Campaign for Freedom of Information

ARTICLE 19

The Law Commission consultation on
Protection of Official Data

Response from

Campaign for Freedom of Information & ARTICLE 19

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Summary

1. This response on behalf of the Campaign for Freedom of Information (CFOI) and ARTICLE 19 deals principally with those proposals in the Law Commission's recent consultation document which involve reform of the Official Secrets Act (OSA) 1989.[1]

2. The CFOI and ARTICLE 19 are extremely concerned about the Law Commission's proposals and the quality of the analysis that supports them. The proposals would substantially and unnecessarily extend the reach of the Official Secrets Act 1989. They would threaten journalists and whistleblowers who release information about danger to the public, abuse of power or serious misconduct. They would go a long way towards turning the clock back towards the discredited section 2 of the 1911 Official Secrets Act.

3. In particular, the Law Commission's proposals (which at this stage are 'provisional') would if adopted:

   - punish those making disclosures that are *unlikely* to cause harm
   - make it a criminal offence to leak information to which there is a public right of access
   - increase the maximum prison sentence for those convicted under the 1989 Act
   - not permit a public interest defence.

   There is no indication that the Commission has appreciated the highly oppressive cumulative effect of these changes, which we believe should be fundamentally reconsidered.

[1] Law Commission, Consultation Paper No 230, 'Protection of Official Data', February 2017.

About us

4. **The Campaign for Freedom of Information** (CFOI) was set up in 1984 and played a key role in persuading the government to introduce the Freedom of Information (FOI) Act 2000 and in improving the bill during its parliamentary passage. It now monitors the operation of the legislation, provides FOI training to public authorities and requesters and advice to those seeking information. The Campaign also assisted the former Conservative MP Sir Richard Shepherd in drafting his Protection of Official Information Bill to reform section 2 of the Official Secrets Act 1911, which was debated in the Commons in January 1988. It played an active role in seeking improvements during the passage of the Official Secrets Act 1989.

5. **ARTICLE 19**, the Global Campaign for Free Expression, is a registered UK charity with offices in eight countries, which works globally to protect and promote the right of freedom of expression, including the right to information. ARTICLE 19 has been involved in the debate over the relationship between freedom of expression, access to information and national security for over 25 years, and participated in the development of the Johannesburg Principles and Tshwane Principles. In 2000, ARTICLE 19 worked with Liberty to produce the report "Secrets, Spies and Whistleblowers: Freedom of Expression in the UK". ARTICLE 19 has participated in many interventions before international, foreign and UK courts in cases where national security is being considered, in particular in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* and *Miranda v Secretary of State for the Home Department & Others* [2016] EWCA Civ 6.

Damage tests

6. We are particularly concerned about the Commission's recommendation that it should be made easier to bring prosecutions under the 1989 Official Secrets Act. The reasoning behind this recommendation appears highly questionable.

7. Currently, some offences under the 1989 Act are committed by disclosing any information within a particular class, regardless of whether it can be shown to be harmful. Others are only committed where the disclosure is, or is likely to be, damaging.

8. The Commission proposes that it should no longer be necessary to show that a disclosure is or is likely to cause damage. Instead, the prosecution would merely have to show that the information was '*capable*' of causing damage.[2] A disclosure which *might* cause damage but is *extremely unlikely* to do so would become an offence under these proposals if the discloser knew or had reasonable grounds to believe that damage was possible. The likelihood of that damage occurring would not be a factor.

9. The new offence could be committed by both civil servants who release information without authority and by journalists and others who publish that information. The range of disclosures which would be criminalised would be substantially widened. A disclosure which is unlikely to do harm, but reveals serious danger to the public, malpractice or dishonesty could result in conviction. There would be no public interest defence.

