

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Response to the Law
Commission's Consultation on Official
Secrecy**

May 2017

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

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EXECUTIVE SUMMARY

Liberty welcomes the opportunity to respond to the Law Commission's consultation on official secrecy. Liberty has a long history of working to oppose government secrecy, from its first conference in 1938 on official secrets and press censorship to supporting brave whistleblowers such as Katharine Gun. We have also sought to hold the intelligence services to account in respect of illegal mass surveillance, revealed only through the whistleblowing of Edward Snowden.

The Law Commission's proposals seek to completely reshape the law of official secrecy and risk returning the UK to a former age of closed government. They seek to widen the scope of the Official Secrets Acts, increase the threat of punitive prosecutions for those who speak out, and do nothing to help whistleblowers and journalists who reveal wrongdoing in the public interest.

The Law Commission's proposals have already received widespread condemnation in the UK's national newspapers, along with severe criticism from civil liberties groups, the National Union of Journalists, and many others. We urge the Commission, in light of this criticism, to think again.

We believe that these proposals would not only be deeply damaging to British society, but would harm national security. Free speech and a free press are necessary underpinnings for any well-functioning democracy – a democracy that remains accountable to its citizens and learns from its mistakes. Whilst secrecy may be sometimes necessary to protect national security, closed systems of government are deeply prone to systemic error and organisational failures. Official secrecy – where not carefully limited and circumscribed to the most pressing security needs – all too easily becomes a charter for official error and a protector of mere power, whilst undermining democratic authority and risking dangerous mistakes.

It is imperative that whistleblowers are not gagged by the threat of prosecution. Only material the disclosure of which would be seriously harmful to national security should be covered by a criminal offence, and whistleblowers and journalists should be able to defend their disclosures in court where they reasonably believed that they were in the public interest.

1. In February 2017, the Law Commission published proposals for a new Espionage Act to replace the Official Secrets Acts of 1911, 1920, 1939, and 1989.¹ Its proposals were met with widespread condemnation as an attack on whistleblowers, journalists, and freedom of speech – and for suggesting that previous discussions between the Law Commission and interested parties had amounted to real consultation.² Liberty seeks now to substantively respond to the proposals, drawing on our longstanding experience working in this area and the extensive legal and academic literature on the subject.
2. Liberty is extremely concerned that the Law Commission’s proposals merely repeat out-dated Government dogma with little analysis or discussion – and in some cases statements and characterisations that are positively misleading. The sorely-needed public interest defence is dismissed without real debate, for example, and the case for even more Draconian powers is quickly accepted on the advice of unnamed “stakeholders”. Very little mention is made of the increasing trend towards greater liberalisation over Government information and the public’s now deep-rooted expectations of transparency and accountability. Nor is any mention made of the other serious limits to freedom of information and speech elsewhere in UK law and practice, such as the longstanding Defence and Security Media Advisory (DSMA) Notice system and the blanket and sweeping exemptions for security and intelligence material in the Freedom of Information Act 2000 and the Public Records Act 1958. Liberty believes that the Law Commission’s proposals are out-dated and dangerous, and we urge it to think again.
3. Notwithstanding claims that the Law Commission wishes to ‘modernise’ old law, these proposals have come – as others have suggested – at a very specific time. In 2013, National Security Agency (NSA) contractor Edward Snowden leaked details of the unlawful joint US-UK mass surveillance programme, igniting one of the most important debates on surveillance in the history of democracy. As a result of his disclosures, serious government wrongdoing has been revealed – and the US and UK governments were given the opportunity to reform their practices to render surveillance more accountable, more proportionate, and more safe. As to the US,

¹ Law Commission, ‘Protection of Official Data: A Consultation Paper’, 2017, available here: http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf. All references below, unless otherwise stated, are to paragraphs in the Law Commission’s paper.

² *The Guardian*, ‘Government advisers accused of full-frontal attack on whistleblowers’, 12 February 2017, available here: <https://www.theguardian.com/uk-news/2017/feb/12/uk-government-accused-full-frontal-attack-prison-whistleblowers-media-journalists>.

“Within six months, nineteen bills had been introduced in Congress to substantially reform the [NSA’s] bulk collection program and its oversight process; a federal judge had held that one of the major disclosed programs violated the Fourth Amendment; a special President’s Review Group (“PRG”), appointed by the President, had issued a report that called for extensive reforms of NSA bulk collection and abandonment of some of the disclosed practices; and the Privacy and Civil Liberties Oversight Board (“PCLOB”) found that one of the disclosed programs significantly implicated constitutional rights and was likely unconstitutional.”³

4. By contrast, the UK has seen the passage of the Investigatory Powers Act, which has simply enshrined in statute the malpractice that Snowden revealed. The Law Commission has now published proposals to make it easier to prosecute and punish not only whistleblowers – even those who are, like Snowden, foreign nationals working abroad with UK intelligence partners – but journalists who reveal wrongdoing in the public interest. Nowhere is this more apparent than in the Law Commission’s proposals to include within the reach of secrecy and espionage offences relating to those who are not British subjects or working for the Government – a suggestion designed to capture future whistleblowers in the same position as Edward Snowden.⁴
5. We believe that the Law Commission has deeply misunderstood the post-Snowden intelligence and security landscape. Rather than seeking to clamp down on future such whistleblowers, we should be seeking to hold the agencies accountable for their wrongdoing and ensure that human rights breaches are not committed. Not even the US – the country of which Snowden is a citizen – has sought to amend to its century-old Espionage Act of 1917 to make it easier to prosecute whistleblowers. We urge the Law Commission to abandon its misguided proposals.

The history of official secrets – a charter for official blunders

6. The UK public now expects their decision-makers to act accountably and transparently. It should no longer be necessary to argue for the benefits – both to democracy and to national security itself – of open government. Governments owe their citizens transparent and accountable administration. Without freedom of information, democracy is not possible. But nor is effective government: secrecy

³ Benkler, Y., ‘A Public Accountability Defence for National Security Leakers and Whistleblowers’, in 8 *Harvard Law & Policy Review*, 2014, pp. 281-326, p. 281, available here:

<https://dash.harvard.edu/bitstream/handle/1/12786017/Benkler.pdf?sequence=3>.

⁴ See paragraphs 2.169-2.175 and 3.125-3.225.

hides officials from their mistakes, shielding them from criticism and removal. Whistle-blowers and journalists – sitting outside the internal machinery of government – open up decision-making to the public and expose mistakes to public scrutiny.

7. Closed systems of government are deeply prone to systemic error and organisational failures. Official secrecy – where not carefully limited and circumscribed to the most pressing security needs – all too easily becomes a charter for official error – and a protector of mere power, whilst undermining democratic authority and risking dangerous mistakes.
8. The law has nonetheless failed to keep with public expectations. The last century or more is replete with ill-conceived and poorly-drafted laws of sweeping and dangerous application, misguided and embarrassing prosecutions, and revelations by whistleblowers to the benefit of accountability and security. With the passage of the Freedom of Information Act in 2000, and the deepening of human rights protections for journalists and whistleblowers with the Human Rights Act, the public now expect far more transparency and accountability from their government than it has provided hitherto.
9. The Official Secrets Act 1989 builds on a century of previous attempts to clamp down on freedom of speech, and the history of the 1911 Official Secrets Act is instructive for future reform efforts today. The sources cited by the Law Commission,⁵ in addition to several others not mentioned, make clear that the 1911 Act was passed in an atmosphere of intense paranoia and xenophobic suspicion. Public anxiety as to German espionage was without any substantial basis in fact, but the Government nonetheless exploited this climate of fear to pass the 1911 Act with little public opposition and with misleading statements as to the Act's intent. It is notorious that the Act – parts of which are still in force today – was passed by Parliament in less than a day and with no debate.⁶
10. As a result, the 1911 Act was sweeping in scope and gave the Government Draconian powers to suppress whistleblowers and freedom of speech. Those speaking out against Government wrongdoing were required to prove their innocence

⁵ See, for example, its paragraphs 2.9 to 2.13.

