

Protection of Official Data: Information for Consultees

INTRODUCTION

- 1.1 This document seeks to assist stakeholders responding to the Law Commission's Protection of Official Data consultation paper. In particular, it focuses on the following elements of the Protection of Official Data consultation paper:
 - (1) the current scope of the Official Secrets Act 1911 compared to the Law Commission's provisional proposals;
 - (2) the maximum sentence for unauthorised disclosure offences under the Official Secrets Act 1989; and
 - (3) the statutory commissioner model that we provisionally conclude would better serve the public interest than a statutory public interest defence.
- 1.2 First, it is important to say a word about our consultation process. The proposals contained in the Protection of Official Data consultation paper are only provisional; our final recommendations will be influenced by our open public consultation which is ongoing and has now been extended to 3 May 2017 due to the large amount of interest in the project.
- 1.3 As with every Law Commission project, the provisional conclusions and questions in the consultation paper have been informed by rigorous legal research and the expert views of the stakeholders with whom we held discussions prior to public consultation. As the project focuses on official data, it was particularly important for us to understand from government stakeholders what the nature of the perceived deficiencies with the relevant legislation might be. We also met with lawyers who advise the media to ask their opinions and discuss their experiences of the relevant legislation – including the Official Secrets Acts 1911-1989 and the Data Protection Act 1998 – and its impacts upon journalism and the right to freedom of expression. In addition, we held meetings with a number of defence practitioners who have experience of defending those charged with offences under the Official Secrets Acts 1911-1989.
- 1.4 Some have questioned whether there was any meaningful engagement with stakeholders before the formal consultation. As in every Law Commission project, meetings with stakeholders in preparing the consultation paper have been crucial to our understanding of the issues and their significance. In some instances, matters raised by stakeholders led us to deal in particular detail with an issue. In light of comments made to us at a meeting with legal representatives from the media, for example, we realised how important it was to consider carefully the freedom of expression and public interest issues implicated by these offences. We therefore devote entire chapters to each of these topics.

THE CURRENT SCOPE OF THE OFFICIAL SECRETS ACT 1911 COMPARED TO THE LAW COMMISSION'S PROVISIONAL PROPOSALS

The current law and obtaining of information

- 1.5 As we explain in paragraph 2.17 of our consultation paper, section 1 of the Official Secrets Act 1911 creates three distinct offences. Section 1(1)(c) of the Official Secrets Act 1911 creates an offence where any person for any purpose prejudicial to the safety or interests of the state:

obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

- 1.6 It has been widely reported that the Law Commission proposes to expand the ambit of the espionage offence to include not only communicating, but also gathering and obtaining information. As can be seen, however, section 1(1)(c) of the Official Secrets Act 1911 already criminalises obtaining information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy for any purpose prejudicial to the safety or interests of the state. The offence currently criminalises someone who:

- (1) obtains, collects, records, publishes, communicates to any person;
- (2) any secret official code word, password, sketch, plan, model, article, note, document, or other information;
- (3) which is calculated to be or might be;
- (4) directly, or indirectly useful to an enemy;
- (5) the person's purpose is objectively assessed to be prejudicial to the safety or interests of the state.

Example of the current law compared to Law Commission proposals

- 1.7 To illustrate how broad the current law is compared to the Law Commission's provisional proposals, consider the following example:

Company A wins the tender to develop military equipment for the Ministry of Defence. A disgruntled employee of Company B, which lost out on the tender, manages to gather information about the trials of the prototype and the risks they pose for military personnel using the equipment. To undermine the reputation of Company A, the employee of Company B approaches a journalist at a national newspaper with the story. The journalist writes up a story. The decision is made not to publish it, however.

Results under the current law

- 1.8 Under the current law, the journalist in this example may have committed an offence under section 1(1)(c) of the Official Secrets Act 1911. This is because:

- (2) The journalist has *obtained* information, thus satisfying the conduct element of section 1(1)(c) of the Official Secrets Act 1911.
- (3) The House of Lords in a case from the 1960s - *Chandler v DPP* - held that in deciding whether the defendant's purposes were prejudicial to the safety or interests of the state two matters needed to be addressed:
 - (a) The defendant's immediate purpose – to expose the flaw in the system, to expose the MOD flawed tendering process etc - that question involves an assessment of the personal belief of the defendant (journalist). In this example, the journalist obtained the information from the employee of Company B for the purpose of publishing an article about these issues.
 - (b) The assessment of the likely prejudice or potential prejudice to the safety or interests of the state - that question is to be determined by the court itself. The defendant's view as to whether his conduct prejudiced the state is legally irrelevant. Further, "Safety or interests of the state" means the objects of state policy determined by the Crown on the advice of Ministers. Therefore, the defendants' opinion as to whether their purpose was beneficial or prejudicial to the interests of the state is irrelevant. In the example, on an objective determination, it could be said that publication would prejudice the safety or interests of the state as it would pose a serious risk to those using the military equipment. Applying *Chandler*, any potential argument from the journalist that publication would lead to further investment to rectify potential design flaws in military equipment would be irrelevant and therefore inadmissible. Therefore, the journalist has a purpose prejudicial to the safety or interests of the state.
- (4) The information is such that it "is calculated to be or might be or is intended to be directly or indirectly useful to an enemy". The court in *R v Parrot* held that "when the statute uses the word "enemy" it does not mean necessarily someone with whom this country is at war, but a potential enemy with whom we might someday be at war". In this example, information relating to vulnerabilities in the UK's defence capabilities might be directly or indirectly useful to an enemy and would therefore satisfy this element of the offence.

1.10 By virtue of section 8(1) of the Official Secrets Act 1920, the defendant would be liable to a maximum sentence of 14 years' imprisonment on conviction.

