22.07.21

To The Home Office ("the department"),

1. This letter is a joint submission by Protect and the Whistleblowing International Network (WIN) to the department's consultation on "Legislation to Counter State Threats (Hostile State Activity)". It seeks to answer the following questions listed in the consultation (as therein numbered):

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

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

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

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

PROTECT – THE UK WHISTLEBLOWING CHARITY

2. Protect's aim is to protect the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice. We support employers to implement effective whistleblowing arrangements. We campaign for legal and policy reform to better protect whistleblowers. We want a world where no whistleblower goes unheard or unprotected.

3. Since 1993, Protect has operated its free, legal Advice Line offering specialist whistleblowing advice to over 3,000 workers a year. We provide consultancy and training services for employers to improve their whistleblowing arrangements and in 2020 alone the employers we worked with had between them an estimated 1.3 million employees. These experiences inform our policy work in campaigning for better whistleblowing laws and public policy.

WHISTLEBLOWING INTERNATIONAL NETWORK (WIN)

4. WIN developed from a small group of NGOs that had built up legal, policy and advocacy expertise on whistleblowing and had supported each other's work from as early as 1979. In response to increased interest in whistleblowing and civil society's need to collaborate in a consistent and coherent way, five of the leading expert organisations on whistleblowing in the world signed a formal agreement to establish the Whistleblowing International Network (WIN). Operating as an organic network with a voluntary steering group for 5 years, WIN is now a registered incorporated charitable organisation based in Scotland with a committed international Board of Trustees and an engaged pool of Members and Associates.

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

5. We feel that the type of information protected by the Official Secrets Act 1989 (OSA) should remain limited and tightly controlled around issues that damage national security, defence and relationships with a foreign entity. It is not actually clear from the consultation what technological issues are missing from this formulation.

6. Protect opposed the Law Commission's extension to include economic issues in 2017 and we continue to oppose their inclusion now. This would be a dangerous extension of criminal liability and it is worth reproducing the text we included in the Law Commission consultation response from 2017 as the arguments hold now as they did then:

'18. In terms of the information that would be protected, we are not convinced that any drafting of such an extension would avoid repeating the mistakes of past where criminal liability was inappropriately attached to all types of disclosures. The report makes the argument that such a change could be limited to economic matters as it relates to national security but even following these principles, a wide interpretation of information covered is still possible. By including this category of information into the scope of the OSA, more civil servants, public sector workers, financial service workers and economic journalists would be brought within the remit of the offences already contained within the statutory framework of the OSA. We are not convinced that there is sufficient justification in the Law Commission report for such a dramatic and far reaching reform to the OSA.

19. The disclosure or improper use of market sensitive information is already criminalised through other parts of criminal law e.g. insider trading etc. On top of this, regulators also have rules and regulations around the proper use of information in certain markets especially when it comes to finance. With this in mind we are unsure what criminal act this extension would be outlawing.'

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

7. We support the creation of a Statutory Commissioner (SC) but we emphasise that it should not be considered as a replacement or alternative for introducing a public interest defence (PID) to the OSA.

8. It is a sensible feature of any employer's whistleblowing arrangements to offer workers a number of options to raise concerns outside of their immediate line management. Those disclosures that could be an offence under the OSA will often involve specialist or technical knowledge and will, by necessity, be highly sensitive. A SC could act as a specialist body with the relevant expertise and staffing to handle these whistleblowing concerns.

9. Second, individuals who may need to make an unauthorised disclosure under the OSA may not have whistleblower protection under the Public Interest Disclosure Act 1998 (PIDA). For example, the armed forces and the intelligence services are expressly excluded from PIDA. This means that if

these individuals make an unauthorised disclosure, they do not have employment law rights for whistleblowing nor is there a PID upon which they could rely. This leaves them vulnerable and may lead them either not to speak up or speak up anonymously. The SC could remedy this by acting as a recipient of concerns from the armed forces or intelligence service personnel where, for example, the whistleblower wishes to escalate a concern that has not been investigated internally but recognises that raising the concern to a government body will be more effective than disclosing to the media.

10. The SC could act as an external point of contact, like a prescribed person, for those in the intelligence services and those handling official secrets. No whistleblowing system truly works if there is no external route for concerns. The SC maintains the government's desire to protect sensitive information while creating an external point to raise concerns.