⁶ For this history, see Moran, C., *Classified: Secrecy and the State in Modern Britain*, Cambridge University Press, 2013, chapter 1, Robertson, G., *Freedom, the Individual, and the Law* (7th edn.), Penguin, 1993, pp. 158-9, Hooper, D., *Official Secrets: The Uses and Abuses of the Act*, 1988, chapters 1 and 2, Cobain, I., *The History Thieves: Secrets, Lies and the Shaping of a Modern Nation*, 2016, chapters 1 and 2, and Fenwick, H., and Phillipson, G., *Media Freedom under the Human Rights Act*, Oxford University Press, 2006, pp. 923-7,.

– a dramatic reversal of historic UK legal tradition.⁷ Journalists were treated as traitors and spies. The disclosure offences under section 2 were so broad as to include *any* information even tangentially related to Government service. As many have highlighted, “In legal theory, it was a crime to reveal the number of cups of tea consumed each day in the MI5 canteen.”⁸ These powers allowed a culture of official secrecy to pervade Government. In essence, transparency became a criminal offence.

11. However, many of the attempts to enforce the Act merely resulted in Government embarrassment, as its efforts appeared to be attempts to cover up state scandal rather than protect national security. In 1977, for example, three individuals – including journalist Duncan Campbell – were prosecuted under the 1911 Act simply for reporting the *existence* of Government Communications Headquarters, or GCHQ – the UK’s signals intelligence service. Even worse, Duncan Campbell was prosecuted under section 1 of the 1911 Act – the provision still in force today to convict spies of foreign governments – until the judge at trial expressed criticism at the “oppressive” use of this anti-espionage provision against a journalist. Such prosecutions, however, should have come as no surprise, since in 1958 two Oxford University students had been convicted for 6 months’ imprisonment for doing precisely the same in their student newspaper.⁹
12. In 1984, Ministry of Defence civil servant Clive Ponting revealed information which suggested that the Government had not been truthful about the circumstances of the sinking of the Argentinian battleship, *General Belgrano*. He was charged under section 2 of the 1911 Act, and at trial he was able to argue – narrowly within the terms of the old legislation – that his disclosure was in the public interest and therefore he should not be convicted. The jury agreed, and he was acquitted – resulting in very significant embarrassment for the Government of the day.¹⁰
13. After the Franks Committee made recommendations for reform in 1972, the Government passed its 1989 Official Secrets Act, removing the worst element of the 1911 Act – the notorious section 2 – whilst retaining much else. Journalists and whistleblowers remained under threat much as before.

⁷ See analysis in Thomas, R., *Espionage and Secrecy*, Routledge, 1991, p. 6.

⁸ Robertson, 1993, p. 159.

⁹ For detail, see Moran, 2013, pp. 186-98.

¹⁰ For detail, see Cobain, 2017, pp. 53-5.

14. Whilst it improved the law in some ways, the 1989 Act failed to render UK Government more transparent and less secretive. It strongly sharpened the language of the offences, denuding the law of any possibility of a public interest defence of the kind on which Clive Ponting successfully relied, and retained blanket bans on disclosure for the intelligence security services. It also imposed only a very limited damages test for the other offences, ensuring that future prosecutions would be all too easy to bring, and created a new, journalist-specific offence of ‘unauthorised publication’.¹¹
15. These concerns have been amply borne out by cases prosecuted under the 1989 Act. Katharine Gun, a translator working at GCHQ, leaked an email which detailed a plan for the British intelligence agency to help the US unlawfully eavesdrop on the United Nations Secretary-General Kofi Annan, along with diplomats of six UN member states, to help them win support for the Iraq War. Having no confidence in internal mechanisms of complaint, she sent the email to *The Observer* – knowing that the fateful decision to launch what she believed to be an illegal war was soon to be made. She was prosecuted under section 1 of the 1989 Act with the consent of the Attorney General, until she – with the support of Liberty – sought to defend herself on the basis that her disclosure had been necessary to prevent loss of life arising from the illegal war which the eavesdropping was to precipitate. The Government was unwilling to disclose its legal advice as to the War in Iraq, and so dropped the case at the last minute.
16. In 2005, David Keogh, a civil servant at the Cabinet Office, was prosecuted under sections 2 and 3 of the 1989 Act for leaking a memo detailing a conversation between Tony Blair and George Bush – alleged by newspapers at the time to detail the US leaders plans to unlawfully bomb the headquarters of news agency Al-Jazeera in Qatar. The trial was held largely in camera under provisions in the 1920 Official Secrets Act, and to this day it remains illegal to report the description of the memo made in court, other than David Keogh’s own words – that it was “abhorrent” and “illegal”. Despite the real public interest in disclosing allegations of grossly unlawful military plans, David Keogh and a Parliamentary researcher, Leo O’Connor – who had passed on the memo to the MP for whom he was working – were convicted and jailed for 6 months.¹²

¹¹ For academic support for this criticism, see, for example, Moran, 2013, p. 340, and Barendt, E., *Freedom of Speech* (2nd ed.), Oxford: Oxford University Press, 2007, p. 196.

¹² For both cases, see Cobain, 2016, pp. 56-9.

17. In 2005 and 2006, Derek Pasquill – a Foreign Office official – leaked details of the CIA’s rendition flights to the *New Statesman* and *The Observer*. The Government charged him with breaches of the 1989 Act, but dropped the charges when it admitted that the documents that had been revealed were not in the least bit damaging.¹³ He was nonetheless retributively sacked from his civil service post. His disclosures revealed, among other things, that officials were aware that rendition “is almost certainly illegal”, and that detainees captured by UK armed forces may have been sent to CIA ‘dark prisons’ around the world.
18. And in 2011, journalist Amelia Hill was threatened with prosecution under the 1989 Act for revealing that the News of the World had hacked Millie Dowler’s phone – in an attempt by the Metropolitan Police to force her to reveal her sources. After widespread outrage from the public and the media, the case was abruptly dropped – but it would never have been an option had the UK’s secrecy laws been less widely drawn.¹⁴
19. Other provisions of the Acts have also been used to clamp down on free speech. For example, section 9(2) of the 1911 Act permits searches of premises without a warrant¹⁵ – entirely outwith the regime of search powers under the Police and Criminal Evidence Act 1984 (PACE), which include specific safeguards for journalistic material.¹⁶
20. Liberty is extremely concerned with any power to search a person’s home or business unconstrained by the need for independent and impartial judicial authorisation.¹⁷ These powers have been used to conduct raids on journalists’ homes and premises – including the storming of the offices of the *New Statesman* and BBC Scotland in 1987, when Duncan Campbell – commissioned by BBC Scotland – sought to publish a documentary which included discussion of a Government

¹³ *The Guardian*, ‘Civil servant who leaked rendition secrets goes free’, 10 January 2008, available here: <https://www.theguardian.com/media/2008/jan/10/pressandpublishing.medialaw>.

¹⁴ *The Guardian*, ‘Metropolitan police drop action against the Guardian’, 20 September 2011, available here: <https://www.theguardian.com/media/2011/sep/20/metropolitan-police-drop-action-guardian>, and ‘Met action against the Guardian: what the other papers said’, 20 September 2011, available here: <https://www.theguardian.com/uk/2011/sep/20/police-official-secrets-act-guardian-papers>.

