

# AN IER RESPONSE

## **Protection of Official Data** Submission to a consultation by the Law Commission

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# The Law Commission *Protection of Official Data: A Consultation Paper*

## INTRODUCTION

The consultee<sup>1</sup> welcomes the Law Commission Consultation Paper No 230, *Protection of Official Data* and the opportunity to review a significant area of the law protecting the disclosure of official data. However a number of the provisional conclusions are cause for substantial concern. The premise of Law Commission's approach appears to be that all disclosure of official information without authority is undesirable. The Introduction states:

“that certain categories of information require the effective protection of the criminal law and that it is necessary to ensure sensitive information is safeguarded against those whose goal is to obtain it contrary to the national interest”<sup>2</sup>

Whilst unauthorised disclosure of information should be criminalised, there is a value in public interest disclosures that can reveal wrongdoing or illegality on the part of government. For as stated by Lord Bingham in *R v Shayler*:<sup>3</sup>

“Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments.”

There is a tension between protecting national security and the public scrutiny of a range of wrongdoing on the part of government. Civil servants and those working in the intelligence and security services are particularly vulnerable as in making a disclosure they face the penalty not only of dismissal, but prosecution under the Official Secrets Act 1989. It is for this reason that the provisional conclusions on reform of the 1989 Act in Chapter 3 are so important. It is unfortunate therefore that the proposals for reform of the legislative provisions fail to fully appreciate the value of public interest disclosure and so do not sufficiently consider how to protect those making such disclosures.

Since the enactment of the Human Rights Act 1998 whistleblowers can claim the right to freedom of expression in domestic courts as the right is one of a number of articles incorporated from the European Convention on Human Rights. The Law Commission considered it needed to assess how legislative provisions in this area “comply with the European Convention on Human Rights”<sup>4</sup>, but, as argued in this response, Provisional conclusion 22 in Chapter 6 of the Consultation Paper fails to fully consider the implications of the incorporation of the right to freedom of expression.

The repeal of section 2 of the Official Secrets Act 1911 and its replacement with the Official Secrets Act 1989 denied whistleblowers a defence of public interest if they were prosecuted

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<sup>1</sup> The consultee would like to thank Elizabeth Stokes for her detailed and valuable comments on earlier drafts.

<sup>2</sup> Law Commission *Protection of Official Date: A Consultation Paper*, Consultation Paper 230, Para 1.10.

<sup>3</sup> *R v Shayler* [2002] UKHL 11, para 21.

<sup>4</sup> Law Commission *Protection of Official Date: A Consultation Paper*, Consultation Paper 230 Para 1.7

for making unauthorised disclosures of wrongdoing or impropriety. In Chapter 7 the Law Commission wrongly conclude that there are no benefits in enacting a statutory public interest defence.

The focus of this response is the protection of whistleblowers bound by obligations of official secrecy, but who may have public interest concerns. Therefore limited attention is given to Chapters Two, Three and Four in this response. The main emphasis is on Chapter Three: The Official Secrets Act 1989, Chapter 6: The Right to Freedom of Expression and Chapter 7: Public Interest Defence. As the consultee considers the restoration of a public interest defence is essential to protect the human rights of whistleblowers responses to the provisional conclusions in Chapters 6 and 7 are set out first. Responses to the other Chapters then follow and are examined in sequence.

## **CHAPTER 6: Freedom of Expression**

### **Provisional conclusion 22**

#### **Compliance with Article 10 of the European Convention on Human Rights does not mandate a statutory public interest defence. Do consultees agree?**

The consultee disagrees with Provisional conclusion 22.

The analysis of the Convention right to freedom of expression (set out in Article 10 of the European Convention on Human Rights) in Chapter 6 of the Consultation Paper is incomplete and therefore the Law Commission's Provisional conclusion is ill-founded. Indeed there are clear arguments that compliance with the right to freedom of expression, as well as other Convention rights, including the right to a fair trial, the right to liberty and the right to non-discrimination in the protection of Convention rights, require a statutory public interest defence.

The right to freedom of expression provides both the right to impart and receive information. This involves the right of the whistleblower to disclose public interest information, but also the right of the public to receive such public interest disclosures for as stated by Lord Bingham in *R v Shayler*<sup>5</sup>:

“The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be a participatory process. But there can be no assurance that government is carried out for the people unless the facts are known, the issues publicly ventilated.”

There is almost no mention of the Human Rights Act 1998 in any part of Chapter 6 of the Consultation Paper other than the comment in paragraph 6.5 of the Consultation Paper that:

“Given its status as a constitutional right, the freedom of expression was protected long before article 10 of the European Convention on Human Rights was incorporated into domestic law by the Human Rights Act 1998”

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<sup>5</sup> [2002] UKHL 11; [2003] 1 AC 247 at paragraph 21.

This dismissal of the constitutional significance of the Human Rights Act 1998 is unfortunate as it leads the Law Commission to incorrectly consider, as set out in paragraph 6.7, whether compatibility with the European Convention on Human Rights mandates a public interest defence. The correct approach is to examine whether a public interest defence should be read into the Official Secrets Act 1989 under section 3 of the Human Rights Act 1998 to ensure compatibility with the domestic Convention right to freedom of expression. This omission contrasts with the approach of the Law Commission in Chapter 2 of the Consultation Paper in respect of provisions in the Official Secrets Act 1920. The Law Commission considered whether certain sections of the 1920 Act were compatible with the principle of the presumption of innocence, under the right to a fair trial set out in Article 6 of the European Convention on Human Rights, concluded they were not and recommended reforming legislation should not contain them. Section 3 of the Human Rights Act 1998 allows the courts to read in a public interest defence into the Official Secrets Act 1989 or make a declaration of incompatibility under section 4 if it cannot as in the case of *David Miranda v Secretary of State for the Home Department & Commissioner for the Metropolis* discussed below

The Law Commission place considerable reliance on the case of *R v Shayler*<sup>6</sup>, which is a case decided in the early days of the Human Rights Act 1998. In *R v Shayler* the House of Lords found the sections 1(1) and 4(1) and (3) were compatible with the right to freedom of expression although no defence of public interest was available under the sections. Lord Bingham stated that the sections “leave no room for doubt”, but the House of Lords did not make a declaration of incompatibility in respect of the Official Secrets Act 1989 as the prima facie interference with the right to freedom of expression was justified to preserve secrecy of information. This emphasis on the case of *R v Shayler* leads the Law Commission to conclude in Chapter 6 that the right to freedom of expression does not necessitate a public interest defence. However it should be noted that this case was decided on the narrow issue of disclosures by former members of the security service under section 1(1) and should not be taken to apply to all section of the Official Secrets Act 1989. Also, as noted by the Law Commission, the case has been criticised by a number of commentators including Helen Fenwick and Gavin Phillipson,<sup>7</sup> who consider that the Law Lords, and Lord Bingham in particular, did not consider the proportionality test in sufficient detail. *R v Shayler* did fail to consider the requirements of the proportionality test fully and this is not acknowledged by the Law Commission who also fails to examine the developments in the law on proportionality since *R v Shayler*. The four part test of proportionality is now to be found in the case of *Huang v Secretary of State for the Home Department*<sup>8</sup>, and as restated in *Bank Mellat v Her Majesty's Treasury (No 2)*<sup>9</sup> in which Lord Sumption set out the fair-balance criteria of whether “a fair balance has been struck between the rights of the individual and the interests of the community”. This fair- balance test is not considered in Chapter 6 nor in any part of

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<sup>6</sup> [2002] UKHL 11; [2003] 1 AC 247.

<sup>7</sup> See H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006), p 941.

<sup>8</sup> [2007] 2 AC 167.

<sup>9</sup> [2013] UKSC 39.

the Consultation Paper. The cases of *Huang v Secretary of State for the Home Department* and *Bank Mellat v Her Majesty's Treasury (No 2)* are also absent.