11. In addition, the SC could offer some form of protection from victimisation for those groups excluded by PIDA. Whilst they may not be able to pursue a remedy in the employment tribunal for victimisation or dismissal, the SC could establish internal remedies and procedures to address victimisation. This would fill a lacuna in the present state of affairs where armed forced and intelligence personnel may choose not to speak up for fear of reprisal without a legal remedy.

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

12. In 2021, Protect commissioned YouGov to conduct a survey of over 2000 people to gauge public attitudes towards whistleblowing. We found that 57% of respondents working in Government/Military/Public Service said that they were aware that their employer had a whistleblowing policy but only 34% said that they knew how to raise a whistleblowing concern at work. This demonstrates that it does not follow that an employer simply having a policy means that employees and workers know how to raise a whistleblowing concern. Whilst this may seem counter-intuitive, it illustrates why the government as an employer should not consider a whistleblowing policy by itself as sufficient for good whistleblowing arrangements.

13. These statistics are relevant to the present question because it is worrying that a relatively small proportion of these workers know how to raise a whistleblowing concern. This may be because they do not know to whom to raise a concern, how to raise a concern, or do not understand the language of the whistleblowing policy. Each of these is a barrier to speaking up in the public interest. The creation of a SC offers an opportunity to remedy this. A SC that is visible to workers and has a very clear and specific investigatory remit (i.e. investigating whistleblowing concerns that would otherwise be an offence to disclose under the OSA) would be more obvious to workers as the relevant place to raise such concerns.

14. Furthermore, the current process of raising whistleblowing concerns within government can be confusing. Although it is open to whistleblowers to raise concerns internally with their department, there are a number of other bodies that they may think – rightly or wrongly – they could approach, such as The Civil Service Commission, the Cabinet Office or an MP. As such, the SC could take a lead role in co-ordinating and clarifying whistleblowing arrangements across government. This could take the form of clarifying the remit of various regulators and offering guidance to whistleblowers on how and to whom to raise concerns.

15. The SC could also take a role in shaping whistleblowing standards within government departments. If the government's aim is to encourage internal whistleblowing then it must consider why its current processes compel some workers to make an unauthorised disclosure. This would require a review of the government's whistleblowing arrangements which the SC, as a body created specifically for the purpose of supporting whistleblowing in government, could conduct. Protect's whistleblowing bill states the minimum legal standards that employers should meet with regards to whistleblowing disclosures which the SC could use as a model. These standards include establishing reporting channels that preserve confidentiality, providing feedback, providing training and pro-actively preventing victimisation (please see page 4 here).

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

16. We have long held the view that the OSA should contain a PID. This was also Protect's position when we responded to the Law Commission's initial consultation in 2017 and we reiterate the arguments we made there. A copy of the relevant part of our 2017 response is at Annex A.

17. A PID is vital to the functioning of a democracy. Whistleblowing is necessary so that wrongdoing, risk or malpractice within or by government can be raised and addressed. There will be concerns of such significance that an external disclosure is necessary to expose wrongdoing and possible cover-up and is perhaps the only viable option left available to the whistleblower. It is in the public interest, therefore, that these concerns should be raised and the law (with its current lack of a PID) should not criminalise the actions of a whistleblower in raising these concerns.

18. The need for a PID arises because of the challenging situation a whistleblower may face when they feel unable to raise a whistleblowing concern internally. This may be because, for example, the whistleblower raised concerns internally but was ignored, has little confidence in internal processes, or was victimised. In those circumstances, a whistleblower may decide that the information is of significant moment such that it requires a

disclosure to an external body, such as the media. The lack of PID means that they may be making an unauthorised disclosure. The effect of this is that it forces a whistleblower to make an anonymous disclosure to the media or to leak information.

19. This happened in the case of Katharine Gun. Gun was a GCHQ translator and bound by the OSA. She disclosed classified documents to the media relating to US intelligence agencies' influence of the UN resolution in the lead up to the Iraq War in 2003. Without any effective mechanism to report this wrongdoing, Gun went to the media. Whilst the prosecution against Gun for offences under the OSA was ultimately dropped, Gun would not have been able to rely on a statutory defence that she was acting in the public interest by making her disclosure to the media.