¹⁵ Where it appears to a superintendent of police that “the case is one of great emergency and that in the interest of the State immediate action is necessary”.

¹⁶ For which see Part II of the Act, in particular sections 8, 13, and 14.

¹⁷ By contrast, the Law Commission appears to accept the Government’s arguments as to its alleged need for these powers without discussion (see paragraph 2.67).

surveillance programme, which also revealed the cost of the project, a detail which had been hidden from Parliament.¹⁸

21. In addition, one of the few extant provisions of the 1920 Official Secrets Act – section 8(4) – gives the criminal courts sweeping powers to exclude any members of the public – including journalists – from trials of any offences under the 1911 and 1989 Acts.¹⁹ Liberty has long campaigned against Government attempts to create secret courts in which trials are heard without public scrutiny or where evidence is adduced unseen by the defence. We vehemently opposed the provisions of the Justice and Security Act 2013 which created ‘closed material procedures’ (CMPs) in civil trials, and remain extremely worried by the slow creep of Government secrecy in criminal trials,²⁰ especially where the Government can use existing powers to restrict the evidence adduced – via Public Interest Immunity – as a means of avoiding *in camera* proceedings and CMPs.

22. Liberty believes that there are serious problems with the current secrecy regime. The offences are too broad, with too few defences for those who disclose information which reveals wrongdoing by Government. We oppose the Law Commission’s proposals as going in entirely the opposite direction to what the evidence suggests and what the public demands – as the backlash to their proposals demonstrated. For all its calls for modernisation, its attitude towards whistleblowers and secrecy is more reminiscent of the Cold War than the new era of ‘Big Data’.²¹ Tellingly, the chief source cited by the Law Commission is a book on *espionage* published before the collapse of the Soviet Union.²² The Commission cites *not a single source* dedicated to the balance between whistleblowing and data protection. We examine each of the most concerning features of their suggestions below.

THE LAW COMMISSION’S PROPOSALS

¹⁸ See Moran, 2013, pp. 199-200.

¹⁹ A court may do so where, on application by the prosecution, it is satisfied that the publication of any evidence given or statement made during the proceedings would be “prejudicial to the national safety”.

²⁰ Even four years after the passage of the Act, no evidence has been presented which would even remotely show that such a comprehensive attack on the principle of open justice is necessary. Even more, secret courts are dangerous and destructive of the rule of law. We continue to urge for the repeal of these dangerous provisions which allow Government to hide its mistakes from the public, not safeguard national security.

²¹ The OSA’s roots in the mentality of the Cold War has been noted by many: for example, see Bailin, A., ‘The last Cold War statute?’, in *Criminal Law Review* 8, pp. 625-31.

²² Thomas, 1991. As far as is known, this is the only book in the available literature which continues to defend that part of the 1911 Act which receives otherwise universal condemnation, section 2, and also defends parts of the 1911 Act which the Law Commission rightly abjures, such as the reverse burden of proof: see pp. 212-3, for example.

23. The Law Commission's proposals include the following suggestions to which Liberty and others have strongly objected:

- i. The widening of the espionage offences under the 1911 Act.
- ii. The removal of the already weak test for damages in the 1989 Act.
- iii. The drastic increase in jail time for journalists and whistleblowers.
- iv. The inclusion of economic matters as 'official secrets'.
- v. The dismissal of a public interest defence.

Prosecuting whistleblowers and journalists as spies

24. One of the Law Commission's most shocking proposals is its suggestion that the remaining espionage offences in the 1911 Act should be expanded to more easily prosecute journalists and whistleblowers who reveal Government wrongdoing in the public interest.

25. Currently, the offence of spying under section 1 of the 1911 Act is committed where an individual (among other things) "obtains, collects, records, publishes, or communicates" any secret document or information "for any purpose prejudicial to the state". Overall, the provision is designed to target those actively spy for a foreign government that seeks to do the UK harm.

26. The Law Commission suggests that an individual who reveals information be prosecuted where he or she "knew or had reasonable grounds to believe his or her conduct was capable of benefiting a foreign power."²³ This finding is reached with little analysis or discussion, and accompanied by the unevicenced claim that "[a] requirement for the prosecution to prove that the defendant's conduct did in fact benefit a foreign power could be very difficult given the nature of the activity in question."

27. We believe that this proposal has very serious implications. *The Guardian* managed to avoid prosecution for its publication of Snowden's disclosure, although they were threatened with it by Government. However, they have serious worries:

"The Law Commission's proposals for a new act appear expressly designed to make sure that if such a thing happened again, this time charges could be brought with confidence. Its proposals require only that someone had been gathering information that might benefit a foreign power or might prejudice the interests or safety of the state. They would not need to involve any intent to

²³ See paragraphs 2.145 to 2.150.

pass the information on to a foreign agency. A journalist would merely have to be notified that the information was capable of benefiting a foreign power for its publication to be banned.”²⁴

28. These concerns are amply borne out by the evidence. Whereas under the 1911 Act the prosecution must show that the individual made the unauthorised disclosure with a purpose prejudicial to the state, the Government would only need to classify the document as secret to then claim that the individual should have known that its disclosure would be prejudicial. In fact, this is precisely what has occurred in the US: evidence that the information is classified is routinely taken by judges as proof that the information is prejudicial or damaging.²⁵ As held by a US appeal decision relating to the disclosures of John Kiriakou, a CIA officer who in 2007 revealed the torture of those subject to ‘extraordinary rendition’ during the ‘War on Terror’, “courts have relied on the classified status of information to determine whether it is closely held by the government and harmful to the United States”.²⁶ We are very concerned that courts would take the same approach under the Law Commission’s proposals, turning its suggested reforms into an even more oppressive tool against freedom of the press. (We expand further on the issue of the damages threshold, concerns as to which overlap with these, below.)

29. The Law Commission refuses to even consider the case that section 1(1)(b) and (c) of the 1911 Act – which set out the offences of espionage – are in need of serious reform. These provisions risk suppressing free speech by criminalising investigative journalists and the whistleblowers with whom they work for communicating information deemed to be an official secret.

30. As far back as 1972, the Franks Committee made the following sensible proposal: to separate the law relating to unauthorised disclosure of information from that of espionage,²⁷ and abolish the offences of merely obtaining information.²⁸ We urge the Law Commission to abandon its proposals, and make one thing extremely clear: journalists are not spies, and must not be treated as such.

²⁴ *The Guardian*, ‘The Guardian view on official secrets: new proposals threaten democracy’, 12 February 2017, available here: <https://www.theguardian.com/commentisfree/2017/feb/12/the-guardian-view-on-official-secrets-new-proposals-threaten-democracy>

²⁵ See Pozen, 2013, p. 523, footnote 39, and Feuer, K., ‘Protecting Government Secrets: A Comparison of the Espionage Act and the Official Secrets Act’, 2015, *Boston College International and Comparative Law Review* 38/1, pp. 117-8, available here: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1737&context=iclr>.

²⁶ Cited at Pozen, 2013, p. 523, footnote 39.

²⁷ Departmental Committee on Section 2 of the Official Secrets Act (‘the Franks Report’), 1972, Volume 1, p. 33.

²⁸ Franks Report, Volume 1, Paragraph 205.

