



Bar Council and Criminal Bar Association response to the Protection of Official Data consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) and the Criminal Bar Association to the Law Commission's consultation paper on the Protection of Official Data.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
5. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
6. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most

¹ http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf

practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Overview- Chapters 2 and 3 - Official Secrets Acts 1911, 1920, 1939 and 1989

7. Before responding to the provisional conclusions and consultation questions set out in chapters 2 and 3, we will set out our overall response to the conclusions at 2.151 and 3.161.

8. The principal submission of the Bar Council is that the remodelled offences contrary to the OSA 1911 and 1989 should respectively retain the element of proof of actual prejudice, or risk of prejudice, to the interests of the state (or national security) and actual damage, or risk of damage, to security/intelligence/defence/international relations.

9. In our view the proposal to shift the focus of the offences away from the result (or potential result) of the unauthorised disclosure (3.161) will lead to significant adverse consequences. While there are inchoate offences with similar construction in the Fraud Act 2006 and other statutes, they are not parallels. They deal with defendants who are - by definition - engaged in dishonesty, or some other form of fundamentally criminal behaviour, and therefore remain rooted in the misconduct, which the criminal law is seeking to address. In the context of official secrets it is only the actual prejudice/damage, or risk thereof, to the state which justifies the intervention of the criminal law, as otherwise D's activities may be perceived as innocuous or even laudable.

10. A disconnect between the gravamen and the definition of the offence means that the context and seriousness of the offences may be lost, both before tribunals of fact and before the general public. Offences may appear trivial when they are not, or indeed may be trivial but appear more serious than they are. This in turn leads to another difficulty: if the tribunal of fact is not required to find that there has been any risk of prejudice or damage, the sentencing exercise becomes a second fact-finding mission, because in most cases fixing the appropriate sentence for these offences will require a determination of whether there was any risk of prejudice or damage.

11. As a matter of principle, if the Crown cannot call evidence of actual prejudice or damage, it is questionable whether the public interest requires that there should be a prosecution for these offences. In practice, if the Crown is required to prove that the defendant had reasonable grounds to believe that there may be an adverse

consequence, or knew that a disclosure was capable of causing an adverse consequence, it will call evidence of that adverse consequence before the tribunal of fact, if it exists. That is the most effective and commonly deployed means of proving a defendant's mental culpability in respect of the result element of a crime. We assume that the reason for proposing an offence without the need to prove prejudice in the remodelled OSA 1911 is akin to that put forward to justify removing the element of "damage" in the remodelled OSA 1989, although that has not been explicitly argued in the consultation.

12. If an adverse consequence has been prevented, but the defendant had taken more than merely preparatory steps towards it, it will always be possible to prosecute for an attempt. But if there is simply no way to prove that there has been or would have been an adverse consequence, or a risk of such, we take the view that there should not be grounds to prosecute.

13. Whereas if the state had to prove objective prejudice, or risk of prejudice to national security, a prosecution would always be justifiable (subject to consideration of the public interest test in the Code for Crown Prosecutors in individual cases). Likewise in the context of chapter 3, the element of "damage" would always ground and justify a prosecution.

Chapter 2: The Official Secrets Acts 1911, 1920 And 1939

Provisional conclusion 1 - We provisionally conclude that the inclusion of the term "enemy" has the potential to inhibit the ability to prosecute those who commit espionage. Do consultees agree?

14. Yes

Provisional conclusion 2 - Any redrafted offence ought to have the following features:

- (1) Like the overwhelming majority of criminal offences, there should continue to be no restriction on who can commit the offence;**
- (2) The offence should be capable of being committed by someone who not only communicates information, but also by someone who obtains or gathers it. It should also continue to apply to those who approach, inspect, pass over or enter any prohibited place within the meaning of the Act.**
- (3) The offence should use the generic term "information" instead of the more specific terms currently relied upon in the Act.**

Do consultees agree?

15. Yes.

Consultation question 1 - Should the term “safety or interests of the state”, first used in the 1911 Act, remain in any new statute or be replaced with the term “national security”?

16. The current wording should be replaced with ‘national security’. It is a concept more readily capable of definition and it also serves to narrow the scope of the offence.

Consultation question 2 - Do consultees have a view on whether an individual should only commit an offence if he or she knew or had reasonable grounds to believe that his or her conduct might prejudice the safety or interests of the state / national security?

17. The remodelled offence removes an important element from the existing offence, namely proof of objective prejudice to the interests of the state (or national security). This approach mirrors the absence of ‘damage’ in the remodelled OSA 1989 offences. Presumably there have been similar concerns expressed about the difficulty in proving prejudice, although the reasoning is not explained (see Provisional Conclusion 9).

18. The gravamen of the offence is the prejudicial effect on national security rather than D’s act which may otherwise be innocuous. If the fault element includes D “having reasonable grounds to believe that his conduct might” have a prejudicial effect, it is almost inevitable that in practice the Prosecutor will seek to prove the risk of prejudice from which the inference of belief can be drawn – in which case the objection to proof of any objective risk of, or actual, prejudice has less force. It may be that the prosecution would be able to prove that a certain type of conduct has the capacity to cause prejudice by reference to established categories of harm which can be adduced in evidence in an open format. Such categories of harm are commonly referred to, for example, in inter partes public interest immunity applications and open summaries of reasons for withholding disclosure of material in Closed Material Procedures (for example those conducted before Special Immigration Appeals Commission). The requirement to adduce some evidence that the conduct engaged in had the potential to lead to one of a number of identified types of harm/damage/prejudice would also be likely to increase public confidence in the use of the offence by illustrating its necessity and/or utility. It would also be more likely to lead to tribunals of fact treating allegations with due seriousness if some evidence of context was required to be adduced. Finally, it would be preferable for a jury rather than a judge to determine whether as a matter of fact there was a prejudicial effect – such will often be the most important feature in the sentencing exercise.

