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Protect Briefing on New Clause 6 – a Public Interest Defence to the Official Secrets Act

Tabled by MPs: Mr Kevan Jones, Joanna Cherry, Mr David Davis, Stewart Hosie, Stuart C McDonald, Chris Bryant, Layla Moran, Mr Alistair Carmichael,

September 2022

Introduction

Protect is the UK's whistleblowing charity and we fully support the aims of this amendment to grant, for the first time, a clear public interest defence for whistleblowers in breach of Government secrecy laws. We advise around 3,000 whistleblowers a year on our free and confidential legal advice line and have advised over 45,000 in our near 30 years history. Many whistleblowers, particularly civil servants, are concerned that they may be in breach of the Official Secrets Act 1989 ("**OSA 1989**") if they raise *any* concern and greater clarity about the reach of this criminal offence is needed. Additionally, for those concerns which do fall within the remit of the OSA 1989, there is currently huge uncertainty and risk attached to raising concerns without a public interest defence.

The law on official secrets was reviewed by the Law Commission (a statutory independent body to review the laws and make recommendations) and in 2020(1) they concluded that the law was *"outdated and no longer fit for purpose".* They said:

"A statutory public interest defence should be available for anyone – including civilians and journalists – charged with an unauthorised disclosure offence under the Official Secrets Act 1989. If it is found that the disclosure was in the public interest, the defendant would not be guilty of the offence."

The Commission noted that the current lack of a public interest defence could be incompatible with the UK's obligations under Article 10 of the European Convention on Human Rights ("**ECHR**") (Freedom of expression). The ECHR recommended a public interest defence for journalists and others charged under sections 5 and 6 of the OSA 1989.

The current position under the Official Secrets Act 1989

There is no defence under the law for a whistleblower who, in the course of raising concerns about wrongdoing, malpractice or breaches of the law which reveal sensitive Government information relating to national defence, security, relations with a foreign power or certain aspects of the criminal justice system.[2] A whistleblower could make disclosures which expose fraud in Government or British involvement in illegal rendition of suspected terrorists and it will be irrelevant that revealing this is in the public interest. **Instead, those revealing this information, whether to the press, MPs or the wider public, could face punishment of up to two years in prison.**

A lack of a public interest defence in statute has not prevented a kind of public interest defence from emerging via the backdoor. There have been situations where prosecutions have collapsed based on the jury refusing to convict because of the public interest in the disclosures or a fear from the prosecution that juries would come to that conclusion. An example of this can be seen from the disclosure made by civil servant, Clive Ponting, who revealed the sinking of the Argentinian ship, the General Belgrano, during the Falkland war. The jury refused the trial judge's direction to convict, even though Ponting's disclosure of

information to an MP broke the law[3] . Furthermore, Katherine Gun was a GCHQ interpreter who revealed in the build-up the Iraqi war how Britain and the USA were spying on foreign diplomats at the UN. – This prosecution collapsed due to concerns the jury would refuse to convict, because they viewed Gun's disclosures as being in the public interest[4]. The current legislation creates uncertainty because a public interest defence is absent from the law but present in the way, or perceived way, a jury may react.

The National Security Bill ("**NSB 2022**") widens these offences to include a breach of the OSA 1989 if disclosures of trade secrets and sensitive Government information are made to a 'foreign power'. The punishment for such a crime is a maximum of life in prison.

Without a public interest defence an unintended consequence of the NSB 2022 could be that whistleblowers who approach a foreign regulatory body and reveal a trade secret while raising concerns (e.g., an engineering practice, a financial product) could be prosecuted.[5]

We are delighted that the proposed amendment will provide a defence to both the NSB 2022 and the OSA 1989. It is also pleasing to see this opportunity to debate the merits of such a defence. We look forward to the Government and Official Opposition's response to the draft presented to the committee.

The amendment as tabled on Thursday 22nd September 2022:

Mr Kevan Jones

Joanna Cherry, Mr David Davis, Stewart Hosie, Stuart C McDonald, Chris Bryant, Layla Moran, Mr Alistair Carmichael,

To move the following Clause—

*"**Defences***
(1) In any proceedings for an offence under section 2 of this Act or section 5 of the Official Secrets Act 1989, it shall be a defence—
(a) that the disclosure in question was in the public interest, and
(b) the manner of the disclosure was also in the public interest.

(2) Whether a disclosure was in the public interest shall be determined having regard to—
(a) the subject matter of the disclosure,
(b) the harm caused by the disclosure,
(c) and any other relevant feature of the disclosure.

(3) Whether the manner of disclosure was in the public interest shall be determined having regard to—
(a) whether the disclosure has been made in good faith,
(b) if the disclosure relates to alleged misconduct, whether the individual reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) whether the disclosure is made for the purposes of personal gain,
(d) the availability of any other effective authorised procedures for making the disclosure and whether those procedures were exercised, and
(e) whether, in all the circumstances of the case, it is reasonable for the disclosure to have been made in the relevant manner."

Protect's suggested changes

Protect is supportive of this amendment and would suggest that if it was accepted, improvements may be made to the drafting to remove reference to 'good faith'.

We recommend to both the committee and the Government that the 'good faith' element (see 3 (a) of the amendment) is removed from the amendment. Our concern is that including good faith as a factor when the courts determine whether the manner of a disclosure was in the public interest could result in many cases revolving around the motives and personality of the whistleblower rather than a discussion about whether the disclosure was in the public interest.

This fear is based on the experience of many whistleblowers' cases pre-2013 when the law that protect non-national security issues (the Public Interest Disclosure Act 1998) contained a requirement for whistleblowers to raise their concerns in 'good faith'. Many cases would revolve around aspersions being made about the whistleblower's character and personality to demonstrate the concerns were raised in bad faith.

It is understandable for the drafters of this amendment to be concerned that the defence may be abused by those bearing a grudge against the Government, agency they work for or their colleagues, but we feel the defence already has safeguards. The whistleblower must show objectively to the court that their actions were in the public interest: frivolous cases designed to cause political or personal damage are highly likely to fail. Our recommendation is that good faith is unnecessary, and we recommend removing it from the amendment.

The uncomfortable fact is that it is human nature for individuals to notice wrongdoing or poor conduct from those we do not like. An unintended consequence could be that whistleblowers who have poor working relationships with their employer, manager or co-workers may not be able to use this defence, even if the disclosure overall was in the public interest.

Conclusion

Protect is pleased to see this amendment tabled because it is an important issue that needs to be debated in Parliament. The fear of prosecution and lengthy custodial sentences may have a chilling effect on those who seek to raise concerns in the public interest. Our democracy relies on the ability of individuals – including whistleblowers – to hold all our institutions to account, and whistleblowers play a vital role in identifying corruption and wrongdoing, even at the heart of government.

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