A recent case that does examine the test of proportionality is *R (David Miranda) v Secretary of State for the Home Department & Commissioner for the Metropolis*<sup>10</sup>. David Miranda, the partner of a Guardian journalist was detained and questioned at Heathrow airport in 2015 under Schedule 7 of the *Terrorism 2000*. He commenced judicial review proceedings arguing the use of the power under Schedule 7 was incompatible with his right to freedom of expression. In his Court of Appeal judgment the Master of the Rolls ruled that the stop power conferred by para 2(1) of Schedule 7 of the Terrorism Act 2000 was incompatible with article 10 of the European Convention on Human Rights “in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise.”<sup>11</sup> This case does not concern a prosecution under the Official Secrets Act 1989, but does involve the use of the criminal law against a person carrying data obtained from a whistleblower in breach of their Convention rights. The case demonstrates the willingness of the Master of the Rolls to engage with the Convention right to freedom of expression and developments in the area of proportionality. In his judgment Lord Dyson commented:

“I accept that there are constraints on the exercise of the power, but in my judgment they do not afford effective protection of journalist’s article 10 rights. The central concern is that disclosure of journalistic material ... undermines the confidentiality that is inherent in such material which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights.”<sup>12</sup>

There is no such concern with the protection of journalistic material and the right to disclose in Chapter 6 of the Consultation Paper and the case of *David Miranda v Secretary of State for the Home Department & Commissioner for the Metropolis* was not considered. Indeed in Chapter 6 there is no analysis of any domestic case law other than *R v Shayler*, with the exception of *Reynolds v Times Newspapers Limited*<sup>13</sup> which is a defamation case decided in 2001. The judgment of Lord Dyson in *David Miranda v Secretary of State for the Home Department & Commissioner for the Metropolis* challenges the view of Lord Steyn in *Reynolds v Times Newspapers Limited*, cited in paragraph 6.5 of the Consultation Paper, that “article 10 of the Convention and the English law on the point are in material respects the same”<sup>14</sup>

Also in Chapter 6 there is confused comment with regard to the reform of the Official Secrets Act 1989. As stated above, reform of the Official Secrets Act 1989 does not have to be compatible with the European Convention of Human Rights<sup>15</sup>, but the Convention rights including the right to freedom of expression. Further any proposed legislation would require the relevant minister under section 19 of the Human Rights Act 1998 to consider whether the

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<sup>10</sup> [2016] EWCA Civ 6.

<sup>11</sup> [2016] EWVA Civ 6, Lord Dyson at paragraph 119.

<sup>12</sup> [2016] EWVA Civ 6, Lord Dyson at paragraph 113.

<sup>13</sup> *Reynolds v Times Newspapers Ltd and Others* [2001] 2 AC 127.

<sup>14</sup> *Reynolds v Times Newspapers Ltd and Others* [2001] 2 AC 127, 207, by Lord Steyn.

<sup>15</sup> See Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 6.27.

bill complies with the Convention rights and to make a statement of incompatibility if it does not so comply. This requirement will not prevent the bill from becoming law and so Provisional conclusion 22 asking whether the Article 10 mandates a public interest defence is posing the wrong question. The enactment of a statutory public interest defence would ensure compliance with the Convention right to freedom of expression, protecting both investigative journalism and whistleblowers who disclose information in the public interest. Any bill failing to provide a public interest defence misses an opportunity to protect the human rights of whistleblowers.

Throughout Chapter 6 of the Consultation Paper the Law Commission also refers to compliance with the European Court of Human Rights, rather than the Convention right to freedom of expression in particular. Also it is not, as stated by the Law Commission in paragraph 6.22, the European court that will be the forum to consider whether an interference with the right to freedom of expression is justified as proceedings to enforce the right will be in the domestic courts. Further in determining a question arising in respect of a Convention right, as section 2 of the Human Rights Act 1998 only requires the domestic courts to “take into account” the jurisprudence of Strasbourg there is no a duty to simply follow the judgments of the European Court of Human Rights. The domestic courts can develop the law beyond an approach taken by the European court for, as argued by Lady Hale in a 2008 lecture:

“the Human Rights Act does not in fact incorporate the Convention into our national law. It deliberately creates new rights and remedies in national law, specifically the right to have public authorities act compatibly with the Convention rights. Those rights are defined in the same words as the rights in the Convention but they are rights protected by national law.”<sup>16</sup>

As evidenced in a number of recent cases the Supreme Court has shown itself willing to adopt such an approach.<sup>17</sup> Recent case law has also shown the Supreme Court willing to rely on the right to freedom of expression to support whistleblowers. In her judgment in *Clyde & Co LLP v Bates van Winkelhof*, Lady Hale notes that “article 10 operates as a protection for whistleblowers who act responsibly”<sup>18</sup>.

The Law Commission does analyse some of the recent cases decided by the European Court of Human Rights involving whistleblowers in Chapter 6 of the Consultation Paper. The Law Commission cites the five principles set out by the Grand Chamber in *Guja v Moldova*<sup>19</sup> in considering whether the interference with the applicant’s right to freedom of expression was proportionate: the public interest in the information; the authenticity of the information; the damage, if any, suffered by the public authority as a result of the disclosure; the motive behind the action of the reporting employee; and the penalty imposed for the disclosure and its consequences.<sup>20</sup> Despite outlining these conditions that would assist a public interest

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<sup>16</sup> Baroness Hale (2008) *Law Lords at the Margin: Who defines Convention rights*, p 3.

<sup>17</sup> *Rabone v Pennine Care NHS Foundational Trust* [2012] UKSC 2 for example.

<sup>18</sup> [2014] UKSC 32 at para 41.

<sup>19</sup> (2011) 53 EHRR 16.

<sup>20</sup> *Guja v Moldova* (2011) 53 EHRR 16 paragraphs 85-88, 89, 92-94 and 95-96.

whistleblower, and can be argued to support a statutory defence, the Law Commission fails to consider the criteria fully but instead places an emphasis on the finding of the Grand Chamber that disclosure should be a “last resort”.<sup>21</sup> This emphasis is reflected in the Law Commission’s support of the view in *R v Shayler* earlier in Chapter 6 that the ban on the disclosure of information in the Official Secrets Act 1989 “is not an absolute ban”, but simply a ban on disclosure without lawful authority<sup>22</sup>, and that David Shayler should have sought authorisation for his disclosures. The House of Lords considered the “sufficient and effective safeguards” provided by the Official Secrets Act 1989 to ensure concerns of unlawfulness and irregularity are not a “blanket ban” that would be inconsistent with the right to freedom of expression.<sup>23</sup> However, there is considerable argument, as acknowledged by the Law Commission, that these safeguards are illusory and a whistleblower risks considerable detriment if they seek to pursue their concerns in the procedures suggested by the House of Lords and endorsed by the Law Commission.

Also the Law Commission does not examine the important European case of *Heinisch v Germany*<sup>24</sup> in which the European Court of Human Rights found that the rights of a geriatric nurse, who reported her employers for understaffing, had been violated under article 10 of the European Convention on Human Rights when the domestic courts failed to order her reinstatement. This case was referred to by Lady Hale in her judgment in *Clyde & Co LLP v Bates van Winkelhof* when she set out the factors relevant to the calculation of the proportionality test. In setting out the test in *Heinisch v Germany* Lady Hale noted “proportionality also required a careful analysis of the severity of the penalty imposed upon the whistleblower and its consequences”<sup>25</sup>. Imprisonment for the unauthorised disclosure of information is a very severe penalty, particularly if recommendations are accepted to increase a maximum sentence to 14 years. At the end of Chapter 6 the Law Commission does provide an descriptive account of the case of *Bucur and Toma v Romania*<sup>26</sup>, a case involving the conviction of applicant for making allegations of irregularities in respect of the interception of communications to his Member of Parliament which was found by the European Court of Human Rights to violate his right to freedom of expression. However after recording the decision of the European court the Law Commission abruptly returns to *R v Shayler* in the following paragraph without an analysis of the impact of this case and states:

“As we have discussed, the House of Lords in *Shayler* rejected the argument that the offences contained in the Official Secrets Act 1989 violated Article 10.”<sup>27</sup>

This failure to fully engage with all European jurisprudence and the domestic developments with regard to the test of proportionality is unfortunate. As stated above, the Human Rights Act 1998 is one of most significant constitutional developments. For this reason Chapter 6 of

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<sup>21</sup> *Guja v Moldova* (2011) 53 EHRR 16 at 73.