19. It is submitted that at the least the prosecutor should be required to prove an objective “risk of prejudice” unless there are compelling reasons to the contrary. It may be that this evidentially presents a low threshold.

20. Alternatively, on the basis that the offence does not contain an element of objective prejudice:

21. The first fault element is “knowledge” of potential prejudice. If the remodelled offence does not include an element of objective prejudice, then it must be envisaged that a jury could be invited to convict on the basis that D knew that his conduct might have a prejudicial effect when in fact it did not. Knowledge of a non-existent fact is a difficult concept to grasp. Indeed the House of Lords decisions in *R v Saik* 2007 AC 18 and *R v Montilla* 2004 WLR 3141 – cases which concerned money laundering offences under the Criminal Justice Act 1988 and Drug Trafficking Act 1994 (see Smith & Hogan 14ed at para 5.2.5) – confirm that knowledge in a criminal statute equates to true belief, that is belief in something which objectively exists. This contrasts with the second fault element – “reasonable grounds to believe”: that is, belief which can fall short of true belief. D can believe a circumstance, including where there are objectively reasonable grounds to support that belief, but where that circumstance does not exist. It is not clear whether this second fault element is wholly objective (see *R v Keogh* [2007] EWCA Crim 528) or has a subjective element (see *R v Saik* at p.42-43 in respect of reasonable grounds to suspect) – i.e. there were reasonable grounds to believe and the defendant did believe.

22. The analogous offence cited in the consultation paper at para 2.135, namely criminal damage, requires the defendant to “intend” to endanger life, notwithstanding that no-one’s life was in fact at risk. The reasoning of the Court of Appeal decision in *R v Parker* [1993] CLR 856 may lead to a different conclusion, if applied to “knowledge” of potential prejudice. It is submitted that “intending that his conduct might prejudice” is to be preferred, together with an alternative fault element of recklessness as to the result, in accordance with *R v G* [2014] 1 AC 1034. In the hierarchy of mens rea, there would appear to be little difference between intention and knowledge and so the fault element of the offence will not be diluted.

23. This formulation of the mens rea is consistent with the mental element of an inchoate commission of the offence, viz. conspiracy (but perhaps not attempt – see Smith & Hogan 14ed at paras 13.2.1.3 and 13.3.3.7), which, again in accordance with *Saik*, would require an intention as to the result which as a matter of definition will not have existed at the point of the agreement.

24. In respect of the elements of the remodelled offence at paragraph 2.151, it is suggested that (4) does not materially add to (2). The deletion of element (4) does not dilute the seriousness of the offence or make the offence easier to commit or for the prosecutor to prove. In (2) ‘knowledge’ and ‘reasonable grounds to believe’ can be replaced by ‘intention’ and ‘recklessness’.

Consultation question 3 - Is the list of foreign entities contained in the Espionage Statutes Modernization Bill a helpful starting point in the domestic context? Do consultees have views on how it could be amended?

25. Yes. The list of entities and organisations is a helpful starting point. It would not be unreasonable under (4) for the prosecution to be able to prove this element by reference to a non-exhaustive list of terrorist organisations designated by the state, in addition to defining “foreign power” so as to include, for example, nation states. Presumably there will be no requirement for the prosecution to prove which foreign power/organisation would benefit by the commission of the offence. It is agreed that in the domestic context the definition should refer to UK residents.

Provisional conclusion 3 - We have provisionally concluded that an offence should only be committed if the defendant knew or had reasonable grounds to believe his or her conduct was capable of benefiting a foreign power. Do consultees agree?

26. Yes. It is not clear though how it is that the prosecution will prove this element of the offence. Is it intended, for example, that it will be sufficient for the prosecutor to lead evidence of the types of behaviour which it might reasonably be considered capable of benefitting foreign power? See also the response to consultation question 2 in respect of knowledge and true belief in the event that it is accepted by the prosecutor that there was no actual or potential benefit to a foreign power.

Provisional conclusion 4 - The list of prohibited places no longer accurately reflects the types of site that are in need of protection. Do consultees agree?

27. Yes.

Consultation question 4 - We consider that a modified version of the approach taken in the Serious Organised Crime and Police Act 2005 is a suitable alternative to the current regime. The Secretary of State would be able to designate a site as a “protected site” if it were in the interests of national security to do so. Do consultees agree?

28. Yes.

Provisional conclusion 5 - There are provisions contained in the Official Secrets Acts 1911-1939 that are archaic and in need of reform. Do consultees agree?

29. Yes

Provisional conclusion 6 - We consider that the references in the Official Secrets Acts 1911 and 1920 to sketches, plans, models, notes and secret official pass words and code words are anachronistic and in need of replacement with a sufficiently general term. Do consultees agree?

30. Yes.

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 engaging 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?

31. Yes, in principle. What are the proposed “links”? In CMA 1990, if D is not a UK national, the link relates to where the computer is located.