The damage requirement under the 1989 Act

31. Liberty is also extremely concerned by the Law Commission's proposal to remove the requirement that the prosecution prove that an unauthorised disclosure was damaging. These recommendations build on the already weak tests for damage in the 1989 Act, and the lack of *any* need to prove damage in respect of disclosures made by members of the intelligence and security services.²⁹
32. In making its suggestions, the Law Commission appears to adopt, without argument, the claim of unidentified "stakeholders" that disclosures must be criminalised regardless of the actual harm caused. Rather than examining the case for a real damages threshold, it offers only a choice between whether the offence would be committed where an individual knew, or merely believed, that the disclosure would be *capable* of causing damage.³⁰ It also simply presumes that the meaning of the word, 'damage', would remain tied to the extremely loose definition in the 1989 Act. No other alternatives – beyond the Law Commission's later discussion, and rejection, of a public interest defence – are even considered.
33. These provisions are already at variance with the conclusions of the 1972 Franks Committee, set up to review the 1911 Act, which found that a reasonable and appropriate standard would be that the disclosure "would be likely to cause serious injury to the security of the nation or the case of the people."³¹
34. Currently, the law is as follows. Section 1(1) criminalises any disclosures by members of the security and intelligence services, regardless of whether they cause any damage at all. Disclosure by any Crown servant or contractor under section 1(3) can be found to be damaging where it simply "falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely" be damaging.³² Disclosure under section 3(1)(b) of confidential information obtained from a foreign state can be deemed to be damaging by virtue of "the fact that it is confidential" or "its nature or contents".³³ And as the writers of a leading textbook on human rights law, Helen Fenwick and Gavin Phillipson, describe the offences under sections 2, 3(1)(a), and 4, the damage need only "be *likely* to occur due to the disclosure in question, whether it has occurred or not."³⁴ Section 5 – which

²⁹ As to the latter, see section 1(1).

³⁰ See paragraphs 3.158 and 3.161-3.164.

³¹ See Franks Committee report, p. 47.

³² See section 1(4)(b).

³³ See section 3(3)(a) and (b).

³⁴ Fenwick and Phillipson, 2006, p. 946, on sections 2, 3

targets journalists – simply imports these tests (depending on the type of unauthorised disclosure), and so provides no additional protection for journalists than these already weak provisions.³⁵

35. Bizarrely, the Law Commission presents its recommendation to remove the damages threshold as *a safeguard* on future prosecutions, amounting, so it claims, to a new requirement to prove an additional element of mental fault.³⁶ Just as with its suggested changes to the 1911 Act, this will not only be an insufficient safeguard but will make the situation worse.

36. As occurs in the US, such a provision invites courts to defer to the Government's own classification system to determine the harm caused, leaving anything labelled an official secret as presumptively damaging, or least presumed *capable* of causing damage.³⁷ Indeed, this result is made especially likely by the Law Commission's proposal that an individual need only know or believe that the disclosure was capable of causing damage. The Government would likely argue that disclosures which were in the public interest – or even disclosures that happened to be actually *harmless* – were nonetheless *capable* of causing damage. A test of such massive breadth would threaten to capture vast swathes of disclosures that are not only permitted under existing law but are crucial to the effective working of a free and independent press.

37. As with the Law Commission's suggested changes to the 1911 Act, Liberty is extremely worried that public interest journalism and whistleblowing would be instantly criminalised by this proposal. Governments have often claimed that disclosures by whistleblowers that reveal wrongdoing have damaged national security or benefited its enemies. It will be remembered that the UK Government's position for the majority of the 20th century was that merely disclosing the existence of MI5, MI6, and GCHQ would endanger national security – leading to the punitive prosecution and conviction of anyone who did so.

38. The Government has also relied on claims of national security to hide embarrassing revelations as to its conduct during the 'War on Terror'. In 2010, whilst defending itself against claims that it had facilitated the torture of British resident Binyam Mohammed, the Government sought to suggest that the UK's national security would be harmed if 7 paragraphs of the court's judgment – which showed that the UK Government knew of his mistreatment and torture – were published. However, the

³⁵ See section 5(3).

³⁶ See paragraph 3.149 onwards.

³⁷ See Pozen, 2013, p. 523, footnote 39, and Feuer, 2015, pp. 117-8.

Court of Appeal found that the disclosure of the paragraphs “would not and could not, of itself, do the *slightest damage* to the public interest”.³⁸ Elsewhere, it has sought to gag whistleblowers speaking out about torture during the Iraq War.³⁹ It is highly likely that similar claims, with similarly dubious foundation, will be made against future whistleblowers revealing things embarrassing to Government. The Law Commission’s proposals will ensure that such claims – no matter how baseless – may form the basis of prosecutions.

39. In the world of national security, journalists play an especially important role. The revelations of Edward Snowden opened a debate as to whether the practices he revealed are in fact more dangerous than targeted, proportionate surveillance, as we believe – along with many others, such as former NSA Technical Director William Binney.⁴⁰ Snowden passed his information to three well-known, well-respected journalists whom he trusted to ensure that only material in the public interest be disclosed. The Law Commission’s proposals jeopardise the crucial relationship between whistleblowers and journalists. If journalists feel more vulnerable to prosecutions, they will stop playing this important role. The result will be more indiscriminate leaks from those who feel they have no other avenue by which to speak out but who lack the assistance of responsible journalists to ensure that disclosure is in the public interest.

40. We urge the Law Commission to abandon its proposals to remove the damages threshold, and recommend instead that any offence of unauthorised disclosure must only attach to information the disclosure of which would cause identifiable, serious harm to national security.

The state’s approach to prosecutions under the Acts

41. To justify its sweeping change to the requirement to prove damage, the Law Commission cites decades-old Government White Papers that claim that adducing evidence in court to prove the damage done to national security by the disclosures may be as harmful or more harmful than the original disclosures themselves.⁴¹ It also

³⁸ [2010] EWCA Civ 65. Emphasis added.

³⁹ *The Daily Telegraph*, “I didn’t join the British Army to conduct American foreign policy”, 12 March 2006, available here: <http://www.telegraph.co.uk/news/uknews/1512767/I-didnt-join-the-British-Army-to-conduct-American-foreign-policy.html>, and *The Guardian*, ‘Court gags ex-SAS man who made torture claims’, 29 February 2008, available here: <https://www.theguardian.com/uk/2008/feb/29/military.law>.

⁴⁰ Liberty, ‘The case for targeted surveillance’, 28 January 2016, available here: <https://www.liberty-human-rights.org.uk/news/blog/case-targeted-surveillance>.

⁴¹ See, for example, paragraphs 3.32 and 3.33.

cites “preliminary consultation with stakeholders” which, it claims, suggest that “the damage element of the offences can pose an insuperable hurdle to bringing a prosecution”.⁴²

42. No evidence is provided for these assertions, and the identities of the “stakeholders” cited are not even disclosed. Surprisingly, the Law Commission reaches this conclusion despite its express acceptance that it “stands in contrast to those commentators who expressed the view that the damage requirement would be easy to satisfy”. In denying this, it merely cites unevicenced “practical experience”.

43. Moreover, whilst the Law Commission cites some who disagree with them, it barely mentions the wide variety of commentary on the Act which starkly contrasts with their broad conclusions. For example, Columbia University Professor of Law David Pozen conducted an extensive review of official secrecy prosecutions in the US and the UK and his conclusions are in striking disagreement with those of the Law Commission.⁴³ It is surprising that the Law Commission does not examine his research, since they later cite another of his papers from as far back as 2005 to support their own views.⁴⁴

44. As Professor Pozen concludes, the only plausible explanation for the lack of secrecy prosecutions in the US is that cracking down on disclosures “has not been a priority” for the government.⁴⁵ As he found, the US government has similarly Draconian powers available to it as the UK – its Espionage Act of 1917 being very similar to UK law – but its government has largely refused to prosecute those who disclose, or even pursue internal disciplinary measures short of prosecution.⁴⁶ Rather, the government largely seeks to benefit from strategic disclosures of even sensitive information to advance its agendas. Put starkly, “vigorous enforcement of the leak laws would cripple the administration’s ability to plant on national security and foreign policy subjects.”⁴⁷

45. As he and others have found, the same appears true of the UK. In his review of the last century of official secrecy cases, academic Christopher Moran concludes that the UK Government “has generally been loath to preserve secrecy by taking offenders to

⁴² See paragraph 3.143.