<sup>22</sup> *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247, Lord Bingham at para 27.

<sup>23</sup> *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247, Lord Bingham at para 36.

<sup>24</sup> [2011] IRLR 922.

<sup>25</sup> *Heinisch v Germany* [2011] IRLR 922, at para 41.

<sup>26</sup> Application 40248/02.

<sup>27</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 6.75.



the Consultation Paper provides a limited and restrictive account of the relevant law in areas of domestic human rights and Provision conclusion 22 is incorrect for the reasons argued above. As acknowledged by the Law Commission, the right to freedom of expression is a qualified right and so can be interfered with for the legitimate aim of national security, but any such interference must be justified by being as prescribed by law, necessary and proportionate. The Law Commission fails to fully explore the developments in the area of the test for proportionality in particular. A public interest defence is required to protect the right of whistleblowers to make public interest disclosures and support the right of the public to receive such information. Such a defence is necessary for, as recognised by the Law Commission,<sup>28</sup> the European Court of Human Rights has emphasised in many cases the right to freedom of expression is an “essential foundation of a democratic society” and a “basic condition for its progress and for the development of every man”.<sup>29</sup>

## **CHAPTER 7: Public Interest Defence**

### **Provisional conclusion 23**

#### **The problems associated with the introduction of a statutory public interest defence outweigh the benefits. Do consultees agree?**

The consultee strongly disagrees with Provisional conclusion 23.

Section 2 of the Official Secrets Act 1911 provided a public interest defence for disclosures of information, but was repealed and replaced by the Official Secrets Act 1989. This is not acknowledged in any part of the Law Commission’s Consultation Paper, which is unfortunate as it is more appropriate to discuss the restoration of a public interest defence rather than the introduction of one. The vulnerability of whistleblowers within the civil service, or working within the intelligence and security services, who discover wrongdoing is clear and the restoration of the defence is required for their protection.

As considered in the response to Chapter 6 of the Consultation Paper, the European Court of Human Rights in *Guja v Moldova* supported a view that civil servants should be allowed to disclose official information if disclosure is justified in the public interest. With reference to Civil Law Convention on Corruption, the European court noted in the course of their work, civil servants may be aware of information, including secret information, the divulgence of which may be in the public interest<sup>30</sup>. Those in Government may on occasion be in error, guilty of incompetence, misconduct, malpractice and even misdeeds. Such wrongdoing requires public scrutiny for, as recognised by Lord Bingham in *R v Shayler* “publicity is a powerful disinfectant”<sup>31</sup>. The restoration of a public interest defence is essential to ensure accountability and transparency of Government. For this reason the benefits are clear and are in no way outweighed by the problems.

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<sup>28</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 6.10.

<sup>29</sup> *Handyside v UK* (1979-80) 1 EHRR 737 at 49.

<sup>30</sup> [2008]ECHR 14227/04, at paragraph 72.

<sup>31</sup> [2002] UKHL 11, at paragraph 21.

Despite this a number of potential problems with a statutory public interest defence are outlined by the Law Commission. The first is that such a defence will undermine trust between Ministers and civil servants<sup>32</sup>. Impartiality is a core value in the Civil Service Code, but disclosures in the public interest do not threaten impartiality as they are not a political act. Further integrity is also a value in the Code and it can be argued that civil servants in serving the public interest, and holding Government to account for wrongdoing, are performing a constitutional role, rather than a political one in merely maintaining a political party in power.

A second issue identified by the Law Commission is a potential risk to national security. It is clear that certain information should not be disclosed in the interests of national security, but national security should not be used as a cloak for impropriety, illegality or wrongdoing on the part of Government. As recognised by the Law Commission:

“At the heart of this debate is the tension between national security – the need to protect official information and prevent harm to the interests of the state – and government accountability – by promoting transparency and exposing wrongdoing which is in the public interest.”<sup>33</sup>

The proposals of the Law Commission in rejecting the need for a public interest defence do not balance these interests or resolve the tension, but simply focus on national security as the primary concern.

The final concern of the Law Commission is that a statutory public interest defence “risks undermining the certainty and coherence of the criminal law.”<sup>34</sup> A number of arguments are advanced to support this concern. The Law Commission considers that the meaning of public interest is “elusive” and poses an “impossible task” for juries who may come to different conclusions on the same set of facts depending on its composition, and thus undermine confidence in the justice system. Such an argument is tenuous. It is impossible to determine whether different juries may come to different conclusions in a criminal law case and such arguments undermine the principle of all jury trials. It is interesting in presenting such an argument no mention is made of the case of *R v Ponting*<sup>35</sup> in which Clive Ponting who successfully asserted a public interest defence when prosecuted for passing two Ministry of Defence documents to Tam Dalyell, a Member of Parliament. As his prosecution was under the Official Secrets Act 1911 he was able to defend his actions on the basis he had made his disclosures in the public interest. The jury acquitted Clive Ponting accepting his defence of public interest despite the direction of the trial judge to convict. This case demonstrates a jury can weigh the difficult issues in establishing whether a disclosure is in the public interest.

Another argument advanced is that a public interest defence would result in transferring the question of public interest from the prosecutor to the jury and cause “the defendant to lose the

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<sup>32</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.39.

<sup>33</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.26.

<sup>34</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.50.

<sup>35</sup> [1985] Crim LR 318.

protection afforded by the public interest stage of the Code for Crown Prosecutors”<sup>36</sup>. The Law Commission also argues that the Attorney General in deciding whether to prosecute is an “effective safeguard”<sup>37</sup>. Both these arguments are not supported by the prosecutions of the whistleblowers Katherine Gun and Derek Pasquill whose prosecutions collapsed on the eve of their trials. Katherine Gun was a translator at the Government Communications Headquarters (GCHQ) in 2003 when she disclosed an e-mail from the National Security Agency in the United States of America requesting assistance with information to be obtained by spying on six non-permanent members of the Security Council whose votes were required to win a resolution authorising the invasion of Iraq. Her prosecution under section 1 of the Official Secrets Act 1989 was halted the day before she was due to appear at the Old Bailey and it was claimed that the case was dropped for legal and technical reasons. Derek Pasquill was prosecuted in 2007 on six counts under the Official Secrets Act 1989 that he made damaging disclosures by passing confidential documents to the New Statesman and The Observer. The documents included a document entitled “Detainees” that related to the UK Government’s knowledge of the US rendition of terrorist suspects and letters concerning the Government’s policy to Islamic groups. The prosecution argued the documents were damaging and related to international relations, but Pasquill claimed the disclosures were in the public interest as they related to debates about public policy. After a 20 month investigation charges were dropped at the Old Bailey when the judge was told by prosecutors that documents to be shown to the defence, as part of legal proceedings, undermined its case that the disclosures were damaging. Prosecuting Counsel told Judge Beaumont that there was no longer a realistic prospect of conviction. Both these cases almost proceeded to trial, so presumably the prosecution of each whistleblower was considered initially to be in the public interest. Therefore it appears these cases demonstrate the uncertainty in leaving considerations of public interest to the prosecutors rather than enacting the safeguard of allowing a whistleblower who is prosecuted to assert a public interest defence which a jury can then evaluate.