10. The Commission says that its preliminary consultation with stakeholders, presumably prosecutors, suggests that the requirement in a number of the 1989 Act's offences to prove that disclosure would be likely to be damaging 'can prove an insuperable hurdle to bringing a prosecution'.[3]

11. The Commission presents no evidence that prosecutions have not been brought for this reason. It cites two sources for its conclusion. The first purports to be a 2002 US report, describing the alleged shortcomings of US legislation and legal procedures.[4] This is not evidence of a problem in the UK. Furthermore, the quote is not from the

[2] Consultation paper, paragraph 3.161
[3] Consultation paper, paragraph 3.143
[4] Consultation paper, paragraph 3.140

report cited but from a memorandum describing the 'personal views' of the vice-chair of the agency that produced it.[5]

12. The consultation paper continues:

> 'A similar point was made by Lord Nicholls in *Shayler*:
>
> > "Damage already done may well be irreparable, and the gathering together and disclosure of evidence to prove the nature and extent of the damage may compound its effects to the further detriment of national security".'[6]

13. In fact, Lord Nicholls was not on the bench in that case: the words cited are from the judgment of Lord Hope of Craighead. Moreover, Lord Hope was referring to the problems that would arise in prosecuting *members of the intelligence services* if the harm resulting from their disclosures had to be demonstrated in court.[7] The offences that would be affected by the proposals do not involve disclosures by members of the intelligence services.

14. These two quotes are the only evidence the Commission cites to suggest that the existing damage tests in the 1989 Act present an 'insuperable' obstacle to prosecutions. If the Commission has been persuaded that this is indeed the case, some account of the evidence it has seen would be expected: none is given. There is no indication that it has subjected what it has been told to critical examination. No example of any damaging disclosure which has gone unpunished is cited. No indication of the number of such cases is given.

15. *If* it is true that prosecutions have not been brought is this actually because of the risk that the proceedings themselves would cause still more damage – or because a prosecution would involve acknowledging embarrassing shortcomings? For example, did the leak occur because the rules for handling classified material were not followed? Did the disclosed information reveal unacceptable malpractice?

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[5] The consultation paper cites the source of the quote as *'Foreign Denial and Deception Committee, Leaks: How Unauthorized Media Disclosures of US Classified Intelligence Damage Sources and Methods (24 April 2002)'* In fact the source of the quote is a memorandum on the report entitled: '*SUBJECT: Personal Views on the Inadequacy of Existing Laws Concerning Unauthorized Disclosures, and Recommendations for New Ones. REFERENCE: Leaks: How Unauthorized Media Disclosures of US Classified Intelligence Damage Sources and Methods'*. The memorandum is available at: https://fas.org/irp/cia/product/leak-report-supp.pdf

[6] Consultation paper, paragraph 3.141

[7] *R v Shayler [*2002] UKHL 11 at 85

16. The 1989 Act allows a court to hear evidence and submissions in camera where necessary.[8] Why is this very considerable safeguard insufficient? The consultation is silent on this point.

17. The tribunals hearing freedom of information appeals have dealt in closed session with cases involving intelligence sharing between the UK and its allies, the use of special forces to detain captives in Iraq and Afghanistan, the use of drones in Afghanistan and the planning of military action against Serbia and Kosovo. None of these cases have, so far as we know, led to any suggestion that the proceedings themselves caused any damage.[9]

18. The Commission proposes that instead of having to prove that a disclosure was 'likely' to damage specified interests, it should only be necessary to show that it was 'capable' of doing so. But this would *still* require the prosecution to show that a disclosure could cause damage. It would *still* require an explanation of how that damage would be caused. The Commission does not explain how this would enable the allegedly 'insuperable' obstacle to prosecution to be overcome. It is more likely to just criminalise a range of disclosures which are not currently offences at all.

The consultation document's description of the offences

19. The offences that would be affected are those in which a civil servant or government contractor discloses without authority information likely to damage the work of the intelligence and security services, defence, international relations or law enforcement and those where such information is then further disclosed by any other person.

20. The damage test relating to the security and intelligence services is uniquely drafted. It applies where a disclosure damages or is likely to damage the work of those services or *'falls within a class or description of information…likely to have that effect'*.[10] None of the other offences refer to information of a 'class or description' likely to cause damage. In every other case where a test of harm applies the information *itself* must be shown to be or be likely to be damaging.

