise of its functions, have due regard to the need to -
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

198. The principles which apply to the discharge of the PSED are set out in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60, per McCombe LJ at [26]:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements*: R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or

what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley*

& Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> '….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take

> steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree…."""

Breach of duty

199. The Claimants submitted that the duties to conduct a focused and conscientious inquiry into which protected groups were impacted, and to demonstrate by evidence that the decision-maker has taken steps to meet the statutory requirements, were not satisfied in this case.

200. The Equality Analysis for the Media DIN 2025 was dated 31 January 2025. It proceeded on the premise that its purpose was "to clarify the MOD's contact with the media policy, and to clarify the appropriate channels for raising a concern or reporting a wrong-doing". No evidence was identified, as the policy comprised "factual and clarification changes to existing policy only". No direct or indirect discriminatory impacts were identified.

201. The Equality Analysis for the Parliamentarian DIN 2024 was dated 2 December 2024. It identified the proposed changes as "minor wording and administrative updates to the previous iteration of the DIN". The evidence base was largely correspondence from Parliamentarians on behalf of their constituents which it found did not provide a reliable basis for assessing disproportionate impact on those with protected characteristics. No specific impacts were identified. It referred to the confirmation in the DIN that it did not affect an individual's right to raise a concern under the MOD's Whistleblowing Policy. It concluded that the policy did not adversely or negatively impact those with a protected characteristic and it did ensure that all individuals, including those with protected characteristics, were aware of their options for contacting Parliamentarians. The Claimants submitted that no thought was given to contact with Parliamentary committees.

202. The Claimants also criticised the equality impact assessments prepared for earlier versions of the Media DIN and the Parliamentarian DIN, for essentially the same reasons.

203. The Defendant conceded in the consent order of 31 July 2025 that the 2020 Media DIN was unlawful by reason of non-compliance with the PSED.

204. The Defendant has now conceded that the PSED was not complied with in respect of the current policies because:

i) in respect of the Media DIN 2025, no focused assessment took place, and a proper equality impact assessment was not conducted; and

ii) in respect of the Parliamentarian DIN 2024, no focused assessment took place, and the equality impact assessment did not consider the impact on particular protected characteristics in a structured fashion.

205. Therefore the Defendant has acted in breach of section 149 EA 2010 and Ground 5 succeeds.

Relief

206. The Defendant submits that no relief should be granted because section 31(2A) of the Senior Courts Act 1981 applies. It provides:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

207. In *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, the Court of Appeal considered the scope of section 31(2A) of the Senior Courts Act 1981 at [267] – [273] and gave the following guidance:

> "273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89)."

208. I recognise that Raising a Concern is the policy which is intended to apply to whistleblowers, not the Media DIN 2025, nor the Parliamentarian DIN 2024. However,

I am unable to conclude that the high threshold under section 31(2A) Senior Courts Act 1981 is met. I am not in a position to judge whether a thorough equality impact assessment might identify unforeseen or unintended impacts on protected individuals, for example, in circumstances in which the Raising a Concern policy and/or the PIDA protections do not apply, and the Media DIN 2025 or the Parliamentarian DIN 2024 are engaged.

209. However, in the exercise of my discretion, I do not consider that the Media DIN 2025 or the Parliamentarian DIN 2024 should be quashed because of the breach of section 149 EA 2010. They are important policies which govern a large number of service personnel and civilians in their day to day service, and a quashing order would leave an unfortunate gap in policy provision for months. A declaration that the policies are unlawful would have the same unfortunate effect. I take into account that the MOD is already undertaking a review of these policies: see the witness statement of Ms Wallington, at paragraphs 38 to 43. In my judgment, the better course would be for the MOD to undertake to review the Media DIN 2025 and the Parliamentarian DIN 2024 within a specified time scale, and to undertake a lawful equality impact assessment as part of the review. Counsel should inform the Court whether the Defendant is prepared to give undertakings. If not, mandatory orders or a quashing order may have to be made.

210. The fact that the King's Regulations do not accurately reflect current policy was a matter referred to on a number of occasions in the Claimants' written and oral submissions, and there is a pleaded application to quash them, even though the primary challenge was only made against the policies (see paragraph 1.1, RSFG). Therefore I consider that the Claimants are entitled to seek relief in respect of them. Ms Wallington states that they are being updated to reflect current policies. I would like to know the likely timescale of the amendments. There is an obvious difficulty if the King's Regulations are updated to reflect the current policies which are then amended again soon afterwards. My provisional view is that the Court should confine itself to making a declaration that specified regulations are unlawful in so far as they refer to out of date policies. This will flag up the problem, but not commit the Defendant to implementing an unsuitable or unworkable solution.

211. Counsel are requested to provide a written response on the issues I have raised in respect of relief, to include draft wording for an order.

Final conclusions

212. The claim for judicial review is dismissed on Grounds 1, 2 and 3. Ground 4 was not pursued by the Claimants. Judicial review is allowed on Ground 5.

Annex 1

Public Interest Disclosure Act 1998

1. Protected disclosures

After Part IV of the Employment Rights Act 1996 (in this Act referred to as "the 1996 Act") there is inserted—

"PART IVA

Protected disclosures

43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B.— Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining

legal advice.

(5) In this Part *"the relevant failure"*, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C.— Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) where the worker reasonably, believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43D. Disclosure to legal adviser.

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

43E. Disclosure to Minister of the Crown.

A qualifying disclosure is made in accordance with this section if—

(a) the worker's employer is—

(i) an individual appointed under any enactment by a Minister of the Crown, or

(ii) a body any of whose members are so appointed, and

(b) the disclosure is made in good faith to a Minister of the Crown.

43F.— Disclosure to prescribed person.

(1) A qualifying disclosure is made in accordance with this section if the worker—

(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

43G.— Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43H.— Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

43J.— Contractual duties of confidentiality.

(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

…

43L.— Other interpretative provisions.

(1) In this Part—

"qualifying disclosure" has the meaning given by section 43B;

"the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 43B(5).

(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."

2. Right not to suffer detriment.

After section 47A of the 1996 Act there is inserted—

"**47B.— Protected disclosures.**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

…."