The Law Commission also argues that a lack of clarity surrounding the concept of public interest “would open the floodgates”<sup>38</sup>. This is a strange argument as making an unauthorised disclosure risks both an individual’s career and their liberty. For this reason few are willing to risk the consequences and, as acknowledged by the Law Commission, prosecutions contrary to the Official Secrets Acts “are so rare”<sup>39</sup>. Further, as recognised by the Law Commission any risk of legal uncertainty can be mitigated “through careful legislative drafting”<sup>40</sup>. A statutory defence could be accompanied by a non-exhaustive list of factors to be taken into account in an assessment of whether a disclosure is in the public interest. Also as commented by the Law Commission, a list of examples could be included in the explanatory note for a bill introducing a statutory public interest defence and these factors and examples could then be included in jury directions. Provided there is a commitment to

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<sup>36</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.62.

<sup>37</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.62.

<sup>38</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.63.

<sup>39</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 5.46.

<sup>40</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.64.

protect public interest whistleblowers with a statutory defence then legal issues can be resolved.

In a number of places in Chapter 7 the Law Commission argues that a statutory public interest defence would be of a limited use to a whistleblower. A public interest defence may not “eliminate” risk for a whistleblower nor guarantee protection<sup>41</sup>, but it offers greater protection than at present. It is odd that the Law Commission dismisses the defence as affording a discloser of the information little legal protection<sup>42</sup> when it would clearly provide a whistleblower with significantly more protection than at present. In *R v Shayler* Lord Bingham stressed the importance of a ‘bright line’ in relation to security and intelligence disclosure so that the legal principles are clear to all<sup>43</sup>. At present the bright line appears to restrict the argument of human rights in support of the concealment of official material. The Law Commission sets out reasons that could be invoked to justify a public interest defence in paragraph 7.28 of its Consultation Paper. The first is that such a defence would enhance “the accountability of government by revealing alleged illegality or impropriety”. The second reason is that it provides protection for those who make disclosures they believe to be in the public interest. These reasons clearly justify restoring a public interest defence for whistleblowers revealing information of iniquity and wrongdoing. Whistleblowers committing public interest disclosures deserve the protection of such a defence.

#### **Provisional conclusion 24**

#### **The legal safeguards that currently exist are sufficient to protect journalistic activity without the need for a statutory public interest defence. Do consultees agree?**

The consultee disagrees with Provisional conclusion 24

The “current legal safeguards” referred to by the Law Commission are the guidelines promulgated by the Director of Public Prosecutions and as provided by the criminal law in general, but these are insufficient. Recent events have shown that journalists investigating public interest concerns have been the target of the criminal law and even anti-terror laws. Section 5 of Official Secrets Act 1989 provides an offence that if information or documents come into the possession of another person who then discloses it without lawful authority, knowing or having reasonable cause to believe it is protected from disclosure under the 1989 Act. This provision covers journalists and makes them criminally liable for the publication of official data disclosed to them by whistleblowers. As found by the recent report of the Institute of Advanced Legal Studies, *Protecting Sources and Whistleblowers in a Digital Age*, recent developments in digital communication technology have made journalists and journalistic sources “increasingly vulnerable” to identification by state agencies<sup>44</sup>, and it

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<sup>41</sup> See Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.32 and Para 7.37.

<sup>42</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 7.53.

<sup>43</sup> Wagner, A official secrets and the powerful disinfectant, posted on 19<sup>th</sup> September 2011 on the UK Human Rights Blog at [www.ukhumanrightsblog.com](http://www.ukhumanrightsblog.com).

<sup>44</sup> Institute of Advanced Legal Studies, *Protecting Sources and Whistleblowers in a Digital Age*, 2017, p 6.

recommends an examination of the merits of extending public interest defences. In an update to the report<sup>45</sup> an additional recommendation is made that:

“It is vital that any new legislation on official data, official secrets and espionage –as proposed by the Law Commission in February 2017 – protects journalists and whistleblowers who disclose information in the public interest”

The disclosures of Edward Snowden in 2013 highlighted the importance of the disclosure of official information in certain circumstances and focussed attention on newspapers as the recipients of disclosed information. As discussed later in responses to provisional conclusions in Chapters Two and Three, although the revelations of the American whistleblower principally concerned the activities of the US American National Security Agency in undertaking widespread surveillance programmes, Snowden’s allegations also raised issues about the role of GCHQ in assisting the National Security Agency. Despite the disclosures raising serious public interest concerns about the invasion of privacy by mass surveillance programmes seeking intelligence, the reporting of Snowden’s claims by The Guardian newspaper was condemned by some as assisting terrorists. Indeed, as commented above, in August 2013 anti-terror laws were used by police officers to detain and question David Miranda, the partner of the Guardian journalist Glenn Greenwald at Heathrow airport for almost nine hours. His laptop and memory stick were also seized as part of his detention and questioning under Schedule 7 to the Terrorism Act 2000. A person may be questioned under this provision to determine whether he is a terrorist or has been ‘concerned in the commission, preparation or instigation of acts of terrorism’. It is clear that David Miranda was not a terrorist or involved in terrorist activities and so there is a good argument that his detention was unlawful and an infringement of his human rights. As stated above the Master of the Rolls in *R (David Miranda) v Secretary of State for the Home Department & Commissioner for the Metropolis* declared the relevant provision incompatible with the right to freedom of expression in relation to journalistic material as there were inadequate safeguards against its arbitrary exercise.

There is considerable reliance by Law Commission on the findings of Leveson in his *Inquiry into the Culture, Practices and Ethics of the Press* which reported in 2012. It should be noted that this inquiry was into the worst practices of the Press, including the use of phone hacking, rather than the merits of investigative journalism. Leveson’s comments regarding the Press and their need to comply with the law should be seen in this light. Also the report pre-dates the use of anti-terror legislation against David Miranda. Indeed in this Chapter, as with the rest of the Consultation Paper, there is no mention of the case of *R (David Miranda) v Secretary of State for the Home Department & Commissioner for the Metropolis*. As recognised by Lord Leveson, the Press “plays a vital role in democracy.”<sup>46</sup> This concern for the role of the Press in publishing in the public interest is shown by the Master of the Rolls in *R (David Miranda) v Secretary of State for the Home Department & Commissioner for the Metropolis*:

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<sup>45</sup> Townend, J & Danbury, R, *Protecting Sources and Whistleblowers in a Digital Age – An Update*, 16<sup>th</sup> February 2017, p 2.

<sup>46</sup> B Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (2012), Vol 1, Ch 2, para 5.1.

“If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of this information is so important”<sup>47</sup>

As stated above in respect of Chapter 7, the right to freedom of expression includes both the right to publish public interest information and the right to receive such information on the part of the public. If journalists fear prosecution then both aspects of the right to freedom of expression is lost. Further if a public interest defence is given to whistleblowers then this should be extended to the possible recipients of disclosures.

### **Consultation question 15**

#### **We welcome views from consultees on the effectiveness of the Civil Service Commission as a mechanism for receiving unauthorised disclosures**

As the consultee does not accept the provisional conclusion 23 of the Law Commission that there is no case for a statutory public interest defence, the Civil Service Commission should not be part of a mechanism that denies whistleblowers a defence for making an unauthorised disclosure in the public interest.

### **Provisional conclusion 25**

#### **A member of the security and intelligence agencies ought to be able to bring a concern that relates to their employment to the attention of the Investigatory Powers Commissioner, who would be able to report their findings to the Prime Minister. Do consultees agree?**

The consultee agrees with Provisional conclusion 25 with reservations.

Members of the intelligence and security agencies must have an effective and safe mechanism to raise concerns, particularly if reform maintains their absolute duty of confidence and denies them any defence for unauthorised disclosures. The Law Commission considers a statutory commissioner model is the “optimal model” to incorporate public interest considerations into the statutory regime that criminalises unauthorised disclosures<sup>48</sup>. However as the Investigatory Powers Act 2016 has only just been enacted it is not clear whether the Investigatory Powers Commissioner is the best mechanism for raising concerns. Further a statutory regime that criminalises unauthorised disclosure should not also deny a whistleblower a public interest defence.