20. In the consultation document, the government seeks to identify "safeguards" that allow individuals to raise concerns without making an unauthorised disclosure, including identifying a number of bodies to which a whistleblower can raise concern such as the Cabinet Office and the Civil Service Commission. Our concern, however, is the government overlooks whether civil servants are aware of these options and would actually use them. This is not an academic concern. As above, our 2021 YouGov survey found that only 34% of Government/Military/Public Service respondents said that they knew how to raise a whistleblowing concern at work. This evidences uncertainty within the Government/Military/Public Service group as to where to raise a whistleblowing concern which leaves open the real possibility that a prospective whistleblower will default to disclosing to the media, believing sincerely that there are few other options available to them. This underlines the need for a PID so that when a whistleblower makes an external disclosure, the courts have a mechanism to balance the public interest in disclosing to the external body with the need to keep the information secret.

21. We also wish to address the government's concern that there is little distinction between espionage and making an unauthorised disclosure (as expressed at page 19 of the consultation document). There is a clear distinction between a whistleblower making a disclosure to the media and indiscriminate publication online. In the former case, a disclosure to the media can be a legitimate avenue, and sometimes the only avenue left for a whistleblower, to expose public interest wrongdoing. There is recognition in current UK whistleblowing law that whistleblowers should be protected where they make a disclosure to the media. Journalistic freedom is an essential part of our democracy.

22. In the consultation document, the government expresses its fundamental concern that a person making an unauthorised disclosure will rarely be able to accurately judge whether the public interest in disclosure outweighs the risks against disclosure. We submit two answers to this concern. First, the

lack of a PID does not mitigate against the risk that a civil servant will make a disclosure to the media. Rather, it is simply more likely that the civil servant will make the disclosure anonymously to the media. Secondly, the better solution, therefore, is to ensure that a PID is drafted carefully and considerately to minimise the risk of damage to national security. As in Protect's 2017 response, we submit that the Tshwane Principles are a useful guide for the government. Principle 43 outlines criteria for prosecutors and judges to consider when deciding whether the public interest in disclosure outweighs the risk. The criteria are:

- whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;
- the extent and risk of harm to the public interest caused by the disclosure;
- whether the individual had reasonable grounds to believe that the disclosure would be in the public interest;
- whether the individual has raised their concerns internally or with an external oversight body;
- the existence of other demanding circumstances justifying the disclosure.[1]

If the drafting of a PID incorporated these principles then the risk of damaging national security by a disclosure is reduced.

23. Furthermore, WIN highlights that the disclosure of public interest information and reporting persons is afforded special protection under international law and several human rights legal instruments, including the United Nations Convention on Corruption,[2] the Recommendations of the Council of Europe,[3] and the International Covenant on Civil and Political Rights (ICCPR).[4] Whilst grounds to protect sensitive information of national security are provided for in these standards, emphasis is clearly placed on narrowly defining exceptions in order to facilitate disclosure and ensure restrictions are not so overly broad as to prevent effective public scrutiny of government and on individuals retaining the right to defend themselves on public interest grounds if disclosure is unauthorised.[5] The aforementioned Tshwane Principles' recommendation that individuals should not be punished for disclosing official secrets so long as the public interest in disclosure outweighs the public interest in keeping information secret reflects these standards and practice from around the world, including the jurisprudence of the European Court of

[1] Page 56 the Tshwane Principles, published by the Open Society Foundation, 2013 (here).
[2] The United Nations Convention against Corruption (UNCAC) of 31 October 2003 available at https://www.unodc.org/unodc/en/corruption/uncac.html
[3] See Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)7 on the protection of whistleblowers (30 April 2014), Principle 5, available at https://rm.coe.int/16807096c7
[4] See CCPR/C/GBR/CO/6 available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx
[5] Danish Criminal Code (section 152(e) (2010) and the Canada Security of Information Act which both provide for a public interest defence.