1.11 To be clear, the purpose of this example is **not** to suggest that the individuals in the scenario should be prosecuted. It is simply to demonstrate the breadth of the current law.

Result under the Law Commission's provisional proposals

1.12 The Law Commission provisionally proposes redrafting the scope of the offence so that a person commits an offence where he or she:

- (1) makes any sketch, plan, model, or note; collects, records, publishes, or communicates any information;
- (2) knows or has reasonable grounds to believe that his or her conduct might prejudice [the safety or interests of the state / national security];
- (3) knows or has reasonable grounds to believe that his or her conduct is capable of benefiting a foreign power;
- (4) intends thereby to prejudice the [national security/safety or interests] of the United Kingdom or is reckless as to whether the [national security/safety or interests] of the United Kingdom would be prejudiced.

1.13 In many ways, the proposed remodelled offence is narrower than the current law. Under the current law, someone can commit an offence even though he or she had no subjective intention to prejudice the safety or interests of the state. This would no longer be the case under our provisional proposal.

THE MAXIMUM SENTENCE FOR UNAUTHORISED DISCLOSURE OFFENCES UNDER THE OFFICIAL SECRETS ACT 1989

1.14 As we explain in paragraphs 3.180 to 3.189 of our consultation paper, we provisionally conclude that the maximum sentence of 2 years' imprisonment currently available for the offences contained in the Official Secrets Act 1989 is not capable of reflecting the potential harm and culpability that may arise in a serious case. To enable consultees to contextualise the maximum sentence length within the wider scope of unauthorised disclosure offences, we compare the Official Secrets Act 1989 with several other statutes.

1.15 For example, it is an offence punishable by up to two years' imprisonment for an employee of the National Lottery Commission to disclose information that has been supplied by Her Majesty's Commissioners for Revenue and Customs that relates to a person whose identity is specified in the information or whose identity can be deduced from the information. This is the same maximum sentence available for an unauthorised disclosure that, to take one example, damages the capability of the armed forces to carry out their tasks.

1.16 Additionally, we point out that the maximum sentence for the offences in the Official Secrets Act 1989 is low when compared with offences that exist in other jurisdictions that criminalise similar forms of wrongdoing, as suggested by our comparative law research in Appendix A. For example, the maximum sentence for making an unauthorised disclosure in Canadian law under the Security of Information Act 2001 is 14 years' imprisonment.

1.17 We do not, however, propose a maximum sentence of 14 years' imprisonment.

THE STATUTORY COMMISSIONER MODEL AND THE PUBLIC INTEREST

- 1.18 It is important to note that there is not, and never has been, a statutory public interest defence for the offences contained in the Official Secrets Acts 1911-1989. Our analysis of the relevant case law demonstrates that compliance with Article 10 of the European Convention on Human Rights does not require the introduction of a statutory public interest defence. The Grand Chamber of the European Court of Human Rights has held, however, that public disclosure of protected information should be a last resort and that the existence of a robust, independent, internal mechanism to address alleged wrongdoing is key to Article 10 compliance.

A statutory public interest defence

- 1.19 As described in our consultation paper, there are several problems which follow from the introduction of a statutory public interest defence, which:
- (1) erodes the impartiality of the civil service by permitting civil servants to weigh government policy against other values when deciding whether or not to comply with their legal obligations;
 - (2) erodes confidence and trust in the working of members of the security and intelligence service and undermines the willingness of prospective informers to co-operate with the security and intelligence services;
 - (3) encourages risk-taking in relation to others and to national security by allowing those who, however well-intentioned, may not be equipped with sufficient information to understand the potential impact of any disclosure. It may cause far more damage than the person making the disclosure was ever in a position to anticipate;
 - (4) creates legal uncertainty given the amorphous nature of the concept of public interest. This creates the very realistic prospect that a jury may not agree with the individual that disclosure was in the public interest, thereby creating an inadequate means of protection.

The Law Commission's provisional conclusion

- 1.20 Our provisional conclusion is that the public interest is better served by providing a scheme permitting someone who has concerns about their work to bring it to the attention of the independent Investigatory Powers Commissioner, who would have statutory abilities to conduct an investigation and report. The Commissioner must hold or have held high judicial office and could investigate the concern. Importantly, disclosing information to the judicial commissioner would not constitute a criminal offence and there would be a statutory obligation placed upon departments to comply with his or her investigation. The commissioner would report directly to the Prime Minister.
- 1.21 We provisionally conclude that this would better serve the public interest than relying on a statutory public interest defence, as it would ensure concerns could be raised, investigated and ultimately rectified without the risks that follow from making a public disclosure.

- 1.22 In reaching our provisional conclusion, we were influenced by the view expressed by Liberty and Article 19 that “relying on whistleblowing to expose wrongdoing is unsatisfactory and a poor substitute for properly effective structures of accountability, both internal and external.”

Example of the current law compared to Law Commission proposals

- 1.23 To illustrate the differences between a statutory public interest defence and the independent statutory commissioner model, consider the following example:

A member of the Security Service thinks she comes across evidence of collusion between the British Government and loyalist paramilitaries in Northern Ireland. The individual does not wish to bring this matter to the attention of her superiors, so approaches the statutory commissioner.

The statutory commissioner investigates the matter and concludes that there was no such collusion, but rather the Security Service was paying members of various paramilitary organisations to act as informants. The Commissioner informs the member of staff of his findings and reports to the Prime Minister.

- 1.24 If the Commissioner discovered that collusion had taken place, this is something that would be brought to the attention of the Prime Minister and also potentially the Intelligence and Security Committee of Parliament.