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<sup>47</sup> R (David Miranda) v Secretary of State for the Home Department [2016] EWCA Civ 6, at paragraph 113.

<sup>48</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230, Para 7.2.

### **Provisional conclusion 26**

**The Canadian model brings no additional benefits beyond those that would follow from there being a statutory commissioner who could receive and investigate complaints from those working in the security and intelligence agencies. Do consultees agree?**

The consultee disagrees with Provisional conclusion 26.

By providing a public interest defence to whistleblowers who follow a statutory procedure the Canadian model is of benefit as it offers protection which does not exist at present. Under the Canadian model if an individual is charged with an offence contrary to the Security of Information Act 2001 the court can consider a defence if the individual has followed a series of steps set out in legislation including the first step of bringing the matter to the relevant organisation's deputy head or Deputy Attorney General of Canada. The Canadian model reflects the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms which provides greater constitutional protection than the enactment of the Human Rights Act 1998. For reasons outlined in respect of Chapter 6, legislation in the United Kingdom should also ensure compatibility with the right to freedom of expression and provide a public interest defence, possibly drawing on the Canadian model.

### **Provisional conclusion 27**

**It should be enshrined in legislation that current Crown servants and current members of security and intelligence agencies are able to seek authority to make a disclosure. Do consultees agree?**

The consultee agrees with Provisional conclusion 27.

Current Crown servants and members of the security and intelligence agencies should have a statutory right to seek authority to make a disclosure. However such a right does not preclude the necessity of a public interest defence.

### **Provisional conclusion 28**

**There should be a non-exhaustive list of factors to be considered when deciding whether to grant lawful authority to make a disclosure. Do consultees agree?**

The consultee agrees with Provisional conclusion 28.

If a right to seek lawful authority is provided to whistleblowers then a non-exhaustive list would provide transparency and restrict discretion. However this assertion of the right to seek lawful authority rests on the false belief of the Law Commission that an effective process for authorisation to make a disclosure exists. Therefore, as stated above, a public interest defence is required to protect a whistleblower who fails to gain authorisation, or considers the process ineffective, but still makes a disclosure of public interest information.

## **CHAPTER 2: The Official Secrets Acts 1911, 1920 and 1939**

**The consultee has no view on Provisional conclusions 1-4 or Consultation questions 1-3.**

### **Provisional conclusion 5**

**There are provisions in the Official Secrets Acts 1911-39 that are archaic and in need of reform. Do consultees agree?**

The consultee agrees with Provisional conclusion 5.

As recognised by the Law Commission, the Official Secrets Act 1911-1939 were enacted before the development of the digital age and some references in the legislation to terms such as “seals” is anachronistic. Modern legislation is required to reflect the digital age and incorporate modern developments in the area of security and intelligence.

### **Provisional conclusion 6**

**We consider that the references in the Official Secrets Acts 1911 and 1920 to sketches, plans, models, notes and secret pass words and code words are anachronistic and in need of replacement with a sufficiently general term. So consultees agree?**

The consultee has no view on Provisional conclusion 6 other than that the references in the Official Secrets Acts 1911 and 1920 are anachronistic, but their replacement should not be defined in too general terms.

### **Provisional conclusion 7**

**The territorial ambit of the offences ought to be expanded so that the offences can be committed irrespective of whether the individual who is engaged in the prohibited conduct is a British officer or subject, so long as there is a sufficient link with the United Kingdom. Do consultees agree?**

The consultee disagrees with Provisional conclusion 7.

Although his name does not appear in this Consultation Paper, this conclusion, and that of Provisional conclusion 16 in Chapter 3, appears to reflect concern over the consequences of the allegations of the American whistleblower, Edward Snowden. This proposal to extend the territorial ambit of legislation so those outside the United Kingdom can be prosecuted is very problematic. It is unclear what would constitute a “sufficient link”. It is unfortunate in this Consultation Paper there is no analysis of the actions of the American whistleblower, Edward Snowden, and the valuable information he provided regarding the gathering of private information through mass surveillance by the US National Security Agency, and its partner the GCHQ in the United Kingdom. Indeed there is no recognition of the public interest of Edward Snowden’s disclosures that has led to US legislation protecting the right to privacy, and the Investigatory Powers Act 2016, simply the intention to extend the ambit of UK legislation to cover the action of whistleblowers who are not British and disclosing information operating outside the jurisdiction.



## Consultation question 5

**Bearing in mind the difficulties inherent in proving the commission of espionage, do consultees have a view on whether the provisions contained in the Official Secrets Acts 1911 and 1920 intended to ease the prosecution’s burden of proof are so difficult to reconcile with the principle that they ought to be removed or do consultees take the view that they remain necessary.**

The consultee is of the same view as the Law Commission that the principle of the presumption of innocence, set out in Article 6(2) of the European Convention on Human Rights which provides the right to a fair trial, is so fundamental that provisions such as section 2(2) of the Official Secrets Act 1920 are “difficult to reconcile”<sup>49</sup> with this principle. As noted by the Law Commission, and discussed in responses to Chapter 7, section 3 of the Human Rights Act 1998 can be invoked to argue an interpretation compatible with this Convention right to a fair trial, but such an interpretation can only be pursued “so far as it is possible” under the 1998 Act. If a court is unable to make the provision compatible then it can only make a declaration of incompatibility which has no effect on the case or the validity of the provision. For this reason, and to provide certainty, the consultee agrees with the Law Commission, that it would be preferable” that any proposed legislation did not contain such provisions.<sup>50</sup>

## Provisional conclusion 8

**We provisionally conclude that the Official Secrets Act 1911-39 ought to be repealed and replaced with a single Espionage Act. Do consultees agree?**

The consultee disagrees with Provision conclusion 8.

Although there are clear arguments for a single new and modern Act to replace the Official Secrets Acts 1911-1939 new legislation should not have the title of the “Espionage Act”. As recognised by the Law Commission, the Official Secrets Acts 1911-39 are only “broadly concerned with espionage”<sup>51</sup>. The prosecution of members of the Campaign for Nuclear Disarmament for non-violent disobedience at a prohibited place under section 3 of the Official Secrets Act 1911 in *Chandler and others v Director of Public Prosecutions*<sup>52</sup>, discussed by the Law Commission in Chapter 2, demonstrates that not all action taken under the three acts involved espionage. The proposed replacement offences do not necessarily fall within the classification of “espionage” and so the proposed title incorrectly labels them as such. It is wrong to categorise protest at prohibited sites or the disclosure of public interest information as “espionage”. The Law Commission may consider that the title of the Official Secrets Acts does not accurately convey the distinct purposes of the legislation, but neither does the term “espionage”. As indicated by the Chandler case the aim of the 1911-1939 Acts is not simply to criminalise those engaged in espionage.

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<sup>49</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 2.189.

<sup>50</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 2.189.

<sup>51</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 2.2.

<sup>52</sup> *Chandler and others v Director of Public Prosecutions* [1964] AC 763; [1962] 3 WLR 694.

## CHAPTER 3: The Official Secrets Act 1989

### Provisional conclusion 9

**We provisionally conclude that, as a matter of principle, it is undesirable for those who have disclosed information contrary to the Official Secrets Act 1989 to be able to avoid criminal liability due to the fact that proving the damage caused by the disclosure would risk causing further damage. Do consultees agree?**

For reasons stated below the consultee disagrees with Provisional conclusion 9.