⁴³ Pozen, D., ‘The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information’, in *Harvard Law Review* 127, 512, available here: <http://harvardlawreview.org/2013/12/the-leaky-leviathan-why-the-government-condemns-and-condones-unlawful-disclosures-of-information/>.

⁴⁴ See paragraphs 7.46 and 7.47.

⁴⁵ Pozen, 2013, pp. 544-5.

⁴⁶ As he concludes, this remains true even if the upswing in prosecutions during the Obama presidency is taken into account, it being insufficient to displace the long-term trend.

⁴⁷ Pozen, 2013, p. 562.

court, preferring instead to use informal mechanisms of control...Typically when confronted with an individual threatening the security of its classified information, the state has relied on making deals and devising pragmatic solutions behind the scenes...officials...countenance deliberate leakages when it suits them”⁴⁸

Government leaks are very often tolerated where they serve political ends, even when in breach of the Official Secrets Act. It is instructive that no Ministers or MPs have been prosecuted under the Act, as many have noted – with Ministers “assumed to have the power to authorize themselves to disclose secrets, however deviously or improperly”.⁴⁹

46. As the House of Commons Public Administration Select Committee found in its investigation of Whitehall leaking, “no government has seemed able *or willing* to stamp out this practice”, with investigations in part stymied by “a political culture that tolerates low-level political leaking”.⁵⁰ Whilst official figures as to the annual numbers of prosecutions under the Acts are not kept, a Government response in 2004 indicated that there are fewer than one a year.⁵¹

47. The lesson of many of the trials under the Official Secrets Act is not that they have harmed national security, but that they have simply been embarrassing to Government. As was remarked by many at the time and since, the prosecution of Duncan Campbell and two others for their disclosure of the existence of GCHQ generated far more publicity for the agency than if no action had been taken.⁵² More recently, when Katharine Gun’s case was dropped by the Attorney General, we commented, “One wonders whether disclosure in this criminal trial might have been a little too embarrassing”.⁵³

48. In many cases, the Government has refrained from prosecution in fear of a public backlash against its use of Draconian powers to punish whistleblowers. As

⁴⁸ Moran, 2013, pp. 4 and 201. The same is in fact concluded in a 1989 source cited by the Law Commission (for a different point): Griffith, J., ‘The Official Secrets Act 1989’, in *Journal of Law and Society* 16/2, 1989, pp. 273-90, p. 280.

⁴⁹ See, for example, Robertson, 1993, pp. 161-2.

⁵⁰ House of Commons, Public Administration Select Committee, ‘Leaks and Whistleblowing in Whitehall’, Tenth Report of Session 2008-09, 16 July 2009, pp. 13 and 18, available here: <https://www.publications.parliament.uk/pa/cm200809/cmselect/cmpublicadm/83/83.pdf>. Emphasis added.

⁵¹ See House of Commons Debates, 6 February 2004, column 1121W, available here: <https://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040206/text/40206w11.htm>.

⁵² For example, see Moran, 2013, p. 193.

⁵³ BBC News, ‘GCHQ translator cleared over leak’, 26 February 2004, available here: <http://news.bbc.co.uk/1/hi/uk/3485072.stm>.

suggested by Helen Fenwick and Gavin Philipson, writers of a leading human rights textbook,

“The decision in *Ponting* suggested that the very width of s 2 was undermining its credibility; its usefulness in instilling a culture of secrecy owing to its catch-all quality was seen as working against it. The outcome of the case may have influenced the decision not to prosecute Cathy Massiter, a former officer in the Security Service, in respect of her claims in a Channel 4 programme screened in March 1985 (*MI5’s Official Secrets*) that MI5 had tapped the phones of trade union members and placed CND members under surveillance. Section 2’s lack of credibility may also have been a factor in the decision to bring civil as opposed to criminal proceedings against *The Guardian* and *The Observer* in respect of their disclosure of Peter Wright’s allegations in *Spycatcher*”.⁵⁴

49. Moreover, whilst we vehemently oppose secret courts, we highlight the existence of the 1920 powers to hold hearings *in camera* to identify the specious basis on which the Law Commission presents its proposals. It fails to provide any reason for thinking that these powers would not deal with its allegations regarding the risks of proving damage in court. Even on the Law Commission’s own assumptions – which Liberty rejects – it has failed to present any real basis for the changes it suggests.

50. This evidence suggests that a real damages threshold – one applicable to all offences, including those against agency personnel – would be a significant and workable safeguard. The Law Commission fails to properly consider the arguments in favour of a damages threshold, simply repeating Government White Papers on the subject from the late 1980s. It fails to produce any evidence or independent analysis to support former Government views, and fails to consider the evidence cited above. We urge the Law Commission to think again.

The arbitrary, blanket prohibition of intelligence and security whistleblowing

51. The Law Commission does not even consider the case for inserting a damage threshold in section 1 of the 1989 Act, which amounts to a blanket ban on all intelligence and security disclosure – no matter how trivial the material they disclose. As noted above, disclosure of literally any information with which an agent comes into contact is banned from disclosure, provided it is merely “related” to security and intelligence and came to them “by virtue of” their employment.

⁵⁴ Fenwick and Phillipson, 2006, p. 926.

52. The confidence and credibility of the intelligence and security agencies needs to be won by transparent and accountable practices, not simply assumed. Old Government arguments against a more proportionate approach to the disclosures of intelligence and security agents – which the Law Commission simply repeats⁵⁵ – are now deeply implausible. It is claimed that the special credibility of agents means that *literally any* disclosures are dangerous, since they are especially likely to be believed. But if the information disclosed is not harmful, why should this matter? And if the information is harmful, why can harm not be assessed, and weighed against the public interest in disclosure? In some cases, false reports may be as damaging as true ones, as the Government has previously suggested, but the threatened harm of any disclosure must be assessed, not simply assumed. Moreover, reliance on this claim by Government is liable to appear specious when the Government routinely relies on its policy of ‘Neither confirm nor deny’.⁵⁶
53. The arbitrary, blanket prohibition on disclosure of any information a person acquires as a result of their work in the security and intelligence services results in the same absurd consequences as the now-repealed section 2 of the 1911 Act – which placed banned the disclosure of all government information, no matter how trivial. Not only are revelations in the public interest punished, but – as we pointed out in 2001 – disclosure of a document by a member of the Security Services may be an offence, whilst disclosure of *the same document* by a former civil servant in the Home Office may not be.⁵⁷ How can this be justified?

A drastic increase in jail time

54. The Law Commission also proposes increasing the length of sentence which conviction under the 1989 Act attracts, and approvingly cites sentences elsewhere of up to 14 years – a sevenfold increase on the existing offences.
55. The Law Commission also approaches the issue of sentence in a manner which appears partial or poorly-informed. It remains the case that individual charges under the 1911 Act – which covers espionage – carry up to 14 years’ imprisonment and

⁵⁵ Paragraph 3.25.

⁵⁶ Evidence suggests that the Government relies on this policy in a selective and self-serving manner. For example, when former MI5 agent David Shayler made disclosures about agency wrongdoing, including the claim that MI6 sought to assassinate former Libyan dictator Moamar Ghaddafi, the Government publicly denied that it had done so – rather than simply refusing to confirm or deny the claim. The arguments of this paragraph are cogently presented in Fenwick and Phillipson, 2006, pp. 928-9.

