

## RESPONSE TO HOME OFFICE LEGISLATION TO COUNTER STATE THREATS CONSULTATION

Open Rights Group (ORG) is a UK-based digital campaigning organisation working to protect fundamental rights to privacy and free speech online. With over 20,000 active supporters, we are a grassroots organisation with local groups across the UK.

We responded to the Law Commission's initial proposals in 2017.<sup>1</sup> Our response highlighted problems with the breadth of their proposals which could have criminalised the mere handling of material, making journalism impossible in areas of public interest.<sup>2</sup>

We echo the concerns raised by the National Union of Journalists<sup>3</sup>, English PEN, Duncan Campbell,<sup>4</sup> Victoria McEvedy and others on the lack of a public interest defence. We draw your attention to the paper on this topic published by Mishcon de Reya advocating a public interest defence for disclosure.<sup>5</sup>

We welcome many of the changes made by Law Commission to their initial proposal, which we believed would endanger journalism. In their revised proposal, they recommended a public interest defence. We are therefore surprised this has not been taken up.

We are concerned that the proposals may still blur the line between espionage and journalism, by failing to define the kinds of actors, and may reduce protections for journalists against police search.

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1 <https://www.lawcom.gov.uk/project/protection-of-official-data/>

2 <https://www.openrightsgroup.org/publications/law-commission-espionage/>

3 <https://www.nuj.org.uk/resource/journalism-and-espionage-home-office.html>

4 <https://www.theguardian.com/commentisfree/2021/jul/20/proposed-secrecy-law-journalism-spying-home-office-public-interest-whistleblowing>

5 <https://www.matrixlaw.co.uk/news/public-interest-defence-campaign/> and <https://www.matrixlaw.co.uk/wp-content/uploads/2021/03/Introducing-a-Public-Interest-Disclosure-Defence-amended-version.pdf>

5) Do you agree with the Law Commission's proposals with regards to introducing a subjective fault element, as part of offences in sections 1 to 4 of the existing Act, instead of a damage requirement?

No. Demonstration of actual harm is an important protection against excessive charges and attempts to make examples of people.

6) Do you agree that the requirement to prove damage should remain for offences under sections 5 and 6 of the existing Act? If so, why?

Yes. Damage is a sensible test of whether a disclosure is sufficiently serious for a criminal charge.

7) Do you agree that maximum sentences for some offences under the Official Secrets Act 1989 should be increased?

No. The main deterrents against leaking are loss of career, respect of peers, and so on. Criminal sanctions are damaging in any case. It is unclear that criminal sanctions would have any real further deterrence.

8) Do you think there should be a distinction in sentencing between primary disclosure offences - committed by members of the security and intelligence agencies, Crown servants, government contractors and those notified - and onward disclosure offences - which can be committed by members of the public?

Yes. Criminal sanctions should only be available for the initial disclosure. Other parties are not in a position to evaluate what they may acquire, nor are they directly responsible for leaking.

9) Do you agree with the Law Commission's proposed recommendations on how sensitive official material could be better protected during the process of obtaining legal advice?

10) Do you have any other suggestions on how it can be assured that sensitive official information is adequately protected during the process of obtaining legal advice?

Access to justice including legal advice is paramount. Means to safeguard official information must be subservient to the right to choose one's representation. The legal

profession and government should be capable of developing codes of practice, guidance and protocols that deal with the tensions between justice and national security, without resorting to schemes of 'approved' lawyers or similar.

11) Do you have a view on whether the categories of protected information should be reformed?

The categories should certainly be narrowed and relate to risk, rather than the current definitions which are 'catch all' in character.

12) In your view, is there a type of sensitive official information that is not currently protected by the existing Act, but should be in reformed legislation?

No, rather what is in scope should be narrowed.

13) Do you think the extraterritorial ambit of offences in sections 1 to 4 should apply to formerly notified persons, Crown servants and contractors, as well as those currently employed?

No.

14) Do you think the extraterritorial ambit of offences in sections 5 and 6 should be extended to bring into scope British citizens, residents and those with settled status (including those located overseas) when committed abroad?

No.

15) Do you think there is a case for extending the extraterritorial ambit of offences in sections 5 and 6 to all, regardless of nationality?

No. This seems instinctively unfair, and impossible for individuals to understand when they may be subject to UK law. ECHR jurisprudence requires that people can understand what laws apply to them and when their rights may be curtailed. International legal practice should be followed.

16) Do you support the potential creation of a Statutory Commissioner to support whistleblowing processes? If so, why?

This may be a reasonable step, but is not a replacement for a public interest defence, Such a position is open to capture; may not be capable of initiating disclosure when that appears necessary to defend the public interest. A Commissioner cannot be a replacement for public debate and journalistic attention to an issue.

17) Do you have any evidence for why existing government whistleblowing processes would necessitate the creation of a Statutory Commissioner?

No,

18) Do you have a view on whether a Public Interest Defence should be a necessary part of future legislation?

This is completely necessary. Without such a defence, an individual cannot be confident when disclosing law breaking, corruption or incompetence within the secret state. Discussion of such matters is vital when such activity takes place. This is well recognised within international human rights jurisprudence, but is also simple common sense. Sometimes the secret state will develop problems, and responsible disclosure is necessary for the preservation of a healthy, democratic society.

Many OSA prosecutions in the UK have failed at court, despite the lack of a public interest defence, because the motivation of the discloser was exactly that of public interest. The lack of a public interest defence makes the actions harder for the whistleblower, but also encourages governments to believe they are able to prosecute or bully such whistleblowers. This is not an acceptable balance.

19. Do you have any views or evidence you'd like to provide on any of the other final Law Commission recommendations, or the Government's response, in Annex B?

No.