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[8] See section 8(4) of the Official Secrets Act 1920 and section 11(4) of the Official Secrets Act 1989

[9] See for example the Upper Tribunal decisions in: *Savic v Information Commissioner & Attorney General's Office & Cabinet Office* [2016] UKUT 0535 (AAC); *All Party Parliamentary Group on Extraordinary Rendition v The Information Commissioner & Foreign and Commonwealth Office* [2015] UKUT 377 (AAC); *Cole v Information Commissioner & Ministry of Defence* [2014] UKUT 345 (AAC); *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC).

[10] Official Secrets Act 1989, section 1(4)(b)

21. Nowhere in the section of the consultation paper dealing with the 'Requirement to cause damage' (paragraphs 3.137 to 3.148) is this distinction recognised. The whole of that section discusses the issue as if the test in *all* the relevant offences was to disclose information of a class, description or type that is likely to be damaging. The consultation paper states that:

> '*All the offences* in the Official Secrets Act 1989, apart from the offences in sections 1(1) and 4(3) require the prosecution to prove that the unauthorised disclosure was damaging to a specified interest or that the information *is of such a type* that its unauthorised disclosure would be likely to cause such damage.'[11] (emphasis added)

22. This is a misreading of the Act. For example, the section 2 offence relating to defence is committed by disclosing, without lawful authority, information which in various specified ways damages the capability of the armed forces or their equipment, leads to loss of life or injury to personnel, harms UK interests or citizens abroad or:

> 'is of information or of a document or article which is such that its unauthorised disclosure *would be likely* to have any of those effects.'[12]

The same form of words applies to disclosures harmful to international relations or law enforcement.[13]

23. The Act does not require the prosecution to show that the information is of a 'type' likely to be damaging. The disclosure *itself* must be likely to cause damage. This is confirmed by the Court of Appeal's decision in the case of *Keogh*. Lord Phillips, then the Lord Chief Justice, made clear that the offences involved (under sections 2 and 3 of the 1989 Act) required the prosecution to show:

> 'that the material disclosed related to defence or international relations and that its disclosure was 'damaging', which by definition includes *'likely to be damaging'*.[14]

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[11] Consultation paper, paragraph 3.137

[12] Official Secrets Act 1989, section 2(2)(c)

[13] Official Secrets Act 1989, sections 3(2)(b) and 4(2)(b)). Sections 3 and 4 of the Act also contain offences that are committed by disclosing any information within particular classes, but in those cases there is no requirement to show that disclosure of the information or the class of information into which it falls is likely to cause damage.

[14] *Keogh v R*. [2007] EWCA Crim 528 at 27. The same expression is repeatedly used throughout Lord Phillips' judgment.

24. Two paragraphs later, the consultation paper once more referring to the 1989 Act's offences *in general*, again mis-describes them:

> 'Proof that damage was caused will involve the prosecution having to confirm the harm to the specified interest – *national security, international relations etc* – which the defendant's unauthorised disclosure caused. The public confirmation that such damage has occurred has the potential to compound the damage caused by the initial unauthorised disclosure… With the aim of avoiding this situation, the legislation provides that the damage requirement can be satisfied if the prosecution proves that a particular disclosure was of a *certain class or description*, and that disclosure of information of that *class or description was likely to cause the requisite damage.*'[15] (emphasis added)

25. Contrary to this account, there is no offence of disclosing information harmful to *'national security'* in the 1989 Act. The relevant offence refers to damaging the work of the *security and intelligence services.*[16] But the more significant error is the suggestion that the Act's offences *in general* apply to the disclosure of information of '*a class or description'* likely to cause damage. The identical suggestion is made at paragraphs 3.145 and 3.146.