⁵⁷ Liberty and Article 19, ‘Secrets, Spies and Whistleblowers: Freedom of Expression in the UK’, 2001, section 3.1.2, available here: <https://www.article19.org/data/files/pdfs/publications/secrets-spies-and-whistleblowers.pdf>.

some have been given multiple sentences running consecutively for up to 40 years.⁵⁸ Moreover, its mention of Canada's 14-year sentences is apt to mislead, since Canadian law provides for a public interest defence – something that the Law Commission rejects whilst still recommending a sentencing increase.

56. The Law Commission claims that heavier sentences are justified by the greater risk presented by modern technology and an increased risk of leaks. The evidence does not bear this out. Whilst there is no UK-specific evidence, in the US there is reportedly “no robust evidence” that the number of leaks has increased over the last decade, and *only two* of the last 16 cases of national security leaks and whistleblowing were conducted using the Internet and computers.⁵⁹ The Law Commission has failed to present any real evidence that a drastic upswing in prison time is justified.
57. If Government wishes to stop unauthorised disclosures, it must improve its data security, properly review security clearances, and take myriad other measures to stop breaches – breaches which have taken place for as long as Official Secrets Acts have been in force. In fact, in an era in which Government intercepts and controls enormous quantities of data on its employees and citizens, it is likely easier than ever for Governments to find and punish whistleblowers. Along with lower thresholds for proving the offences, increased sentences will strongly incentivise others to remain quiet – knowing that if they speak out they may be swiftly identified and jailed for years.
58. The Law Commission's proposals represent a serious step backward for whistleblower protection and press freedom. Instead of making an already-Draconian system more prone to abuse, it should be recommending reforms to render government more open and accountable. Suggestions of increased sentences – within a regime that is already heavily punitive, and alongside further suggestions to render it more so – are deeply inappropriate. Liberty urges the Law Commission to reconsider this proposal.

Matters of real national security

59. The Law Commission also proposes to include within the ambit of any new Espionage Act information relating to economic matters “in so far as it relates to

⁵⁸ Such as the spy George Blake, who received a total sentence of 42 years' imprisonment in 1961.

⁵⁹ Benkler, 2014, pp. 282-3.

national security.”⁶⁰ We are extremely concerned that such a change would permit Government to cloak all manner of information with the veil of secrecy, including information that has no national security impact whatsoever.

60. In making this suggestion, the Law Commission ignores the recommendations of the Franks Commission, which found that only those economic matters relating to the currency should be included within the ambit of official secrecy legislation. Since this recommendation was made at a time at which the exchange rate for the Pound was fixed, as it no longer is, the finding falls away. Otherwise, the Commission’s view was that it is not appropriate to use prosecutions for breach of official secrecy to conceal economic information. We agree. It cannot be appropriate to punish individuals with prosecution and criminal sanction for breach of information that does not cause serious harm to national security. Individuals who obtain economic information whilst employed by Government and wrongly disclose it may face serious disciplinary sanction. Criminal punishment must be reserved for cases of serious harm to national security.

61. The apparent consequences of the Law Commission’s contrary recommendation are stark. As *The Times* have suggested, “Disclosing contents of Brexit documents deemed harmful to the UK’s economic wellbeing could land journalists in jail”.⁶¹ As *The Times* continued in an editorial,

“There was once another country that considered economic wellbeing and policy as matters of national security, and outsiders who delved too deeply into them punishable as spies. It was called East Germany and it was the most oppressive police state in history.”⁶²

62. The Law Commission relies on provisions of the Investigatory Powers Act 2016 to justify its suggestions, which include economic matters within the definition of national security “so far as those interests are also relevant to the interests of national security”.⁶³ Far from clarifying matters, these provisions confuse things further. There remains no explanation as to what it means for an economic matter to be “relevant to the interests of national security”. We remain deeply concerned that Government will treat this as an extremely low threshold. It is easy to imagine

⁶⁰ See paragraphs 3.213-4.

⁶¹ *The Times*, ‘Brexit leaks could put journalists in prison’, 11 February 2017, available here: <http://www.thetimes.co.uk/article/brexit-leaks-could-put-journalists-in-prison-0fvmv5gdm>.

⁶² *The Times*, ‘Official Nonsense’, 13 February 2017, available here: <http://www.thetimes.co.uk/article/official-nonsense-gqz2t778l>.

⁶³ See sections 20(2)(c), 61(7)(c), 102(5)(c), and 138(2)(b) of the Investigatory Powers Act 2016, for example.

possible examples. Suppose a future government seeks to conceal the fact that it has paid exorbitant sums in corrupt contracts for arms sales to the UK, which a whistleblower reveals to the media. Were the Law Commission's proposals made into law, we would be seriously worried that such a whistleblower would be charged with an offence for revealing information "relevant to the interests of national security."

63. We continue to oppose the definition adopted in the IPA, which provides for a dangerously wide power to conduct invasive surveillance without sufficient safeguards to ensure that it is necessary or proportionate. We agreed with the recommendations of the Joint Committee on the draft Bill that it should have included definitions of national security and economic well-being.⁶⁴ The Government refused to adopt this definition, leaving the scope of surveillance operations under the IPA dangerously wide. We urge the Law Commission not to make this same mistake, as it proposes to do.

64. As we urged the Government during the Parliamentary passage of the Investigatory Powers Bill, we urge that the Law Commission to adopt a significantly tighter, clearer, and less abuse-prone definition of national security, drawing on the definition of national security provided by UN's Siracusa Principles. It lays down a standard that 'national security' may only be invoked to protect "the existence of the nation or its territorial integrity or political independence against force or threat of force."⁶⁵ This would ensure that national security remains tightly defined, permitting official secrecy only where truly justified.

The public interest defence

65. The fundamental flaw which undermines the UK's secrecy legislation is a simple one. There remains no defence that the accused was acting in the public interest. Whistleblowers and investigative journalists may discover and disclose crucial material proving Government wrongdoing from which both the public and Government may ultimately benefit – transparency bringing both accountability and change. But they cannot bring to bear this public interest justification when defending themselves against charges under the Official Secrets Act.

⁶⁴ Joint Committee on the Draft Investigatory Powers Bill, 'Draft Investigatory Powers Bill Report', 11 February 2016, pp. 164-6, available here: <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf>.

⁶⁵ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), available here: <http://hrlibrary.umn.edu/instatee/siracusaprinciples.html>.

66. The Law Commission concludes that this status quo should continue. Its proposals, in essence, amount to a repetition of the Government's position of 1989, aptly summarised by former Conservative MP Richard Shepherd as the Act passed through Parliament:

“The Government's proposition to the House in the Bill is that it is necessary to send a man or woman to prison even if he or she reveals crime or fraud or iniquity, without their having any defence or the Government's having to adduce any form of damage or harm. That is an outrageous and monstrous proposition. It is a proposition that tyrants hide behind.”⁶⁶

67. As it stands, there are no comparable safeguards under the 1989 Act to protect those who disclose in the public interest. For example, the Law Commission discusses in some detail the reasoning of the Court of Appeal in the case of *Keogh*, which held that in order to convict individuals under sections 2 and 5 of the 1989 Act, for example, the prosecution must prove that the defendant had reasonable cause to believe that the information fell within a protected category and that disclosure would be damaging.⁶⁷ But these requirements amount to no safeguard at all. A whistleblower or journalist may know or have reasonable cause to believe that the information they obtain and disclose falls within a protected category – but disclosure may still be in the public interest. And since the Act defines ‘damage’ so loosely, that requirement may not be difficult to satisfy either.

