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OFFICIAL SECRETS ACT 1989 – WHY WE NEED A PUBLIC INTEREST DEFENCE BRIEFING

INTRODUCTION

1. Between May and July of this year, the Home Office conducted a consultation on the *'Legislation to Counter State Threats (Hostile State Activity)'* as part of its efforts to empower the whole national security community to counter threats that the UK faces today.

2. Part of these proposals include the Reform of the Official Secrets Act 1989 (OSA) – the law which governs the unauthorised disclosure of official material and its onward disclosure.

3. Protect is particularly concerned by the Home Office's proposed rejection of the Law Commission's 2020 recommendation to include a public interest defence in the OSA.

4. We are interested in the campaign for a public interest defence proposed by Robert Buckland and written about by Charles Hymas in the 30 October Telegraph article, '*Protect whistleblowers who leak government secrets in public interest, says Robert Buckland*'. Protect supports the introduction of a public interest defence (PID) into the OSA.

PROTECT – THE UK WHISTLEBLOWING CHARITY

5. 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 whistleblowing. We want a world where no whistleblower goes unheard or unprotected.

6. Since 1993, Protect has operated its free, legal Advice Line offering specialist whistleblowing advice to around 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.

7. Protect was heavily involved in the drafting of what became the Public Interest Disclosure Act 1998 (PIDA) – the current law which gives rights to whistleblowers in the UK. Our Advice Line gives us first-hand knowledge of the gaps in the current whistleblowing legislation and our campaign, Let's Fix UK Whistleblowing (please see here), proposes solutions to those gaps.

THE OFFICIAL SECRETS ACT 1989

8. Official Secrets Act 1911, 1920 & 1939 are core pieces of legislation providing criminal offences to protect UK from espionage and hostile activity by states.

9. Official Secrets Act 1989 is supporting legislation which constitutes the core legal framework to protect specific categories of sensitive official information, by making its unauthorised disclosure a criminal offence. Offences under sections 1-4 of the Act relate to Primary Disclosures. Offences under sections 5-6 of the Act cover those who do not have access to primary sources i.e., 'onward disclosures'.

10. Currently, the defences to offences under the OSAs are extremely limited and there is no public interest defence. Although we do see elements of a contrived public interest in defences that already exist.

11. The two main defences are:
    a. Damage: the accused must show that they did not know and had no reason to believe that the disclosure was or was likely to be damaging. This defence is not available to certain groups prosecuted under strict liability offences (i.e. intelligence and security officers under section 1).
    b. Necessity: the accused can establish that the offence of disclosure involved lesser harm than the crime it sought to prevent.

RESPONSE TO THE LAW COMMISSION'S CONSULTATION

12. In May 2017, Protect (then Public Concern at Work) responded to the to the Law Commission's Report '*The Protection of Official Data*'. In our response, we proposed the introduction of a PID.
13. In its Report, the Law Commission made a string of proposals that were of concern to Protect:
    a. They initially rejected a public interest defence
    b. They proposed the need for the government to show damage was caused by the leak
    c. They proposed expanding the information covered by the law to include economic matters
    d. They proposed expanding the prison term served.
14. Protect convened a campaign group of interested parties which met and agreed a set of joint principles. The overall message from the group was that these were the wrong reforms at the wrong time. We then wrote separate responses to the Law Commission's proposals.
15. In the final Report, published in September 2020, the Law Commission made a number of recommendations including an Independent Statutory Commissioner with the purpose of receiving and investigating allegations of wrongdoing or criminality where it would otherwise be a breach of OSA 1989. They also recommended the introduction of a PID, suggesting:

    a. *A person should not be guilty of an offence under OSA if that person proves, on the balance of probabilities that:*
        (a) it was in the public interest for the information disclosed to be known by the recipient
        (b) The manner of which the disclosure was in the public interest
16. The Home Office is not convinced that the Law Commission's recommendations strike the right balance between press freedom and the right to whistleblow, holding organisations to account, and the safeguarding of official and sensitive information. Now we are back to square one with the introduction of a PID.

DO WE NEED A PUBLIC INTEREST DEFENCE?

17. Protect has long held the view that the OSA should contain a PID. Introduction of a PID is a vital reform to ensure there is effective accountability in the sensitive area of government activity.

18. Whistleblowing has a necessary function in all sectors and industries. It is particularly important where the OSA is relevant because it ensures that wrongdoing, risk or malpractice within or by government can be raised and addressed.