26. The latter states:

> 'Although the legislation absolves the prosecution of the burden of proving that the disclosure in fact caused damage, the prosecution must still prove that the information in question fell *within a certain class or description and that the disclosure of information within that class or description was likely to cause the requisite damage.* Our initial consultation with stakeholders suggests that the requirement to prove that the disclosure of such a category of information was likely to cause the requisite damage *can still pose an insurmountable barrier* to initiating a prosecution.' (emphasis added)

27. The repeated mis-description of the existing offences raises questions about the rigour of the Law Commission's analysis. It is possible that what concerns the government and the Commission is the prosecution of cases involving information about the security and intelligence services - the only type of information to which the reference to a 'class or description' actually applies. However, the proposed change to a

[15] Consultation paper, paragraph 3.139
[16] Official Secrets Act 1989, section 1(4)

'capable' of damage test would not be limited to this class of information but would apply to disclosures of:

> 'information capable of damaging security and intelligence, *defence or international relations*'[17]

28. The lack of evidence presented for this change is disturbing. So too is the failure to discuss the consequences of extending the offences to information whose disclosure is *unlikely* to cause harm.

29. The problems can be illustrated by reference to section 4(2)(a) of the 1989 Act which makes it is an offence to disclose information 'likely' to result in the commission of an offence. The proposed new offence would apply to any disclosure that is merely 'capable' of having that effect. An official who reveals that, say, the lock on the front door of their building is sometimes not engaging or that deliveries of office supplies are not being properly checked would probably commit this offence. The official could reasonably be expected to know that the first disclosure *might* encourage a burglar to have a go, and that the second *might* lead a driver to remove a pack of photocopying paper from a delivery for their own use. A journalist reporting those defects as part of a story on government inefficiency who might reasonably anticipate that these crimes could result could also commit an offence. The reach of *all* the damage based offences in the 1989 Act would be extended in this highly unsatisfactory way.

The Freedom of Information Act

30. The consultation paper does not discuss how its proposals would operate alongside the Freedom of Information (FOI) Act 2000. In some areas, both the FOI Act and the 1989 OSA operate by reference to a common standard. That would cease to be the case under the Commission's proposals.

31. Most of the FOI Act's exemptions apply where disclosure would be 'likely to prejudice' a specified interest. Since many of the existing 1989 OSA offences apply where disclosure is 'likely' to be damaging, the two regimes are broadly in step in these areas. For example, it is an offence to make an unauthorised disclosure of information which:

[17] Consultation paper, paragraph 3.161

> 'impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or…*would be likely to* have any of those effects'.[18]

32. The corresponding FOI exemption allows information to be withheld where its disclosure:

> 'would, *or would be likely to*, prejudice…the prevention or detection of crime, [or] the apprehension or prosecution of offenders'[19]

33. This means that information which, if leaked, is *not* likely to result in the commission of an offence is disclosable under the FOIA. Conversely, information whose leaking *would* be an offence is exempt under FOI.[20]

34. The proposed change would unbalance this relationship. It would become an offence to make an unauthorised disclosure about defence, international relations and law enforcement even though that information would be available on request under FOI.

35. In the FOI context, the meaning of 'likely' in the phrase 'likely to prejudice' is interpreted in accordance with the High Court Judgment of Mr Justice Munby, as he then was, in *R (Lord) v Secretary of State for the Home Department*.[21] Referring to the use of the term in section 29(1) of the Data Protection Act 1989 he said:

> 'In my judgment "likely" in section 29(1) connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not.'

36. This interpretation is routinely applied by the Information Commissioner, the First-tier Tribunal and the Upper Tribunal.[22]

37. One such case concerned a historian's request for information about Metropolitan Police payments to informants reporting on Irish secret societies between 1890 and 1910. The Home Office refused the information claiming that disclosure, even more

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[18] Official Secrets Act 1989, section 4(2)(a)(iii) or 4(2)(b)
[19] Freedom of Information Act 2000, section 31(1)(a) and (b)
[20] This leaves aside for the moment the FOI Act's public interest test which could mean that even information likely to prejudice the prevention or detection of crime may have to be disclosed on public interest grounds.
[21] [2003] EWHC 2073 (Admin) at 99-100
[22] See *Department for Work and Pensions v IC and FZ* [2014] UKUT 334 (AAC) at 26-27 and *Keane v Information Commissioner & Home Office* [2016] UKUT 461 (AAC) at 50.

than 100 years after the event, would allow the descendants of informants to be identified by, and put at risk of attack from, the descendants of those informed on.[23]