68. Moreover, the defence of necessity remains an insufficient safeguard. Some have benefited from the defence, such as Katharine Gun, a former employee of GCHQ who in 2004 discovered a secret plan to eavesdrop on UN diplomats – including Kofi Annan, then-Secretary General of the UN – while the Government sought support for the Iraq war. Her disclosure was plainly in the public interest, and she raised the defence of necessity in view of the serious threat to life that an illegal war presented. She also maintained that staff had no confidence in internal processes which in any event would not have responded sufficiently quickly to deal with the abuse. Her defence went untested, however, since it would have required the disclosure of the Government's advice as to the legality of the war – something the Crown Prosecution Service was not willing to provide and so offered no evidence.

⁶⁶ Hansard, House of Commons, 2 February 1989, Volume 146, Column 473, available here: <http://hansard.millbanksystems.com/commons/1989/feb/02/security-and-intelligence>.

⁶⁷ *R v Keogh* [2007] EWCA Crim 528. For discussion, see paragraphs 3.74 to 3.90.

69. Whistleblowers, journalists, and the public deserve much better. We need the legal means by which the public interest of such disclosures can be assessed, providing a defence to unauthorised disclosure where it is truly in the public interest.

The European Convention on Human Rights

70. In examining the compatibility of its proposals with the ECHR, the Law Commission cites cases which may well be out of date – covering UK cases from 1990 and 2002 – and fails to cover more recent case law which has changed the human rights landscape in this area.⁶⁸ The House of Lords’ decision in the case of *Shayler* – now around 15 years old – has been strongly criticised, with Helen Fenwick and Gavin Phillipson – authors of a leading human rights textbook – finding that the majority decision “did not consider the proportionality test in any detail, or give much consideration to the type of expression in issue.”⁶⁹

71. In fact, the Law Commission references several legal experts who found that the House of Lords took an excessively optimistic view of the internal mechanisms by which staff could raise their concerns short of public disclosure, failed to properly examine their efficacy, or even require evidence that they were minimally effective.⁷⁰ Today, the Supreme Court, considering the modern law on proportionality, would be very unlikely to repeat such a meagre assessment of whether the current system is a necessary and proportionate interference with Article 10.⁷¹

72. Since that time, moreover, the case law of the European Convention on Human Rights has developed significantly, finding in many cases that sanctions against public interest whistleblowers breached Article 10, the right to freedom of expression.⁷² The Law Commission partially cites this case law, but fails to examine its clear and crucial implications for whistleblowers.

73. The European Court of Human Rights has identified several important considerations in assessing the compatibility of sanctions for unauthorised disclosures with Article 10 of the ECHR. These include the following: “(a) public interest involved in

⁶⁸ See paragraphs 6.26 to 6.78.

⁶⁹ Fenwick, and Phillipson, 2006, p. 941.

⁷⁰ Fenwick and Phillipson, 2006, p. 941, and Birkinshaw, P., and Varney, M., *Government and Information: The Law Relating to Access, Disclosure and their Regulation* (4th ed.), Bloomsbury Professional, 2011, p. 208.

⁷¹ For example, significantly stronger scrutiny of blanket bans and ‘bright line rules’ which allow for no exceptions or the consideration of relevant matters is now expected as a matter of course: see *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, in particular paragraph 37.

⁷² *Matúz v Hungary* (App. No. 14277/04), *Wojtas-Kaleta v Poland* (App. No. 20436/02),

disclosing the information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of the duty of discretion owed by an employee towards his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) the severity of the sanction imposed”.⁷³

74. Indeed, the dismissal of a civil servant for leaking confidential information has been found to be a breach⁷⁴ – leaving the significantly more severe measure of criminal punishment likely only justifiable in the most serious of cases.

75. In 2013, it found that the Romanian government breached Article 10 in prosecuting and convicting a former intelligence agent for revealing in a press conference the existing of unlawful wiretaps of journalists, politicians, and businesspeople.⁷⁵ It found that the disclosure was in the public interest, that any damage caused to the intelligence agencies was outweighed by that public interest, and that internal reviews and an independent Parliamentary commission did not amount to effective mechanisms for bringing the wrongdoing to light. The Law Commission considers this case, but does not draw out the obvious implication: that Article 10 protects intelligence and security whistleblowers, and requires a holistic assessment of all the circumstances of the disclosure – unlike the cursory analysis provided by the House of Lords in *Shayler*. As the Court of Human Rights has stressed, “in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed”.⁷⁶

76. In addition, the landscape of intelligence and security accountability has changed drastically since 2002. At that time, it might have been thought unlikely that in a judgment written by one of the UK’s most senior judges, the Security Services would be implicated in the illegal rendition and torture of a British resident, Binyam Mohammed. Instead, in 2010, they were described by Lord Justice Neuberger (as he then was) in the following terms:

“...as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the

⁷³ See *Guja v Moldova* (App. No. 14277/04), paragraphs 74-78, summarised in *Matúz v Hungary*, paragraph 97.

⁷⁴ *Matúz v Hungary*.

⁷⁵ *Bucur and Toma v Romania* (App. No. 40238/02).

⁷⁶ *Voskuil v. The Netherlands*, (App. No. 64752/01), paragraph 70.

behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others.”

“...Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on...Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information.”⁷⁷

77. Liberty believes that both the public and the courts now rightly expect a far greater degree of transparency and openness about agency activity. Rather than simply rely on antiquated judicial dicta as to the need to promote trust within the services, it is now expected that such trust will extend “only to information which did not reveal illegality” – since “[o]therwise, the policy of ss 1(1) and 4(1) of the OSA [would] seem to be to promote criminal conspiracies among members of the services or between members and informants to conceal information revealing unlawful activities.”⁷⁸ In other words, the intelligence and security agencies surely wish to create trust in them to do right – not trust that enables them to hide wrongdoing.

78. Instead of engaging with these arguments, however, the Law Commission simply dismisses them as “speculation” and prefers to rely on “the views of stakeholders” who remain unidentified and whose claims are unevidenced.⁷⁹ The evidence suggests otherwise. After the wrongdoing that took place during the War on Terror, the public expects far greater transparency and accountability.

The Law Commission's arguments against a public interest test

79. The Law Commission rejects the public interest defence on several spurious grounds. Firstly, it suggests that such a defence would undermine the relationship of trust between Ministers and civil servants. But the argument is misconceived. It cannot be right that civil servants justify the concealment of serious wrongdoing using a cloak of Ministerial trust. Certainly, only disclosures the revelation of which is in the public interest should be protected. The threat of prosecution and imprisonment for disclosures which are not so justified will remain a powerful deterrent. But trust in a

⁷⁷ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

⁷⁸ Fenwick and Philipson, 2006, p. 944.

⁷⁹ Paragraph 6.53.

civil servant not to reveal blatant illegality is not something to be fostered, but opposed. Moreover, the Law Commissions does not attempt to suggest that countries such as Canada which have a public interest defence have less trustworthy civil servants as a result – and yet this is the implication of their claims.