The view of the Law Commission that the damage element of the offences provided by the Official Secrets Act 1989 “can pose an insuperable hurdle to bringing a prosecution”<sup>53</sup> is incorrect and unsupported by evidence other than a simple reference to an initial consultation with “stakeholders”. All offences, other than offences under sections 1(1) and 4(3), require the prosecution to prove that the unauthorised disclosure was damaging, or likely to cause damage, and not simply that there was an unauthorised disclosure. It is the damaging element that distinguishes the offences from the conduct based offence under section 1(1) of the Official Secrets Act 1989. As shown by the prosecution of David Shayler under section 1(1) of the 1989 Act, the simple offence of making an unauthorised disclosure, with no requirement that the disclosure is damaging, nor a defence of public interest, means a member, or former member, of the intelligence or security service, will commit a strict liability offence by disclosing information without authority, with no account taken of the content of the information or its impact on the public interest. If the element of damage is excluded from all offences under the Official Secrets Act 1989 prosecutions would be easier, but a whistleblower would be denied a right to a fair trial by creating stricter offences of unauthorised disclosure.

Further there is no evidence provided by the Law Commission that public confirmation that damage has occurred will “compound the damage”. To prosecute an individual evidence of actual damage is not required. The Law Commission’s assertion that the need to show that the disclosure of a protected category of information was likely to cause damage, can “still pose an insurmountable barrier to initiating a prosecution”<sup>54</sup> is unconvincing. Also the view of the Law Commission that reform is required to ensure “individuals are not free to make damaging disclosures with impunity”<sup>55</sup> is not persuasive. Whistleblowers who disclose official data not only face dismissal, but also criminal prosecution and so do not act with impunity. In the absence of a defence of public interest the element of damage should continue to be an element of the offence

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<sup>53</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.143.

<sup>54</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.146.

<sup>55</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.140.

## **Provisional conclusion 10**

**We provisionally conclude that proof of the defendant’s mental fault should be an explicit element of the offence contained in the Official Secrets Act 1989. Do consultees agree?**

The consultee in part agrees with Provisional conclusion 10

There may be some merit in the recommendation that proof of defendant’s mental fault should be an explicit element of offence within Official Secrets Act 1989. The Law Commission argue that one reason for this proposal is to “reduce problems of proof”<sup>56</sup>. If this is the basis of this proposal then such a reform could place additional burdens for whistleblowers seeking to defend themselves in cases involving disclosure in the public interest. Any intention to frame offences under the Act more broadly will widen liability and impact adversely on the human rights of whistleblowers, not least the right to a fair trial. For this reason it is even more important that these reforms include a restoration of a public interest defence.

## **Consultation question 6**

**We welcome consultees’ views on the suitability of shifting to non-result based offences to replace those offences in the Official Secrets Act 1989 that require proof or likelihood of damage.**

Under the proposed redrafting of offences in the Official Secrets Act 1989 the result is a shift of focus in the offence from the result of the unauthorised disclosure to that of the defendant’s conduct and culpability in engaging in the disclosure. The main advantage of drafting an offence in an inchoate mode is that, as recognized by the Law Commission, it “would reduce problems of proof” and make prosecutions easier<sup>57</sup>. The consultee does not consider that should be the primary concern in drafting an offence. A preferred focus would be on the information disclosed and whether it is in the public interest.

An interesting suggestion of the Law Commission is to redraft the offences to have graduated offences better reflecting the defendant’s culpability<sup>58</sup>. This may assist public interest whistleblowers whose intention is not to cause damage, although a public interest defence would be a better means of ensuring protection of such disclosures

For reasons stated above, the consultee rejects Provisional conclusion 9 that the element of damage be removed from offences, and for that reason does not support the restructuring of offences to non-result based offences that would be detrimental to whistleblowers.

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<sup>56</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.156.

<sup>57</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.156.

<sup>58</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.150.

## **Consultation question 8**

**We would welcome consultees' views on whether the categories of information encompassed by the Official Secrets Act 1989 ought to be more narrowly drawn and, if so, how?**

The consultee agrees that the categories of information encompassed by the Official Secrets Act 1989 should be narrowly drawn to limit prosecutions to those that are strictly in the public interest. For example the disclosure of *any* information, document or other article relating to defence in section 2 or *any* information, document or other article relating to international relations in section 3 is far too broad. These categories of information are very widely drafted and such broad definitions are particularly problematic if the element of damage is removed from the offence.

## **Provisional conclusion 11**

**With respect to members of the security and intelligence agencies and notified persons, the offences should continue to be offences of strict liability. Do consultees agree?**

The consultee disagrees with Provisional conclusion 11.

Members of the security and intelligence agencies, as well as notified persons, should not be subject to a strict liability offence under section 1(1) of the Official Secrets Act 1989. The Law Commission offers no argument for maintaining strict liability other than arguing there is “still force” in reasons relied on in the White Paper to the Official Secrets Act 1989 that membership of the security and intelligence services carries:

“a special and inescapable duty of secrecy and such disclosures may reduce public confidence in the services’ ability to carry out their duties effectively and loyally<sup>59</sup>

Such a view denies a defence of public interest to those in the services who may have information relating to the conduct of the services which may relate to illegality or inefficiency, such as the allegations made by David Shayler who was denied a right to a fair trial and imprisoned for making public interest disclosures.

## **Provisional conclusion 12**

**The process for making individuals subject to the Official Secrets Act 1989 is in need of reform to improve efficiency. Do consultees agree?**

The consultee disagrees with Provision conclusion 12.

The Official Secrets Act 1989 is in need of reform. However the aim should not simply be to improve efficiency, but also to ensure its compatibility with human rights by allowing a public interest defence to ensure that the right to freedom of expression protect the rights of whistleblowers.

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<sup>59</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.165.

## **Consultation question 7**

**If the consultees agree with provisional conclusion 12, do consultees have a view on whether these options would improve the efficiency of the process for making individuals subject to the Official Secrets Act 1898?**

- (1) Member of the security and intelligence services
- (2) Notified person
- (3) Definition of Crown servant

As the aim of this response is not the improved efficiency of the Official Secrets Act 1989, the consultee has no view on these options.

## **Provisional conclusion 13**

**We provisionally conclude that the maximum sentences currently available for the offences contained in the Official Secrets Act 1989 are not capable of reflecting the potential harm and culpability that may arise in a serious case. Do consultees agree?**

The consultee disagrees with Provisional conclusion 13.

The recommendation that there should be an increase in the maximum sentence imposed under the Official Secrets Act 1989 without proposals to provide a public interest defence for such disclosures is of particular concern. The maximum sentences currently available reflect the seriousness of offences. The prosecution of David Keogh in 2007, considered by the Law Commission in Chapter 3 in respect of evidential issues, demonstrates the harshness of the existing sentences. David Keogh disclosed a document that raised concerns in respect of the conduct of the Iraq war. He did not disclose his information to the press, but passed the document to the political researcher of a Member of Parliament. Both David Keogh and the researcher were prosecuted under the Official Secrets Act 1989, found guilty and sentenced to six months and three months respectively. The imprisonment of a whistleblower, even for six months, has a profound impact upon their lives and, in addition to loss of employment, harshly punishes an individual who discloses in the public interest.

## **Provisional conclusion 14**

**A disclosure made to a professional legal advisor who is a barrister, solicitor or legal executive with a current practising certificate for the purposes of receiving legal advice in respect of an offence contrary to the Official Secrets Act 1989 should be an exempt disclosure subject to compliance with any vetting and security requirements as might be specified. Do the consultees agree?**

The consultee agrees with Provisional conclusion 14 in part.

A disclosure to obtain legal advice should be an exempt disclosure and is particularly important for an individual considering disclosing information in the public interest. It is essential that full legal advice is sought and given before an individual decides whether to make an unauthorised disclosure and so risk prosecution. However limiting the exemption to

a barrister, solicitor or legal executive denies a potential whistleblower legal advice from whistleblowing organisations such as Public Concern at Work. Such organisations provide expert free advice as to the legal implications of a disclosure and can also advise an individual how to raise concerns internally to prevent the consequences of disclosure for all parties concerned. For the same reason the imposition of vetting and security requirements may prohibit an individual from gaining the expert legal advice they require. The Law Commission states in its Introduction to its Consultation Paper that it “sought to assess the extent to which relevant provisions comply with the European Convention on Human Rights”<sup>60</sup>. The right to seek expert legal advice is necessary to support a right to a fair trial provided in Article 6 of the European Convention on Human Rights, as well as the right to liberty set out in Article 5.