19. 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, might occur, or that has been concealed 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. This may be because, for example, the whistleblower raised concerns internally but was ignored, they have little confidence in the internal processes, or they have been or fear victimisation for raising the concerns. In such circumstances, a whistleblower may decide to raise their concerns, if significant, to an external body, such as the media.

20. It is in the public interest that these concerns should be raised and the law (with its current lack of PID) should not criminalise the actions of a whistleblower in raising these concerns for 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.

21. 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.

22. The Home Office, in its consultation, seeks to identify "safeguards" that allow individuals to raise their concerns without making an unauthorised disclosure, including identifying a number of bodies with which a whistleblower could raise their concerns i.e. the Cabinet Office and the Civil Service Commission. Protect is concerned that the government is overlooking whether civil servants are aware of this option and whether they would use them. Our 2021 YouGov survey found that only 34% of Government/Military/Public Service respondents said they knew how to raise a whistleblowing concern at work. This uncertainty leaves open the possibility that a whistleblower will default to disclosing to the media, sincerely believing that there are few other options available to them. A PID is therefore needed so that when an external disclosure is made, the courts have a mechanism by which they can balance the public interest and the need to keep information secret when assessing whether an offence has been committed.

23. A far more damaging consequence of no PID is that concerned workers will stay silent about their concerns, the current legal approach has created an uncertain system where whistleblowers are uncertain of their legal rights even if they are well-informed. The danger to the public is not necessarily just that damaging disclosures are more likely, is that many people will instead stay silent.

24. In its consultation, the government expresses concern that there is little distinction between espionage and making an unauthorised disclosure (as expressed at page 19 of the consultation document). There is in fact 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 (the Public Interest Disclosure Act 1998) that whistleblowers should be protected where they make a disclosure to the media. Journalistic freedom is an essential part of our democracy.

WHAT A PUBLIC INTEREST DEFENCE COULD LOOK LIKE

25. The Home Office is concerned 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. In response, we submit:

a. The lack of PID does not mitigate against the risk that a civil servant will make a disclosure to the media. Instead, it becomes more likely that the civil servant will make the disclosure anonymously to the media or stay silent on the concern they have witnessed.

26. A better solution is that a PID is drafted carefully and considerately to minimise the risk of damage to national security. With clear principles of public interest, the right balance between disclosure and national security can be achieved. In PIDA, UK law demonstrates that it can already handle complex questions of public interest, balancing this against an employer's right to efficiently run their business without victimising a whistleblower. There are also examples in the law of Confidence and Data Protection law where the rights of Government and business to protect data is balanced against the public interest in breaching these laws. In relation to that second point, in its briefing paper, *Introducing a public interest disclosure defence,* Matrix Chambers and Mischon de Reya make some practical and sensible suggests as to what a public interest defence could look like.

27. At Protect, we suggest 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 similar to those suggested by Matrix and Mischon de Reya:

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

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

OTHER SUGGESTED REFORMS

I CATEGORIES OF PROTECTED INFORMATION

28. Protect proposes that the type of information protected by the OSA 1989 should remain limited and tightly controlled around issues that damage national security, defence and relationships with a foreign entity.

29. In 2017, Protect opposes the Law Commission's extension to include economic issues and we continue to oppose their inclusion now. This would be a dangerous extension of criminal liability as a wide interpretation of information covered is possible. By including this category of information, 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 there is sufficient justification for such a dramatic and far reaching reform of the OSA.

30. 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.

II INDEPENDENT STATUTORY COMMISSIONER

31. Protect supports the creation of an Independent Statutory Commissioner (SC), but we emphasise that it should not be considered as a replacement or alternative for introducing a PID.

32. It is sensible for an 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.

33. Individuals who may need to make an unauthorised disclosure under the OSA may not have whistleblower protection under 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.

34. 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.

35. The SC could also 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.

CONCLUSION

36. In summary we are concerned that the Home Office have decided to reject the Law Commission's proposals for the PID, and we see this as vital for any reform of the OSA.

37. We are supportive of the creation of an Independent Statutory Commissioners, as a further internal option for concerned workers to approach, but not as an alternative to PID.

38. We see no credible argument for extending the categories of information to include economic issues, and much risk to whistleblowers and journalist from such a change.

If you have any questions or wish to discuss our proposals further, please contact Rhiannon Plimmer-Craig, Parliamentary Officer at rhiannon@protect-advice.org.uk