See, for example, Section 12(4) Bribery Act 2010 -

“(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made –

- (a) a British citizen,
- (b) a British overseas territories citizen,
- (c) a British National (Overseas),
- (d) a British Overseas citizen,
- (e) a person who under the British Nationality Act 1981 was a British subject,
- (f) a British protected person with the meaning of that Act,
- (g) an individual ordinarily resident in the United kingdom,
- (h) a body incorporated under the law of any part of the United kingdom,
- (i) a Scottish partnership.”

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 principle that they ought to be removed or do consultees take the view that they remain necessary?

32. If objective prejudice is not to be retained in the remodelled offence, the principal difficulty identified in proving espionage will be removed. In those circumstances the balance of the offence will not require the cited provisions.

33. In any event the presumption (A) of communication by virtue of visiting the address of, or having contact details for, a foreign agent (section 2(2) of the 1920 Act) is less objectionable than the presumption (B) of (i) obtaining information, (ii) prejudicial purpose and (iii) intention that it may be useful to an enemy, all resulting simply from the fact of communication (section 2(1) of the 1920 Act). (A) and (B) are in different terms: (A) “shall be evidence that” and (B) “shall, unless [the defendant] proves the contrary, be deemed”. (B) is a reverse burden; (A) is arguably not, as recognised in the cited case of Kent and is no more than an iteration of a rule of evidence regarding inferences.

34. The presumption in section 1(2) of the 1911 Act that the defendant can be proved to have had a prejudicial purpose from the mere fact of his “known character” is an archaic proposition, at odds with the bad character provisions of the CJA 2003 and should be removed regardless of its categorisation as a legal or evidential burden and the application of section 3 HRA 1998.

35. It is submitted that these presumptions are no longer necessary.

Provisional conclusion 8 - We provisionally conclude that the Official Secrets Acts 1911-1939 ought to be repealed and replaced with a single Espionage Act. Do consultees agree?

36. Yes.

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?

37. Yes in principle, assuming that the evidence supports the reasoning behind provisional conclusion 9, which is based solely on “preliminary consultations”; the Law Commission is presumably privy to empirical evidence rather than simple assertion. How many prosecutions, which otherwise would have been brought, have been abandoned for this reason as opposed to the inherent sensitivity of the information?

38. We feel it is important to emphasise that agreement with this principle does not lead inescapably to the conclusion that it is necessary to relieve the prosecutor of any burden of proving that conduct engaged in was of a type capable of causing damage (see consultation question 2 above).

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?

39. Yes.

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.

40. The terms of, for example, section 2(2) together with the procedural protections of section 8(4) appear on their face to be sufficient to enable a prosecution to be brought. For a meaningful response more detail is needed. If the prosecutor does not

have to prove even the risk of damage, given the breadth of the definition/scope of 'defence' and 'international relations' and 'confidential information', there is no sufficient statutory check on the potential for prosecution.

41. In Fraud Act offences the gravamen of the offence is the dishonest misrepresentation or abuse of position etc. Here the gravamen is the damage or potential for damage to the national interest. There mere fact of disclosure or whistle blowing should not be criminalised (it may of course be subject to civil remedy) unless it has a prejudicial consequence.

42. The proposals at 3.161 do not meet the perceived problem of proving damage in practice. In order to prove that the defendant knew or had reasonable grounds to believe that disclosure is capable of causing damage, the prosecutor will in the ordinary course have to prove the potential for damage. It is from that evidence that the inference of knowledge is often drawn. The practical difference between proving reasonable grounds to believe that disclosure could cause damage and proving that disclosure could cause damage may be less than envisaged. Both involve an objective assessment of potential damage.

43. See consultation question 2 – similar difficulties arise in respect of a jury considering the concept of knowledge of a result in circumstances where that result did not happen.

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?

44. Yes. In practice it is difficult to conceive of circumstances in which there would be scope for such persons to avail themselves of the defence that they did not "know" (as to which see consultation question 2 above) or "have reasonable grounds to believe" in respect of the fault element of the offence.

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?

45. These appear to be matters of process. The Bar Council has no view on whether the identified problems could be resolved by an amendment of the law or changes in the administrative systems by which the law is put into effect.

Consultation question 7 - If 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 1989?

46. The overriding principle should be clarity in the process both as a protection to the affected persons and to the sensitive information. We note that in respect of (2)

there is flexibility in the concept of a 'notified person' and also clarity – if a person countersigns a notification there can be no doubt that he is subject to the relevant provisions.

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?

47. The Bar Council does not wish to express a view on sentencing policy but would say that before any increase in sentence is proposed a clear rationale should be established based on evidence of such offences and of how and why any increase would be necessary to enhance the deterrent effect of the offences.

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 consultees agree?

48. Yes. A defendant must be able to give full instructions to his legal adviser. Whilst a special advocate can operate in discrete areas of evidence/disclosure in criminal proceedings, to deny a defendant proper access to his legal adviser may be in breach of ECHR Art 6(3)(c).

49. The Bar Council has concerns about the suggestion that fully qualified legal advisers with current practising certificates ought to be subject to vetting before being given full access to the material on which to advise their clients. The proviso as to vetting does not appear to be reflected in section 58 of the Investigatory Powers Act 2016. It is not clear whether it is proposed that there would be a panel of pre-vetted lawyers (to which exception may be taken) or a system whereby a suspect has a right to select a legal adviser of his choice, subject to post-selection vetting. The latter course has the potential to result in considerable delay.