### **Provisional conclusion 15**

**We provisionally conclude that a defence of prior publication should be available only if the defendant proves that the information in question was in fact already in the public domain and widely disseminated to the public. Do consultees agree?**

The consultee disagrees with Provisional conclusion 15.

The Official Secrets Act 1989 should include a defence of prior publication. However the defence should be available if the information is already in the public domain *or* widely disseminated. It is an unnecessary burden for a defendant to prove both that the information was already in public domain and also “widely disseminated” to the public. If the information is already in the public domain then there is no disclosure and no offence has been committed. The additional element that information is “widely disseminated” is too onerous. If information is already in the public domain then it has lost its secrecy and there is no basis for the Law Commission to suggest that:

“the defence of prior publication ought only to operate if the defendant believes the information has become widely disseminated to the public”<sup>61</sup>

There is also the question as to the uncertainty of the definition of “widely disseminated” in that how wide must the publication be sufficient to satisfy the test. However the criteria of wide dissemination could provide an alternative defence of prior publication if the information was not in the public domain, but widely distributed. The case of *R v Keogh*<sup>62</sup>, considered in detail by the Law Commission with regard to the evidential burden demonstrates the possible value of wide dissemination as a single defence of prior publication. Despite the marking of the document disclosed by David Keogh as “secret, personal” it was widely circulated and there were 33 recipients of the document and a total of 87 people saw it including the then Prime Minister’s Director of Communications and his spokesperson.

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<sup>60</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 1.7.

<sup>61</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.203.

<sup>62</sup> [2007] EWCA Crim 528; [2007] 3 All ER 789.

### **Consultation question 8**

**We would welcome consultees' views on whether the categories of information encompassed by the Official Secrets Act 1989 ought to be more narrowly drawn and, if so, how.**

The categories of information encompassed by the Official Secrets Act 1989 should be narrowly drawn to restrict criminal liability for the disclosure of information. Categories of information falling within the 1989 Act are broad and should be defined with more precision. A more limited definition of the categories protected by sections 1 to 5 of the Act would provide greater certainty.

### **Consultation question 9**

**Should sensitive information relating to the economy in so far as it relates to national security be brought within the scope of the legislation or is such a formulation too narrow?**

The scope of the legislation should not be extended to the disclosure of sensitive information relating to the economy. To bring additional information within the scope of the Official Secrets Act 1989 is unwarranted. Further, contrary to the suggestion by the Law Commission, such a definition is not too narrow and a broader definition is not “desirable to maximise legislative protection.”<sup>63</sup> The proposed definition is unacceptably broad, even if, as suggested by the Law Commission it

“only encompasses information that affects the economic well-being of the United Kingdom in so far as it relates to national security.”<sup>64</sup>

A category of sensitive information relating to the economy is very wide and lacks a precise definition that may result in a person being prosecuted for disclosing statistical data relating to the economy.

### **Provisional conclusion 16**

**The territorial ambit of the offences contained in the Official Secrets Act 1989 should be reformed to enhance the protection afforded to sensitive information by approaching the offence in similar terms to section 11(2) of the European Communities Act so that the offence would apply irrespective of whether the unauthorised disclosure takes place within the United Kingdom and irrespective of whether the Crown servant, government contractor or notified person was a British Citizen. Do consultees agree?**

The consultee disagrees with Provisional conclusion 16.

As with the recommendation of Provisional conclusion 7 in Chapter 2 of the Consultation Paper, a recommendation to extend the territorial ambit of an offence to encompass conduct

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<sup>63</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.213.

<sup>64</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.213.

by non-British citizens outside the United Kingdom is not an appropriate extension of legal obligations. Although there is no mention of Edward Snowden or his important revelations about the use of mass surveillance in any part of this Consultation Paper, it appears that this proposed extension of the law of secrecy is aimed at restricting the publication of the disclosures of whistleblowers within other jurisdictions, even if their significant revelations highlight the infringement of individual privacy rights by the intelligence agencies and lead to necessary reform.

### **Provisional conclusion 17**

#### **The Official Secrets Act 1989 ought to be repealed and replaced with new legislation. Do consultees agree?**

The consultee agrees that fundamental reform of the Official Secrets Act 1989 is required.

As recognised by Lord Phillips CJ in *R v Keogh* the provisions of the 1989 Act are “both lengthy and complex”.<sup>65</sup> The repeal of the Act and its replacement with new legislation may be the best means to achieve this reform. The Law Commission considers that the aim of the 1989 Act is to “protect information that falls within specified categories” and that the use of the words “secrets” in the title of the Act means it is viewed with “undue suspicion”<sup>66</sup>. This suspicion is warranted as the Official Secrets Act 1989 guards official information and punishes those who disclose information in the public interest. There is nothing in the reforms proposed by the Law Commission in Chapter 3 that will remove wariness on the part of civil servants for, as stated by the Law Commission, the aim of the reforms is to “re-educate those who work in the public sector on the nature of their legal obligations”<sup>67</sup> by confirming their duty of secrecy, rather than supporting and protecting public interest whistleblowers

The Law Commission invites views on whether the title of legislation should change. If new legislation is to be enacted a new title would signal a change provided it reflects a change in approach and the protection of public interest disclosures. A new title, such as the Security of Information Act, as in Canada, or the Protection of Official Data, is just a change of title unless it enacts real reform.

A fundamental overhaul of the Official Secrets Act 1989 may, as suggested by the Law Commission, be the optimal solution to address defects with the Act, but the deficiencies with the current legislation and requirements of reform are not fully acknowledged by the Law Commission in Chapter 3 of its Consultation Paper. It may be that, as argued by the Law Commission, fundamental reform is “preferable to amendments to effect targeted reforms”, but unless these allow for a public interest defence the flaws in the 1989 Act will not be addressed.

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<sup>65</sup> [2007] EWCA Crim 528; [2007] 3 All ER 789, paragraph 33.

<sup>66</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.228.

<sup>67</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 3.228.



## CHAPTER 4: Miscellaneous Unauthorised Disclosure Offences

The consultee does not have a detailed response to questions within Chapter 4 of the Consultation Paper but would comment on the following question:

**Do consultees have a view on whether the offence in section 55 of the Data Protection Act 1998 ought to be reviewed to assess the extent to which it provides adequate protection for personal information?**

Any review of section 55 of the Data Protection Act 1998 should not involve an examination of the defence in section 55(2)(d) providing “that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest”. As noted by the Law Commission in this Chapter on miscellaneous unauthorised disclosure offences, there is a lack of uniformity in all the provisions restricting the disclosure of personal information and the Data Protection Act 1998 is unusual in that it provides a statutory defence to personal information disclosure. In contrast, as commented upon by the Law Commission, the Digital Economy Act 2017<sup>68</sup>, that introduces a criminal offence for the unlawful disclosure of personal information, failed as a Bill to provide a defence if the disclosure is in the public interest. This absence was criticised by the Institute of Advanced Legal Studies 2017 report, *Protecting Sources and Whistleblowers in a Digital Age*, which called for the then Bill to be amended so it “did not criminalise appropriate disclosures by whistleblowers operating in the public interest”<sup>69</sup>. In an update to their publication the authors reported that the House of Lords sought amendments to the relevant clause in the Bill to create a defence if the publication is for the purposes of journalism in the public interest<sup>70</sup>.