38. The Upper Tribunal was not persuaded that this was 'likely':

> 'I am struggling to see any basis on which the Tribunal could properly reach a finding that disclosure would endanger the physical or mental health of any individual or endanger the safety of any individual. I am also in a similar difficulty in identifying any basis on which the Tribunal could be satisfied that disclosure would be *likely* to result in either type of harm. At best the majority's findings would appear to justify a conclusion that disclosure *might just conceivably* lead to such a harm.' (emphasis added)[24]

39. The possibility that damage 'might just conceivably' occur could however be enough to meet the Commission's proposed new 'capable of causing damage' test. If no other exemption was involved, this information would be available to the public under FOI, but a person who disclosed it without authority could face imprisonment.[25] That would bring the law itself into disrepute. It may also deter officials from discussing disclosed information with members of the public for fear of breaching the OSA.

Prior publication

40. The Commission's approach to a prior publication defence reinforces this concern. It proposes that it should be a defence to show that the disclosed information was (a) lawfully in the public domain *and* (b) had been widely disseminated. *Both* tests would have to be satisfied. [26] This second limb is unnecessary and unworkable.

41. We understand the concern that if there were *two* unauthorised leaks of the same information, a second widely disseminated leak might be more damaging than an initial unnoticed disclosure, and should not *automatically* benefit from a prior publication defence. However, if the initial disclosure is *lawful* this scenario is irrelevant.

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[23] In that case, the information would have been exempt under section 38(1) of the FOI Act.
[24] *Keane v The Information Commissioner & The Home Office & The Commissioner of Police of the Metropolis [2016] UKUT 461 (AAC), at 50.*
[25] In this case, the Upper Tribunal found that another exemption *did* apply, and the information was not disclosed.
[26] Consultation paper paragraphs 3.201 to 3.204

42. The consultation paper expressly recognises that a disclosure under the FOI Act would be such a lawful disclosure.[27] Remarkably, it considers that this would not be sufficient and the information must also be widely disseminated.

43. This appears to be an attempt to incorporate a principle derived from breach of confidence cases such as *Spycatcher*. But *Spycatcher* involved the *improper* disclosure of confidential information in breach of an obligation of confidentiality. Injunctions obtained in that case were designed to prevent the confidential information being more widely published. They were ultimately discharged because the information had become so widely disseminated as to lose its confidential nature and its ability to do further harm.[28]

44. The need for 'wide dissemination' of the information should be irrelevant if the initial disclosure has been lawful. It is beyond the bounds of common sense to suggest that an official should face possible prosecution for revealing information which has already been disclosed under FOI, even if the official did not know this.

45. It is well-established that an FOI disclosure, though made to a specific requester, is regarded as a disclosure to the world at large. No restrictions apply to information released under FOI: the recipient is free to publicise it. In the first FOI case to reach the High Court, Stanley Burnton J, as he then was, held that:

> 'once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure.'[29]

46. An initial FOI disclosure of information relating to the work of the security and intelligence services,[30] or to defence, international relations or law enforcement is only

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[27] Consultation paper, paragraph 3.201

[28] Lord Griffiths stated: 'Having established that Peter Wright remains bound by his duty of confidence, the Attorney General then submits that any third party who receives the confidential information, knowing of his breach of confidence, is likewise bound by the same duty not to disclose the contents of Spycatcher. The Attorney General therefore submits that despite the fact that Spycatcher has received worldwide publication and is in fact available in this country for anyone who wants to read it, the law forbids the press, the media and indeed anyone else from publishing or commenting on any part of it, saving only that which has already been referred to in the judgments of the courts. If such was the law then the law would indeed be an ass, for it would seek to deny to our own citizens the right to be informed of matters which are freely available throughout the rest of the world and would in fact be seeking in vain because anyone who really wishes to read Spycatcher can lay his hands on a copy in this country…

The courts have to evolve practical rules and once the confidential information has escaped into the public domain it is not practical to attempt to restrain everyone with access to the knowledge from making use of it.' *Attorney-General v Guardian Newspapers Ltd (No 2),* [1990] 1 AC 109

[29] *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) at 72

likely to have been made after a department such as the Ministry of Defence, Foreign and Commonwealth Office or Home Office has found that disclosure is unlikely to be harmful or has been ordered to disclose it by the Information Commissioner or tribunal. The suggestion that a second disclosure of the same information (albeit outside the FOI framework) could trigger an Official Secrets prosecution would be to set the two statutory regimes on a collision course with each other. It would also in our view breach Article 10 of the ECHR.