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 lawfully in the public domain and widely disseminated to the public. Do consultees agree?

50. The defence appears to be more restrictive than necessary.

51. There is a principled objection to the suggestion that material which has been lawfully disclosed and made publically available (whether widely or not) should thereafter be the subject of a criminal charge on further publication.

52. Further, as a matter of practical application the meaning and proof of “widely disseminated” may be problematic.

53. Accordingly there should be no requirement to prove “wide dissemination” of material which can be proved to be “lawfully in the public domain”. This is consistent with the proposed limitation of the various offences of unlawful disclosure of personal information in the Digital Economy Bill² (see for example Clause 60(2)(a) in respect of the combating of fraud against the public sector).

54. Arguably there should be a subjective element, such as belief on reasonable grounds, as an evidential burden on a defendant.

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.

55. In the absence of any evidence of the prevalence of the unlawful revelation of information under the existing categories, or under categories not currently subject to the 1989 Act, the Bar Council does not have a view.

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?

56. The extent of the evidence that the disclosure of economic information could damage national security (whether or not such is an element of the offence) is not clear.

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 1972 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 who disclosed the information was a British citizen. Do consultees agree?

57. There is force in the proposition in principle. As with the 1911 Act offences (Provisional Question 7), the extent of the required links will need to be considered, whether on a ‘last act’ or ‘substantial measures’ basis.

Provisional conclusion 17 - The Official Secrets Act 1989 ought to be repealed and replaced with new legislation. Do consultees agree?

58. Yes.

Chapter 4 - Wider Unauthorised Disclosure Offences

² HL Bill 122 (as amended on Report 29.03.17)

Consultation question 10 - Do consultees agree that a full review of personal information disclosure offence is needed?

59. The Law Commission amply makes out the case for a full review of personal information disclosure offences. There is at present a lack of uniformity, coherence or strategy to the current plethora of offences such that the legal landscape is confusing and often unrealised. This confusion is reflected in three inter-related ways: first, a lack of realisation as to the true restrictions on sharing information, and thus an unjustified fear of the liabilities that might arise; second, a consequent reluctance to share information even where the law permits such collaboration; and third, a failure to hold individuals and organisations to account where material is improperly disclosed. A full review is needed to address these problems.

Consultation question 11 - 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?

60. A review of section 55 ought to be encompassed within the overarching review of personal information disclosure offences.

Consultation question 12 - Do consultees have a view on whether national security disclosure offences should form part of a future full review of miscellaneous unauthorised disclosure offences?

61. The national security disclosure offences are very different in nature to the personal information disclosure offences: the information in question will be within the knowledge of a smaller number of individuals; such individuals will often have access to the sensitive information because of their particular training or appointment, and thus will have a realisation of its importance; the disclosure of material will therefore entail a higher level of culpability; and the consequences of unauthorised disclosure may be far greater. However, there is scope for a consistency of approach across the spectrum of disclosure offences, for example there is no obvious reason why a common approach to the proof of objective damage should not be adopted (subject to exceptions such as section 4 Official Secrets Act 1989) and common elements should have the same meaning (for example the definition of recklessness in the Uranium Enrichment Technology Regulations is out of step with the House of Lords' interpretation of statutory recklessness in *G* [2004] 1 AC 1034). The national security disclosure offences would therefore merit attention within a wider review of the personal information disclosure offences but any such review should give careful and proper attention to the special features of these offences that set them apart.

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?

62. Yes. The Protocol is the product of a specific instance where high profile arrests were made during the course of an investigation. The cause for concern was politically embarrassing “leaks” of confidential information from the Home Office. However, the Protocol outlines a process that must be followed “...before any investigation for an offence contrary to the Official Secrets Acts can be initiated...it applies to all instances of unauthorised disclosure” [emphasis added: see paragraphs 5.1 and 5.17 of the consultation document]. One of the stated aims of the Protocol was its versatility and to ensure the necessary sensitivity where a high profile public figure (such as a Member of Parliament) is the subject of an investigation. One concern is that the Protocol may not be sufficiently versatile where the investigation is not concerned so much with strategic political “leaks” as with criminal disclosure intended to compromise national security. Any “gateway process” must not lose sight of this far more serious dimension and must allow for a swift and robust response where appropriate.

Consultation question 13 - Do consultees have a view on whether defining the term “serious offence” and ensuring earlier legal involvement would make the Protocol more effective?

63. The term “serious offence” should not be defined because there may be many different justifications for investigating a case in accordance with the Protocol. Examples include the incremental damage caused by a series of unauthorised disclosures (where the specific instances of unauthorised disclosure would not themselves seem so serious); the persons involved in the unauthorised disclosures, particularly where an individual has access to information by reason of special training, appointment or circumstances; the persons to whom the information is disclosed; the means by which the information is disclosed; or where the individual concerned is the holder of elected office. Rather than defining “serious offence”, a sensible course would be to outline factors that should be taken into account by the decision maker when determining whether an offence is sufficiently serious. This would allow decisions to be made on a case by case basis.

Consultation question 14 - Do consultees have views on how the Protocol could be improved?

64. Our experience of the operational demands which underpin the Protocol is limited. However, one suggestion is that the Protocol should be more easily adaptable and should reflect the wide range of situations to which it could be applied, for example there should be the option to involve the police and Crown Prosecution Service from the outset.