Human Rights on the application of Article 10 of the Convention on Human Rights, given effect by the Human Rights Act 1998.[6]

24. To be consistent with freedom of expression rights under Article 19(3) ICCPR, states must strictly adhere to necessity and proportionality in protection of national security.[7] Public interest disclosures which outweigh any identifiable harm to a legitimate national security interest must still be promoted and protection against retaliation should apply in all public institutions, including those connected to national security, and that prosecution should be reserved for exceptional cases of the most serious demonstrable harm with defendants being granted the ability to present a public interest defence.[8] The Human Rights Committee of the Office of the High Commissioner in 2008 has remarked on its continued concern that powers under the OSA have indeed been used to penalise disclosures of information even where they are not harmful to national security, and the proposed reforms only take the UK further away from these best practice norms and consensus.[9]

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[6] See two significant cases of ECtHR, Guja v Moldova, App no 14277/04 (12 February 2008) and Bucur and Toma v. Romania, App no 40238/02 (8 January 2013)

[7] See CCPR/C/BNR/CO/6 para 24 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f6&Lang=en

[8] See A/70/361 paras 43 – 50 and 65 available at https://www.undocs.org/A/70/361

[9] See CCPR/C/BNR/CO/6 para 24 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f6&Lang=en

ANNEX A – Extract From Protect's (then Public Concern at Work) Response to the Law Commission's Report 'The Protection of Official Data' (May 2017)

The inclusion of a public interest defence

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

23. We strongly disagree with the report's conclusions in this area, and see the introduction of a public interest defence (PID) as a vital reform to ensure there is effective accountability in this sensitive area of Government activity. An absence of a PID risks undermining internal whistleblowing arrangements across Government, from Whitehall to the intelligence services, pushing concerned civil servants into making anonymous disclosures to the media.

Why is a public interest defence needed?

24. It is legitimate for the Government - with the aim of protecting the public - to withhold information involving national security, defence or the national interest. However, there will inevitably be situations where information may come across either a civil servant or intelligence officer's desk that shows that wrongdoing, risk or malpractice has occurred or might occur which causes the individual concern. Whilst it is hoped that in most cases this could be raised internally with the appropriate person in their department or organisation, there will be times when this is not feasible.

25. In this scenario the OSA criminalises unauthorised disclosures of this type of information providing no mechanism by which a court can balance out the competing public interest needs of a disclosure to an external body, as opposed to the need to keep information secret.

26. As the report points out, this is problematic as it effectively means that the only means of exposing this type of wrongdoing is through an internal mechanism outside of the individual's line management or department, even though the report found little evidence that civil servants or security personnel have faith in the current internal measures. We echo this concern as it is very difficult to judge whether there are effective arrangements in place for intelligence personnel to raise concerns internally (to managers within their place of work) and whether these are periodically reviewed, as these arrangements are neither publicly available nor accessible via Freedom of Information Laws.

27. One possible outcome of such a scenario is that far from ensuring proper accountability, because of a lack of trust in internal mechanisms - and an absence of the possibility of a public interest defence - a civil servant or intelligence official with concerns may feel that their only option is to make an anonymous disclosure or a leak of data. The lack of trust combined with very few options other than an internal disclosure may mean that anonymous media disclosures and leaks are more, rather than less, likely.

28. Furthermore, while the media may not be the starting point for any public interest disclosure, the option of a wider disclosure to the media is a vital option in a

functioning democracy and is a vital part of the wider framework employed to prevent wrongdoing.

Addressing the criticism of the concept of a public interest defence

29. In this section we will look at the various arguments made in the report against the concept of a public interest defence (PID):

a) **PID poses a threat to national security**: The report argues this threat can come where an individual decides a disclosure is in the public interest and yet it will be rare that this person will be fully aware of all the information connected to the disclosure, or have a proper appreciation of the potential damage to national security the disclosure could cause. A poorly drafted PID could create this risk but this can be mitigated by ensuring that the drafting of the defence so safeguards minimises the risk of damage to public security. This issue has already been considered in depth by Principle 43 of the Tshwane Principals provides examples of safeguards that courts and juries could be required to consider when applying the defence as follows:

- whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;
- the extent and risk of harm to the public interest caused by the disclosure;
- whether the individual had reasonable grounds to believe that the disclosure would be in the public interest;
- whether the individual has raised their concerns internally or with an external oversight body;
- the existence of other demanding circumstances justifying the disclosure.[10]

If these principles are followed when drafting a PID then the right balance between disclosure and national security can be achieved. Such clear principles also provides guidance for concerned workers in relation to the issues they have to consider before making a wider public disclosure which inevitably will mean breaking the law.