47. We believe, the prior publication defence should be available where *either* the prior publication was lawful, *or* where the information had been sufficiently widely disseminated beforehand.

Public interest defence

48. We support the introduction of a public interest defence to charges under the 1989 OSA. We think it should be an *objective* defence, requiring a well-founded belief that the benefit of disclosure to the public interest outweighs any likely damage. The proposed lowering of the damage threshold, to allow a conviction even where damage is unlikely, substantially strengthens the case for this.

49. We disagree with the Commission's suggestion that:

> 'it would be difficult to distinguish between disclosures that serve the public interest from disclosures that do not. Juries would be faced with an impossible task, given that the meaning of public interest is elusive.'[31]

50. The meaning of public interest is not as unknowable as this suggests. It is well understood in the context of the law on breach of confidence. As long ago as 1981, the Law Commission itself was confident enough of the principles to recommend that the action for breach of confidence should be put on a statutory basis and that:

> 'the courts should have a broad power to decide in an action for breach of confidence whether in the particular case the public interest in protecting the

[30] Although such information is subject to absolute exemption under section 23 of the FOI Act, section 64(2) provides that it becomes disclosable on public interest grounds if it is held in The National Archives and is 30 or more years old.

[31] Consultation paper, paragraph 7.52

> confidentiality of the information outweighs the public interest in its disclosure or use.'[32]

51. In support of its view that a public interest defence would create damaging uncertainty, the Commission cites a Danish case in which two different courts reached opposing conclusions on the release of classified intelligence on Iraq's alleged weapons of mass destruction. One held that the public interest did *not* favour disclosure as the information did not reveal misconduct; the other that the public interest in knowing the basis for Denmark's involvement in the invasion of Iraq *did* justify disclosure in public interest.[33]

52. It is bewildering of the Commission to cite this case against a public interest defence. The English courts accept that a public interest defence under the law of confidence is not restricted to cases of misconduct.[34] The Law Commission's own 1981 report concluded:

> 'In our view the courts, in considering whether the balance of public interest lies in favour of the disclosure of information, *should not be restricted to considering only information which concerns "misconduct"*. We think there are important areas of information, not necessarily involving "misconduct", where the public's claim to be informed should be weighed by the courts against the interest in protecting confidentiality.'[35] (emphasis added)

53. If the issue is thought to require clarification in the context of the OSA this could be done by a statutory definition, as the Commission itself proposed in 1981[36] or in more prescriptive form.

54. We are also surprised that the Commission should argue that a public interest defence would 'undermin[e] the relationship of trust between officials and ministers.'[37] It cites a 2009 report of the Public Administration Committee which observes that leaks by civil servants 'undermine the trust' necessary between them and ministers.[38]

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[32] Law Commission, Breach of Confidence, Cmd 8388, October 1981, paragraph 6.77
[33] Consultation paper, paragraph 7.54
[34] *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491
[35] Law Commission, Breach of Confidence, Cmd 8388, paragraph 6.78
[36] The Commission in its Draft Breach of Confidence Bill proposed a clause stating: 'A public interest may be involved in the disclosure or use of information notwithstanding that the information does not relate to any crime, fraud or other misconduct'.
[37] Consultation paper, paragraphs 7.38 – 7.42
[38] Consultation paper, paragraph 7.40. The Commission attributes this report to the Public Accounts Committee. It was in fact produced by the Public Administration Committee

55. The 1988 White Paper on Reform of Section 2 of the Official Secrets Act 1911, stressed that the preservation of trust should *not* be an objective of the 1989 Act:

> 'The central concern of any reform of section 2 is to determine in what circumstances the unauthorised disclosure of official information should be criminal. For this purpose it is *not sufficient that disclosure is undesirable, a betrayal of trust or an embarrassment* to the Government.'[39]

56. The preservation of 'trust' had long been the justification for retaining the discredited section 2, criminalising the unauthorised disclosure of *all* official information. If the current proposals are based on the need to protect trust between ministers and officials, ministers in the Department of Transport, the Department for Education, the Department for Work and Pensions and others may argue that they have as much need as their Foreign Office or Ministry of Defence colleagues for their officials' loyalty. This would point to a return to the philosophy of the old section 2.