Provisional conclusion 19 - The power conferred on the court by subsection 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 safety (the term used in the 1920 Act) is not prejudiced. Do consultees agree?

65. No. In particular:

- a) It is questionable whether a statutory test is necessary in light of the common law jurisprudence;
- b) The common law retains the flexibility that may be missing from the proposed statutory test;
- c) The proposed test seems more stringent than the common law test, which would surely be an unintended consequence and could confuse the legal landscape;
- d) The proposed statutory test may be difficult to apply in the following circumstances:
 - i) Prejudice to national safety may be immediate and direct or may be incremental and indirect. A stringent test such as that proposed may fail to adequately protect against incremental and indirect harm;
 - ii) Where the safety of a particular community (as opposed to “the nation”) would be prejudiced, whether it be a geographical, political, social or racial group;
 - iii) Where the prejudice may relate to sensitive operational techniques. This may be an example of indirect and incremental harm;
 - iv) Where the prejudice would be faced by a group outside of the nation, for example where the information in question would compromise the security or economic integrity of an ally.

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?

66. Particular care is required in this area. Paragraph 12 of the 2012 Attorney General’s Guidelines: Jury Checks (Archbold 2017 Supplem. A-286) provides that information revealed in the course of an authorised check must be considered within the normal rules on disclosure. This would ensure that any material that might reasonably be considered capable of undermining the prosecution case or assisting the defence case would be provided to the defence (subject to public interest immunity considerations). Conversely, the absence of a right to challenge the decision to conduct a jury check, or the extent of the check, raises questions as to what benefit there can be in routinely sharing such information. The proposed reform would have to be carefully justified together with guidance on the use that could be made of any disclosed information.

67. A defendant is entitled to trial by a jury picked at random. Jury checks are a legitimate and proportionate exception in exceptional circumstances. But the exception must be made out to the satisfaction of the trial judge (who will inevitably be a High Court or Senior Circuit Judge). If the defence take objection to the jury checking – eg. because they contend that no issues of national security arise and that any restriction on random selection violates Article 6 ECHR – then the trial judge should determine that issue as if it were a PII issue under the principles set out by the House of Lords in *R v H & C* [2004] UKHL 3.

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?

68. Yes. This is an area that is likely to be encountered in the courts with increasing frequency. Clear guidance as to how to deal with such situations is required.

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?

69. The offences contrary to the OSA 1989 are not in breach of Article 10. The potential engagement of Article 10(2) recognises that in a democratic society there is no absolute right to disclose state secrets.

70. The consultation document understandably places considerable reliance on the House of Lords' decision in *R v Shayler* [2003] 1 AC 247.

71. The central issue is proportionality. Lord Bingham at paragraph 26 identified the "acid test" as "whether in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve". The conclusion reached (at paragraph 36) was that the statutory safeguards contained within the OSA 1989 (principally *per* Section 7 – authorised disclosures, together with the availability of judicial review) were sufficient and effective so as not to require a public interest defence to ensure the Act was ECHR compliant. Lord Hope (at paragraphs 50-51 and 70) expressed doubt whether authorisation for disclosure would have been granted in this case if Shayler had sought it. Lord Bingham expressed no more than the "hope" that the prescribed authorised disclosure under the OSA 1989 would be effective.

72. Lords Bingham (at paragraphs 25 and 36) and Hutton (at paragraphs 93-95) placed considerable reliance on Shayler's status as a member of the security service, signing declarations on entering and leaving the service, and his acknowledgement

thereby that his post carried “duties and responsibilities”. In that regard there is a significant difference between, on the one hand, members of the security and intelligence services (i.e. Shayler) and duly notified persons (section 1(1)) and, on the other hand, current or former Crown servants or government contractors (sections 2-4; sections 2 and 3 are in similar terms to section 4 as far as is relevant here), whose contractual duties in this regard may be less onerous.³ Shayler, it appears, qualified under both categories of employment. The House of Lords therefore did not directly address the position of a Crown servant or government contractor *simpliciter* or journalists or others who come into possession of secrets in breach of Section 5.

73. It is also of note (Lord Hope at paragraphs 41 and 45) that the OSA 1989 was not drafted so as to be compliant with Article 10(2). The Act predated the Human Rights Act 1998 albeit that the United Kingdom ratified the ECHR in 1951.

74. Lord Hope (at paragraph 61) emphasised that: “A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them”.⁴ His Lordship also acknowledged the wide margin of appreciation which is afforded the state in assessing what is necessary in order to meet the legitimate aim of advancing national security (paragraphs 68 and 80).

75. The Grand Chamber in *Guja v Moldova* 2011 EHRR 16 at paragraph 74-78 identified the factors relevant to assessing the proportionality of the restriction on a civil servant’s Article 10(1) rights. It is of note that they are predominantly fact specific – the public interest in the disclosed information, its authenticity, the damage caused by the disclosure and the motive of the employee – and did not feature prominently in the speeches in *Shayler*. Indeed they may well be some of the issues which a jury would be asked to consider in the context of a public interest defence.