30. **PID undermines legal certainty and the coherence of the criminal law**: The report finds this is derived from the ambiguity within the term public interest, and the multiple non-legal factors (e.g. moral, political, social economic etc.) that could be deployed in arguing whether a disclosure is or is not in the public interest. These non-legal factors are issues individuals (including more importantly juries) could reasonably disagree upon making the task of juries almost impossible and leading to inconsistencies from one case to the next, even where the facts presented are of a similar nature. This uncertainty would also mean whistleblowers would be unclear as to whether and how they are protected for the disclosures they make. The effect would be for the 'floodgates' to be opened on all types of disclosures, and an increase in prosecutions as prosecutors would see PID as a matter for the jury to decide rather than a subject with which to engage. We dispute these conclusions; on one level the courts are already adept at weighing up the public interest, whether this is via common principles found in areas of civil law such as the law of confidence, or

[10] Page 56 the Tshwane Principles, published by the Open Society Foundation, 2013 (here).

via a statutory drafted test found in the criminal law such as the Data Protection Act. On a legislative level, a PID could be drafted in such a way so as to give clarity as to the type of disclosures that could be covered by the defence. This list should not be prescriptive but act as a guide to the whistleblower, judge and jury as to the types of wrongdoing and malpractice that should be protected by the defence.

Principle 37 of the Tshwane Principals gives a good list of such wrongdoing that could be included in the defence:

(a) criminal offenses;
(b) human rights violations;
(c) international humanitarian law violations;
(d) corruption;
(e) dangers to public health and safety;
(f) dangers to the environment;
(g) abuse of public office;
(h) miscarriages of justice;
(i) mismanagement or waste of resources;
(j) retaliation for disclosure of any of the above listed categories of wrongdoing; and
(k) deliberate concealment of any matter falling into one of the above categories.[11]

The report is correct in stating that the public interest as a concept is one that is ambiguous, and there is a risk of causing confusion if the OSA was reformed in such a way that just placed a public interest test with no guidance on how it should operate. Principle 37 of the Tshwane Principals already outlines the key components of the type of wrongdoing and circumstances surrounding the disclosure, when made externally and in order to give some counterweight to the power of the State to cover up wrongdoing in the name of secrecy and the national interest. This is clearly a last resort position, but is vital if the power of the state in this area is to be properly and adequately balanced by open, democratic principles.

31. PID undermines the core value of trust and confidence between civil servants and ministers: The argument here is that a PID undermines a civil servant's impartiality (a core value) by allowing them to weigh up the public interest against Government policy when deciding to make unauthorised disclosures. The report is effectively arguing that the system of Government cannot operate if ministers cannot trust the confidentiality of their own civil servants. This point is relied upon to an exaggerated extent and we fundamentally disagree. Rather the counter argument applies. In the extreme case of an external disclosure of national security information, providing the possibility of a public interest defence is more likely to enhance trust than undermine it. For instance there is already legal protection for whistleblowers who disclose information that is not covered by the OSA outside the machinery of Government, whether this is to a regulatory body or the media. This protection has been in force for 19 years and there is no evidence to show that such legal protection has caused a shredding of trust between civil servants and ministers.

[11] Ibid page. 49

We would also argue that an unintended consequence of no PID and the removal of the need for the prosecution to prove damage in OSA cases would not prevent the disclosure of information but in fact could increase the likelihood that concerned civil servants anonymously disclose their concerns through the media. This is ironically the very outcome this report seeks to prevent.

32. We also want to address comments made in the report about whether PID should be subjective or objective. The report comments upon both scenarios but finds fault in both approaches. An objective defence was criticised for being overly restrictive in its protection, it is rare that a concerned worker will know all the information relevant to judge whether their disclosure was in the public interest and an unknown piece of information may well compromise an objective PID. On the other hand, the report argues that a subjective defence could encourage disclosures of information that are not in the public interest simply because the individual could argue that they had a belief that it was so even if later this assumption is shown to be incorrect. Our view is that this is a very reductive point of view, and if the defence was based on the Tshwane Principles then it could be drafted in such a way so as to have both objective and subjective elements to the legal test. These elements can be seen in principle 37 (the objective element) by outlining the types of wrongdoing included under the defence and principle 43 which provides the subjective element of the defence.