57. The Commission suggests that if a public interest defence were introduced, prosecutors – or presumably the Attorney General – would no longer need to consider the public interest before authorising a prosecution. It suggests that issues of public interest might be left to the jury instead.[40] We doubt that this could happen. The decision on whether to initiate a prosecution may raise entirely separate issues of public interest (such as whether to prosecute a defendant suffering from mental illness) from the question of whether the disclosure itself was in the public interest.

58. The Commission suggests that a public interest defence would 'open the floodgates' allowing 'virtually anyone' to claim that a disclosure was justified, so that 'no information could necessarily ever be guaranteed to be safe'.[41] We are surprised to see this argument put in such apocalyptic terms. No information is ever 'guaranteed' to be safe under existing legislation or the Commission's proposals. It is also unrealistic to talk about 'floodgates' being opened. Even with a public interest defence, a civil servant who disclosed official information without authority would expect to lose their job if identified and to face a very real risk of imprisonment. This would be a substantial deterrent to anyone capable of rational consideration. Anyone not so capable is likely to disclose information regardless of a public interest defence.

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[39] Paragraph 14
[40] Consultation paper, paragraph 7.62
[41] Consultation paper, paragraph 7.63

59. The Commission also considers whether there should be a public interest test specifically for journalists and rejects the option. We do not believe that journalists or others who publish disclosed information should be subject to prosecution under the 1989 Act. It should focus on the person making the original disclosure. If the Act is not limited in this way, a public interest test should be available to *any person* making the disclosure.

60. Instead of a public interest defence the Commission proposes to rely on the existing arrangements for civil servants to report concerns to the Civil Service Commission and for members of the security and intelligence services to raise concerns with the Staff Counsellor. It suggests that, in addition, members of the security services should also be able to raise concerns with the Investigatory Powers Commissioner.[42]

61. Whilst this provides an additional route for members of the security and intelligence services it adds nothing to the position of civil servants who would be at risk of prosecution for disclosing information *unlikely* to cause harm in order to try and prevent or expose malpractice.

62. What for example would be the position of an official who revealed that potentially lethal nerve agents such as sarin were being applied to the skin of uninformed volunteers, who had been reassured that they would suffer no more than mild discomfort? What if the experiments had continued after the death of one of the volunteers had provided unmistakeable evidence of the danger? This is of course what happened at Porton Down in the 1950s.

63. Volunteers were told that:

> 'The physical discomfort resulting from tests is usually very slight. Tests are carefully planned to avoid the slightest chance of danger, and are under expert medical supervision.'

64. The resulting inquest was held in camera on national security grounds. The experiments continued after the volunteer's death in 1953. The information provided to volunteers was amended, but only to state that: 'Tests are arranged so as to *eliminate all foreseeable danger'*. The Prime Minister, Winston Churchill, and the Home Secretary Sir David Maxwell-Fyfe, were informed – or rather misinformed – by the minister responsible for Porton Down that the tests 'were of an exceedingly mild type

[42] Consultation paper, paragraph 7.116

and are conducted under strict medical supervision'. In fact the research was designed to discover the dosage of nerve agents 'which when applied to the clothed or bare skin of men would cause incapacitation or death'.[43] It was not until 2008 that the claims of survivors were settled, with the government acknowledging that 'there were aspects of the trials where there may have been shortcomings and where, in particular, the life or health of participants may have been put at risk'.[44]