76. It is suggested that the decision on the merits (as opposed to the identification of the applicable principles) of the Grand Chamber in *Guja v Moldova* 2011 EHRR 16 is of limited assistance. The applicant himself (a public prosecutor) was not subject to criminal prosecution. He disclosed the commission of a serious criminal offence (corruption in the office of the public prosecutor) and there was virtually no damage which was suffered as a result of the disclosure. The case is not necessarily analogous to factual scenarios which will inform the compatibility of the modified official data offences. As the consultation document (paragraph 6.63) observes it is not entirely clear whether the lack of any procedure for internal reporting itself rendered the

³ The “strong” duties on a state prosecutor (not it seems a member of the security services) were relevant to the decision in *Guja v Moldova* 2011 53 EHRR 16 at paragraphs 70-71

⁴ See also *Guja v Moldova* 2011 53 EHRR 16 at paragraph 69(i): “... the need for any restrictions must be established convincingly.”

restriction on disclosure incompatible with Article 10(2). However it does appear that the opinion of the Grand Chamber was that the unavailability of “effective means of remedying the wrongdoing which he intended to uncover” was indeed a condition precedent to the need to consider the five factors relevant to the particular disclosure made. There can be no other sensible reading of the words “last resort”. Provided that an effective alternative scheme (which itself could be challenged by judicial review as per the authorisation scheme) were to be in existence, there would be no need to examine the particular disclosure made. It could be argued that the particular disclosure would need to be considered when evaluating whether in a given case the prescribed alternative was effective – as was done in *Bucur v. Romania*. One issue to consider is in what forum - and how – the effectiveness of the alternative procedure is to be determined in any given case, necessarily after the disclosure had been made.] Whether as a preliminary point in the Crown Court or as a reviewable certification by the Attorney-General before proceedings can be commenced.

77. It cannot be said that compliance with Article 10 *mandates* a public interest defence in the terms of Provisional Conclusion 22. The success of a challenge may turn on the factual circumstances underpinning the alleged offence and the effectiveness of the reporting procedure (such as to the Investigatory Powers Commissioner) enacted in place of Section 7 OSA 1989.

Chapter 7: Public Interest Defence

Overview

78. At its heart the debate about the need for a public interest defence and the efficacy of any alternative referral procedure is one of policy, as recognised at paragraph 7.1: whether in a democratic society the state should prevent and/or punish by criminal (as opposed to civil) sanction the disclosure of information in circumstances where there is a genuine public interest in its wider dissemination in order to hold the state to account for illegality, misconduct or malpractice. The Bar Council does not express a view as to the ultimate issue as to whether as a matter of policy the defence ought to be included in some or all of the remodelled offences.

Provisional conclusion 23 - The problems associated with the introduction of a statutory public interest defence outweigh the benefits. Do consultees agree?

79. It is submitted that some of the factors cited against the public interest defence have been overstated.

80. The concern that the citizens would “have no way of knowing” whether a prospective jury would accept an objective or subjective public interest defence (paragraphs 7.32, 7.35, 7.37 and 7.52) is inherent in the adversarial jury system where every case is fact specific and the finders of fact are randomly selected citizens whose backgrounds and opinions are unknown. Every person has to regulate their behaviour

in accordance with the law which, if it is to be enforced, must be sufficiently certain (see below). No defendant can know in advance how a potential juror will retrospectively assess his conduct or determine other objective facts about which the defendant has no control.

81. It is submitted that it is wrong to state that it would be “impossible” for a jury to reach a just conclusion when evaluating a public interest defence (paragraph 7.52). No empirical studies or academic opinion is cited to support the proposition. The issue of whether a disclosure is made in the public interest would be determined on an assessment of the relevant evidence which would be called and challenged. It should not be elevated into a special category of evidence. It is the experience of criminal practitioners that jurors routinely grapple with technical and complicated concepts relating to financial, medical and scientific evidence in circumstances where experts disagree. Parliament could prescribe categories of behaviour or circumstances, of which disclosure would be in the public interest; see for example Section 43(B)(1) Employment Rights Act 1996 at paragraph 7.19 and below. Although the statutory whistle blowing provisions do not apply to members of the security and intelligence services and military personnel (paragraph 7.22), they do otherwise apply to those in the employment of the Crown, who are and will continue to be subject to the OSAs and any replacement statutory regime.⁵

82. Parliament has relatively recently enacted a public interest defence (albeit not yet in force) to Section 55 of the Data Protection Act 1998 (paragraph 7.13).⁶ It is not known whether during the passage of the amending legislation any similar argument was raised as to the “impossibility” of a jury grappling with the concept.

83. However it may be of more than historical interest that in libel trials conducted before a judge and jury, where the defendant pleaded the common law defence of “honest (or fair) comment on a matter of public interest”⁷, it was for the jury to determine whether the words used amounted to honest comment and for judge to decide the public interest test.⁸ The rationale for that division of responsibility is not immediately apparent. Section 4 of the Defamation Act 2013 provides that it is a defence for the defendant to prove that the relevant statement complained of was “... on a matter of public interest” and that “the defendant reasonably believed that

⁵ Section 191 Employment Rights Act 1996

⁶ Whilst the Data Protection Directive 95/46/EC did not require the enactment of a criminal offence for the unauthorised disclosure of data (paragraph 7.10) it did provide that one of the grounds on which disclosure (or processing) can be lawful is that it is “necessary for the performance of a task carried out in the public interest” (Recital 30 and Article 7(e))

⁷ The common law defence was abolished and replaced by section 3 of the Defamation Act 2013 – the new defence of honest opinion does not contain a public interest element.