Further, as acknowledged by the Law Commission, section 78 of the Criminal Justice and Immigration Act 2008 inserts an additional statutory defence into section 55 of the Data Protection Act 1998 if an individual disclosing personal data acts with a view to publishing “journalistic, literary or artistic material” with a reasonable belief that the disclosure was in the public interest. The failure to bring this provision into force nine years after its enactment is unfortunate. Public interest defences, discussed in more detail in respect of Chapter 7, are of significant benefit to both whistleblowers and investigative journalism.

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<sup>68</sup> The Act received royal assent on 27<sup>th</sup> April 2017.

<sup>69</sup> Institute of Advanced Legal Studies, *Protecting Sources and Whistleblowers in a Digital Age*, 2017, p 21.

<sup>70</sup> Townend, J & Danbury, R, *Protecting Sources and Whistleblowers in a Digital Age – An Update*, 16<sup>th</sup> February 2017, p 1.

## **CHAPTER 5: Procedural Matters Relating to Investigation and Trial**

### **Provisional conclusion 18**

**We provisionally conclude that improvements could be made to the Protocol. Do consultees agree?**

The consultee agrees with Provisional conclusion 18.

The Protocol should be clear and transparent. Also, if a public interest defence is restored to whistleblowers then the issue of whether the disclosure is in the public interest would be considered at Step Two (Meeting the threshold for police involvement) and at subsequent steps to prevent the prosecution of public interest whistleblowers. Any redrafting of the Protocol should ensure the involvement of the police in the investigation of unauthorised disclosures is only in exceptional circumstances and also the independence of the police from the Executive is maintained.

### **Consultation question 13**

**Do consultees have a view in whether defining the term “serious offence” and ensuring earlier legal involvement would make the Protocol more effective?**

The Protocol would be more effective if clarity as to the term “serious offence” were provided so the police were only involved when an actual threat to national security is involved rather than a mere disclosure of information. Earlier legal involvement may ensure the Protocol is more effective if a clear legal definition is provided.

### **Consultation question 14**

**Do consultees have views on how the Protocol could be improved?**

As stated in response to other questions in the Consultation Paper, the restoration of the public interest defence to offences of disclosure of official information is essential to protect whistleblowers. If this reform is effected the Protocol should reflect this reform.

### **Provisional conclusion 19**

**The power conferred by the court by section 8(4) of the Official Secrets Act 1920 ought to be made subject to a necessity test whereby members of the public can only be excluded if necessary to ensure national security (the term used in the 1920 Act) is not prejudiced. Do consultees agree?**

The consultee agrees with Provisional conclusion 19.

As recognised by the Law Commission, the “principle of open justice is fundamental to the rule of law and democratic accountability”<sup>71</sup> so a power conferred to the court to exclude the public from trials involving unauthorised disclosures should be subject to a necessity test.

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<sup>71</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230 Para 5.27.

Although it should be stated that it is difficult to see a justification for an entire trial to be in private and therefore an application should only be considered in respect of the part of the trial that relates to evidence the discussion of which may prejudice national security.

### **Provisional conclusion 20**

**The guidance on authorised jury checks ought to be amended to state that if an authorised jury check has been undertaken, then this must be brought to the attention of the defence representatives. Do consultees agree?**

The consultee agrees with Provisional conclusion 20.

The vetting of members of the jury should be exceptional and if undertaken this infringement of the random selection principle is so significant, transparency is “vital” and so the defence must be informed.

### **Provisional conclusion 21**

**A separate review ought to be undertaken to evaluate the extent to which the current mechanisms that are relied upon strike the correct balance between the right to a fair trial and the need to safeguard sensitive material in criminal proceedings. Do consultees agree?**

The consultee agrees with Provisional conclusion 21.

The penalty of imprisonment for unauthorised disclosures is so significant a review of the current mechanisms for the conduct of a trial, including the specific provision for closed material proceedings, is required. It is essential that the correct balance is struck between a right to a fair trial and the need to safeguard sensitive material. As shown by the trial of David Shayler the protection of sensitive material can interfere with a defendant’s right to a fair trial. Although David Shayler’s appeal against his conviction<sup>72</sup> failed it demonstrated the limitation of the rights of defendant when national security issues are claimed. In his trial witnesses were screened and not named in public. Further the defence was required to give the court advance notice of any evidence and not permitted to cross-examine certain witnesses as to their credibility. The cumulative effect of the court’s rulings can be said to have denied David Shayler a fair trial. It is essential that the correct balance is struck between the protection of the rights of a defendant and national security in criminal proceedings.

## **CONCLUSION**

The Law Commission considers a fundamental aspect of this review is its open, public consultation that it believes “is crucial to ensuring public confidence in our provisional conclusions”<sup>73</sup>. Despite this consultation the Consultation Paper does not inspire confidence with many of the provisional conclusions. As set out in this response, some conclusions,

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<sup>72</sup> R v Shayler [2003] EWCA Crim 2218.

<sup>73</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230, Para 1.9.

such as Provisional conclusion 14 regarding the exemption of legal advice, are welcome, but many proposals for reform are of concern, in particular provisional conclusions in respect of the Official Secrets 1989. In its examination of the 1989 Act the Law Commission fails to consider the role of public interest disclosures in exposing iniquity on the part of government or review any material on whistleblowing.

Further Chapter 6 of the Consultation report demonstrates a misunderstanding of the Human Rights Act 1998 and relevant human rights case law. An example is in paragraph 6.26 when the Law Commission comments: “This analysis will be crucial in ensuring that our options for reform are compatible with the European Convention on Human Rights”. This confusion results in an ill-founded Provisional conclusion that the right to freedom of expression does not mandate a public interest defence. It is argued that Law Commission has not achieved its aim to ensure the compatibility of its proposals for reform with relevant human rights by failing to recommend the restoration of a public interest defence.

The main failure of this Consultation Paper is that Chapter 7 fails to recommend the restoration of a public interest defence. As noted by the House of Commons Committee of Public Accounts in its 2016 report, the Cabinet Office has accepted “whistleblowers can help to identify systematic problems in organisations and across government.”<sup>74</sup>, but risk their career to raise important concerns. A whistleblower also faces prosecution under the Official Secrets Act 1989 and there is nothing in these proposals that will protect an individual who makes an unauthorised disclosure in the public interest. Effective whistleblowing policies should be in place to allow an individual to raise their concerns, but there should be a statutory public interest defence available to a whistleblower as a last resort.

The Law Commission undertook an extensive review of legislation in other jurisdictions. Although the relevant provisions are set out in Appendix A, there is little mention of them in the presentation of the provisional conclusions, except as justification to increase penalties for the disclosure of information in Chapter 3 or the dismissal of the Canadian model in Chapter 7. This failure to engage with comparative material is unfortunate as the material does provide some useful examples of good practice. For example, the Canadian Public Servants Act 2007, set out in the Appendix,<sup>75</sup> provides protection for public sector employees making disclosures classed as wrongdoing in respect of the public sector. Wrongdoing includes misuse of public funds, gross mismanagement and an act or omission that creates a substantial danger to life, health or safety of persons or the environment. The Preamble states the conflict all whistleblowing involves:

“Public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the Canadian Charter of Rights and Freedoms and that this Act strives to achieve an appropriate balance between those two principles.”

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<sup>74</sup> House of Commons Committee of public Accounts *Making a whistleblowing policy work: progress update*, 2016 HC 602, p 9.

<sup>75</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230, p 238, Para A.149.

It is unfortunate that the Law Commission has not undertaken the same approach in its review of how to protect official data. The intention of the Law Commission in its Consultation Paper was to consider whether existing legislation “effectively protects official information”, and not how to protect public interest whistleblowers, but its other aim was to assess whether the provisions strike “an appropriate balance between transparency and secrecy”<sup>76</sup>. The Law Commission have proposed reform of the existing official secrecy legislation, but its recommendations place an emphasis on secrecy and deny transparency.

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<sup>76</sup> Law Commission *Protection of Official Data: A Consultation Paper*, Consultation Paper 230, Para 1.7.