65. What would the position be today if some equally grave problem which had been concealed from even the prime minister occurred and a government scientist made public or disclosed to those directly at risk a greater part of the truth than the government was prepared to acknowledge? Both the discloser and any journalist who reported it would, without any form of public interest defence, face prosecution, conviction and imprisonment for whatever extended period may be adopted in light of the Commission's final recommendations.[45] That would be a high and in our view unacceptable price to pay for the 'legal certainty' that the Commission seeks by rejecting a public interest defence.[46]

References to ARTICLE 19/Liberty Report of 2000

66. We also wish to respond to references in the consultation document[47] and in a subsequent document released by the Commission to a joint ARTICLE 19 and Liberty publication. This 2000 report was entitled "Secrets, Spies and Whistleblowers: Freedom of Expression in the UK". We believe that the Commission's two references to this report are both substantial misrepresentations of its position in relation to the protection of whistleblowers and oversight.

67. The consultation paper purports to quote directly from paragraph 7.3 of the 2000 report. However, the quote actually combines two paragraphs from two different sections. It starts with an extract from the end of a chapter criticising the way in which the Official Secrets Act has been used against whistleblowers. It continues with an extract from an entirely different section 21 pages later dealing with the lack of

[43] This summary is based on the findings of the historical expert appointed in 2004 to assist a reconvened inquest into the death of the Porton Down volunteer mentioned above. See: Ulf Schmidt, 'Cold War at Porton Down: Informed Consent in Britain's Biological and Chemical Warfare Experiments', Camb Q Health Ethics. 2006 Fall; 15(4): 366–380. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1832084/

[44] Hansard, House of Commons, 31.1.2008, cols WS47-48.

[45] Consultation paper, paragraph 3.189

[46] The Commission's view is that: 'The introduction of a statutory public interest defence risks undermining the certainty and coherence of the criminal law. In practice, it would be difficult to predict how the defence would operate and when it would be successful or unsuccessful.' Consultation paper, paragraph 7.50

[47] Consultation paper, paragraph 7.30

democratic accountability of the security and intelligence services. These are presented as 2 consecutive paragraphs from the 2000 report.

68. Following public criticism of the Commission's proposals, the Commission released an additional document making even more selective use of the 2000 report. This states:

> '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."'[48]

69. Neither extract accurately represents the findings of the 2000 report. Even a brief glance at the recommendations of this now 18 year old document shows that it calls for the creation of a public interest defence (Recommendation 8), the adoption of a substantial harm test for OSA prosecutions (Recommendation 7), and the extension of the Public Interest Disclosure Act (PIDA) to security and intelligence personnel (Recommendation 13). Shortly after the second of the extracted quotes the report states:

> 'ARTICLE 19 and Liberty believe that the Government can do much more to fulfil its commitment to openness. It should extend the protection offered by PIDA to its employees in the Security and Intelligence Services, and amend the current FOI Bill to remove the blanket exemption of security information and generally to meet the standards of openness of many other established democracies. Lastly, it should subject the Security and Intelligence Services to greater Parliamentary scrutiny than currently exists.'

70. Rather than being influenced by this report, the Commission appears to have merely extracted a few sentences that appear compatible with its own views.

ECHR Case law regarding protection of whistleblowers

71. Further, we disagree with the additional document's analysis of the European Court of Human Rights case law on public interest disclosures. The Commission states:

> '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

[48] Law Commission, Protection of Official Data: Information for Consultees, paragraph 1.22

> 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.'[49]

72. What this fails to mention is the Court's ultimate ruling in both cases found that, if the internal mechanism fails, disclosure of information of public interest including classified information (see *Guja* and *Burcar*) is protected under Article 10. Thus, in Convention law, there is a de facto public interest defence and any new legislative measure which fail to recognise this would be not be in compliance with the European Convention on Human Rights, and the Human Rights Act 1998.

73. This has also been recognised by other international bodies, in considering the UK's implementation of its treaty obligations. The UN Human Rights Committee has twice criticized the UK for using the OSA 1989 to supress whistleblowers and journalists releasing information of 'genuine public concern'.[50]

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[49] Law Commission, Protection of Official Data: Information for Consultees, paragraph 1.18

[50] Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK,CCPR/CO/73/UKOT; Concluding observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6, 30 July 2008