⁸ Gatley on Libel and Slander 12ed 13-32

publishing the statement complained of was in the public interest”.⁹ It is therefore both an objective and subjective test, but is not further defined. Most libel trials are now tried by a judge alone; the 2013 Act, in respect of those cases tried by a jury, is silent on the scope of the issues to be determined by the jury. The trial of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, which effectively established at common law what became the Section 4 defence, was tried by a jury. It was for the jury to determine any dispute of fact and for the judge then to determine whether on those facts as a matter of law the publication was subject to qualified privilege (which was the origin of the public interest defence).¹⁰

84. Whilst the need for confidentiality on the part of members of the security and intelligence agencies is undoubtedly an important factor in considering the merits of a public interest defence, the authority of *A-G v Blake* [2001] 1 AC 268 needs to be considered in its context (paragraph 7.42). The citation from Lord Nicholls' speech is in reference to the confidentiality undertaking which Blake signed on commencing employment with the SIS which he then breached by egregious disclosures. The 1989 OSA does not impose an “absolute” prohibition on disclosure in respect of other Crown employees or contractors, against whom the element of ‘damage’ (currently) has to be proven. Also it may not be the case that every contractor signs such an undertaking; certainly journalists who would be liable under Section 5, do not.

85. It is not accepted that a public interest defence will inevitably offend against the certainty rule (paragraph 7.50 et seq). The requirement, in respect of the ingredients of an offence, is “for sufficient rather than absolute certainty ... no-one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it”.¹¹ Different considerations may apply between ingredients of an offence and a statutory defence and again depending on whether the defence imposes an evidential or legal burden on the defendant. The defence could be subject to further statutory definition, for example setting out relevant categories as per the whistle blowing provisions (see paragraph 7.19).

86. The risk of conflation between a public interest defence and the public interest test in the Code for Crown Prosecutors is limited. The tests are different and it is not clear whom it is suggested is likely to be confused by them. The decision of the Crown to institute criminal proceedings is not a matter which can be litigated before a jury. The limited circumstances in which a challenge can be raised are via an application for judicial review or during an application to the trial judge to stay the proceedings on the grounds of an abuse of the process of the court.¹² The prosecutor is required

¹⁰ Gatley on Libel and Slander 12ed 34-19

¹¹ *R v Rimmington; R v Goldstein* [2006] 1 AC 459 at paragraph 33

¹² *A v R* [2012] EWCA Crim 434 at paragraphs 80-84

under the Code to have regard to seven specified questions, most of which are far removed from the circumstances in which a relevant disclosure of information may be justified.¹³ The prosecutor, prior to considering the public interest test, will already have concluded that there is a realistic prospect of conviction at the evidential stage of the decision whether to prosecute.¹⁴ That stage will have included an assessment of the strength of the merits of a public interest defence.

87. The 'floodgates' argument (paragraph 7.63) can be overstated. In respect of the defence pursuant to Section 55 of the Data Protection Act 1998, stakeholders have confirmed that the defence is pleaded very rarely (paragraph 7.12). Whilst there is often likely to be some causal link between disclosure and the existence of a public interest defence that will not always be the case, for example where financial reward is the motivation for the disclosure.

88. The limited empirical evidence from Canada and Denmark – jurisdictions which have enacted a public interest defences in official secret cases – suggest that it will only be rarely, if at all, where the need will arise for reliance on the defence.

89. There is understandable concern over a purely subjective public interest defence, which may allow the misguided whistleblower to reveal information which is not in the public interest (paragraphs 7.43 - 7.49). That concern could be allayed to some extent by enacting a defence that incorporates both a subjective and an objective element, such as "D believed on reasonable grounds that the disclosure was in the public interest". A similar formulation is to be found in Section 78 of the Criminal Justice and Immigration Act 2008 in respect of the offence in Section 55 of the Data Protection Act 1998 (see paragraph 7.9 and 7.13). It is not known whether the relevant stakeholders have provided the Law Commission with an explanation as to why this provision is not yet in force. See also Provisional Conclusion 26 below.

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?

90. It is understood that this conclusion addresses Section 5 OSA 1989. The issue of whether journalists, as procurers of information, should be afforded special protection by a public interest defence which is not available to those who disclose the information, is essentially a question of policy.

91. A public interest test could be subject to exemptions to meet the concerns expressed by Lord Justice Leveson (paragraph 7.70), namely that it is not in the public interest that disclosure is made as a result of the commission of prescribed criminal

¹³ Code for Crown Prosecutors 7ed January 2013 paragraph 4.12(a)-(g)

¹⁴ Code for Crown Prosecutors 7ed January 2013 paragraphs 4.4-4.6

behaviour such as bribery or blackmail. In this context issues surrounding the obtaining of information by simple theft may not be easy to resolve.

92. Parliament has already addressed the issue of journalists in the context of a public interest defence in Clause 44(2)(i) of the Digital Economy Bill¹⁵ relating to the disclosure of personal information in respect of public services and utilities, in cases:

“consisting of the publication of information for the purposes of journalism, where the publication of the information is in the public interest.”

93. “Public interest” is not defined (but see PC26 below). In addition, in order to qualify for any public interest protection, journalists would have to show that they had conducted, to the best of their ability, due diligence to ensure that they had satisfied themselves that the whistleblower had, as far as reasonably possible, tried their best to comply with all of the statutory requirements before publication. There is no definition of “journalism” or “journalist” in the Bill, which in the context of data disclosure may prove problematic.

94. If no statutory public interest defence for journalists is created, then it is likely that Article 10 will be invoked on a case by case basis which creates the very same uncertainty that the Law Commission predicts from a statutory defence.

Consultation Question 15- We welcome views from consultees on the effectiveness of the Civil Service Commission as a mechanism for receiving unauthorised disclosures.

95. The Bar Council is not in a position to comment on the effectiveness of the Civil Service Code and Commission. However there appears to be force in the expressed concerns over the fact that there is no appeal mechanism from the Commission’s decisions, that its procedures are seldom invoked and that there is no legal obligation on the state to follow its recommendations.

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 investigate the matter and report their findings to the Prime Minister. Do consultees agree?

96. It is not clear whether the individual is required to escalate his or her concerns through the three tiers or whether it is proposed that an approach can be made directly to the Investigatory Powers Commissioner. There is a risk that the three-tier procedure will be or will appear to be cumbersome and over-bureaucratic. Any system that

¹⁵ HL Bill 122 (as amended on Report 29.03.17)

inevitably involves considerable delay may be vulnerable to challenge on the basis that it is not an effective method for ensuring compliance with the proportionality requirements of Article 10.

97. If the “last resort” test provides inadequate protection of the public interest in disclosure of abhorrent official conduct there should be some means of determining that issue in advance of disclosure, rather than requiring the individual to choose between the risk of prosecution or suppressing information about potentially very damaging conduct (such as grave breaches of international humanitarian law, war crimes or systematic crimes against children). A fast-track application to a Commissioner would provide an effective and proportionate route in the few cases where this is likely to arise. Perhaps such a process could be available for journalists (especially editors) when there are reasonable grounds to believe that the information has been obtained directly or indirectly from a person under a strict liability duty of confidentiality.

98. In order for there to be confidence in the role of the Investigatory Powers Commissioner in this context, we take the view that the role should include a power to authorise disclosure of the protected material (or a gist thereof), and to issue a certificate to the effect that any disclosure outside such authorisation has been deemed by him/her capable of harming the public interest/national security. Such an exercise could take the form of a review of any refusal to authorise disclosure under e.g. the provisions which will replace Section 7(1) of the OSA 1989. This would necessarily be an adversarial process which would be likely to benefit from the assistance of special advocates to the extent that the responding authority (i.e. whoever has previously refused authorisation to disclose) seeks to rely upon material to demonstrate a risk to national security that is outwith the knowledge of the whistleblower – similar to the role of the judicial commissioners in relation to the Investigatory Powers Act 2016. One benefit of this would be to enable clarity prior to the point of publication as to the assessed risk of harm – the whistleblower would be aware that the disclosure has either been deemed capable or incapable of harming the public interest, and the certificate could be used as evidence of either the presence or absence of “reasonable grounds to believe” that such a risk existed. This would also inform any editorial decision as to publication.

Provisional conclusion 26 - The Canadian model brings no additional benefits beyond those that would follow from their being a statutory commissioner who could receive and investigate complaints from those working in the security and intelligence agencies. Do consultees agree?

99. A public interest defence would only be available if the Investigatory Powers Commissioner fails properly to address a concern (see paragraph 128).

100. The potential for anonymous disclosures exists whatever regime operates.

101. As to paragraph 7.129(2), most if not all potential whistleblowers will be reluctant to publish or disclose any material. It is reasonable to assume that the safeguard of referral to the Commissioner should satisfy most if not every potential disclosure. However, if a jury were to reject a public interest defence with an objective element, this would serve as a warning to others fully to consider the whether any disclosure of sensitive information was in the public interest. It could also be argued that the effect of a successful public interest defence advanced at trial would enhance the rule of the law in this country and public confidence in both the whistle blowing regime and the jury system.

102. One benefit of the Canadian model is that it promotes confidence in the public as to the disclosure procedure. Whatever the powers of the internal or independent referral bodies, the perception could remain that without the defence the state is not sufficiently open to scrutiny. In a democratic society there may be a need for what Lord Hope described as “injection of a breath of fresh air”, which may only be provided by a statutory defence.¹⁶

103. Consideration should be given as to whether or not further prescriptive criteria could be applied to a public interest defence, which would have the advantage of giving clarity to the law. For example, the Digital Economy Bill¹⁷ at Clause 44(2)(k) lists the following factors which (albeit not expressly stated as such) could constitute the public interest:

- (i) preventing serious physical harm to a person,
- (ii) preventing loss of human life,
- (iii) safeguarding vulnerable adults or children,
- (iv) responding to an emergency, or
- (v) protecting national security.

104. Alternatively the Public Interest Disclosure Act 1998 at section 43B defines a "qualifying disclosure" as any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and 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,

¹⁶ R v Shayler [2003] 1 AC 247 at paragraph 70

¹⁷ HL Bill 122 (as amended on Report 29.03.17)

- (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.

105. The combination of all of these factors should be considered as a non-exhaustive statutory list to be taken into account when deciding upon whether or not it has been in the public interest to make the disclosure.

Provisional conclusion 27 - It should be enshrined in legislation that current Crown servants and current members of the security and intelligence agencies are able to seek authority to make a disclosure. Do consultees agree?

106. Yes.

Provisional conclusion 28 - There should be a non-exhaustive list of the factors to be considered when deciding whether to grant a lawful authority to make a disclosure. Do consultees agree?

107. Yes.

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¹⁸ Prepared for the Bar Council by the Law Reform Committee of the Bar Council