80. The Law Commission also suggests that such a defence would “undermine legal certainty” due to the “ambivalence” and “inherent ambiguity” of the concept of public interest – being unable, so it claims, to predict “how the defence would operate and when it would be successful or unsuccessful”.⁸⁰ But the law is replete with concepts that bear multiple meanings and carry a variety of moral and political implications, ‘murder’, ‘terrorism’, ‘dishonesty’, and ‘necessity’, being only some of the more obvious examples. None of these concepts places insuperable difficulties on defendants, juries, judges, or prosecutors. Indeed, it is the very job of judges and lawyers to ensure that the legal meaning of a term is clear to juries, building on the legal definitions of these concepts generated by case law.
81. In any event, the Law Commission cites the use of a ‘public interest’ test by the Crown Prosecution Service, including a list of considerations which such an assessment includes, such as “the seriousness of the offence, the culpability of the suspect, the harm to the victim, and the impact on the community”.⁸¹ Relying on such a list, the Law Commission later makes the sensible suggestion that the problems it seeks to identify can be remedied by specifying in legislation a “non-exhaustive list of factors to be taken into consideration” as part of the defence.⁸² This demonstrates that a public interest defence is not only necessary, but practical and workable.
82. Moreover, it does not require a barrister to understand that juries may arrive at different conclusions on the same set of facts in any criminal case. Contrary to what the Law Commission suggests, this would not be unique to a public interest defence.⁸³ Juries exercise judgment, analysing and evaluating the facts as evidenced before them using the law as the judge presents it. Some cases will be harder than others. In many cases, an individual’s guilt may be clear; in others, not so. So would it be with any public interest defence.

⁸⁰ See paragraph 7.50.

⁸¹ See paragraph 7.60.

⁸² See paragraph 7.64.

⁸³ See paragraphs 7.53 and 7.54.

83. The Law Commission also claims that a public interest defence would require a jury to assess what it confusingly terms “non-legal considerations”.⁸⁴ The Law Commission ignores the fact that the criminal law often provides defences of this kind, the defence of necessity (which the Law Commission cites) being only one. Self-defence, for example, involves an assessment of whether the force used was ‘reasonable’ and, as prescribed by statute, “disproportionate in the circumstances”⁸⁵ – presenting a multiplicity of considerations for the jury to assess on a case-by-case basis, including the degree of force used, the situation as it appeared to the defendant, and the alternatives to force available at the time. The Law Commission’s paper presents nothing to indicate that a public interest defence to unauthorised disclosures would be any more difficult.

84. In fact, tests of ‘public interest’ are by no means unfamiliar to the law. For example, the courts regulate the disclosure of evidence that may risk harming national security under the law of Public Interest Immunity (PII), permitting judicial review defendants to withhold disclosure where to do so would harm the public interest.⁸⁶ The Freedom of Information Act 2000 uses the term to regulate access to information, and the Information Commissioner’s Office provides substantial guidance.⁸⁷ The Public Interest Disclosure Act also includes a public interest test to determine whether any disclosure is protected. None of these cases is cited, much less criticised, by the Law Commission.

85. As these examples demonstrate, public interest tests allow judges and decision-makers to balance competing values and objectives – much like proportionality tests familiar to human rights law and judicial review. As said of the common law in general, such tests are flexible and evolutionary, developing in tandem with society’s norms and values. As judicially recognised as far back as 1977, “The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.”⁸⁸

86. Another argument made by the Law Commission cites the CPS’s existing use of a public interest test in deciding whether to bring a prosecution to suggest that prosecutors would conflate this exercise with any public interest defence for

⁸⁴ Paragraph 7.55.

⁸⁵ Section 76 of the Criminal Justice and Immigration Act 2008.

⁸⁶ See *R. v Chief Constable of West Midlands Police, ex parte Wiley* [1004] 3 WLR 433.

⁸⁷ See sections 2(1)(b), 2(2)(b), 17(3)(a), 17(3)(b), 35(4), and 46(3), and ICO, ‘The public interest test’, undated, available here: https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf.

⁸⁸ *D v National Society for the Prevention of Cruelty to Children* [1977] 2 WLR 201, 230.

whistleblowers.⁸⁹ It claims that this would result in the CPS failing or refusing to discharge their legal obligation to assess the public interest in bringing a prosecution, since the jury would be assessing, so the Law Commission claims, the same matter as part of the defence. This argument is deeply misconceived. It would be a serious dereliction of duty for the CPS to make such an elementary error. The Law Commission proposes that the CPS would mistake its own assessment of whether *the prosecution* of an unauthorised disclosure is in the public interest with the jury's assessment of whether *the disclosure* is in the public interest. Such an argument relies on the suggestion that the introduction of a public interest defence would render CPS prosecutors incapable of doing their job. Such a claim has no obvious basis in evidence, to say the least.

87. The Law Commission also suggests that the requirement for the Attorney General's permission before any prosecution provides a sufficient safeguard.⁹⁰ No evidence, analysis, or discussion is provided, but it appears similar to the fallacious claims made of the CPS noted immediately above.

88. Even worse, the Law Commission misleadingly cites a legal textbook as an apparently independent academic source of the suggestion. However, examination of the source demonstrates that the writers of the textbook do not proffer the claim as their own, but only quote Government material as an example of the kind of views available.⁹¹ Poor practice such as this indicates that the Law Commission is not properly examining or assessing the arguments presented.

National security and the public interest

89. The Law Commission also claims that the defence would endanger national security. They are wrong. National security is strengthened by robust accountability and appropriate transparency. Without them, errors are covered up rather than corrected. All too often, official secrecy hides official embarrassment, resulting in destructive and dangerous policies that become ossified rather than overturned. It cannot be in the interests of national security that Government wrongdoing goes unremedied.

90. Firstly, however, it is important to highlight that most disclosures under the current regime which implicate national security are covered by section 1 of the 1989 Act – the offence attaching to intelligence and security officials. These are the individuals

⁸⁹ See paragraphs 7.60 to 7.62.

⁹⁰ Paragraph 7.62.

⁹¹ Birkinshaw and Varney, 2011, p. 234.

who routinely deal with information that implicates national security, and in prosecuting individuals under section 1 the Government need not prove *any* damage in court. As a result, the Law Commission's stated concerns should largely not arise, even on its own assumptions. And yet it suggests this sweeping change which would lower the bar for prosecutions across the board – a dangerous proposal introduced without evidence.

91. Regardless, Liberty believes that national security is safeguarded by whistleblowers. Whilst some individual leaks may be harmful, in general whistleblowing helps government by identifying wrongdoing and bringing independent scrutiny of activity that would otherwise remain concealed – which are of vital importance in an area as critical as national security. Recognising the fact that large organisations – such as the UK's intelligence and security agencies – will suffer from organisational blindspots and systemic errors does not require any special scepticism towards them, just a recognition that sometimes only outside oversight – often by the press and public – can break through entrenched practice.⁹²

92. But, more importantly, the Law Commission has not identified a single case where press publication has harmed national security.⁹³ As to the UK, the cases brought under the 1911 and 1989 Act cited above speak for themselves. As academic Christopher Moran writes reviewing the last century of official secrets prosecutions, “Far too often the leverage of ‘national security’ has been misappropriated in a bid to conceal information likely to cause political embarrassment.”⁹⁴

93. Certainly, the Government must have some means at its disposal to protect information where its disclosure seriously threatens national security, but there is no evidence to suggest that the introduction of a public interest defence would render this legitimate objective more difficult to achieve overall. In fact, individuals who do recklessly endanger national security would face the task of convincing juries that they acted in the public interest. As the Law Commission itself accepts, “the defence would not be able to be pleaded successfully if the endangering of others outweighed other considerations.”⁹⁵

⁹² For a review of the problems to which the agencies may be prone, see Benkler, 2014, pp. 290-2.

⁹³ Of the US, academic Geoffrey Stone comments, “[T]here has not been a single instance in the history of the United States in which the press's publication of a ‘legitimate but newsworthy’ government secret has gravely harmed the national interest”, cited with additional similar comment in Pozen, 2013, p. 543, and originally from Stone, G., ‘The Lessons of History’, in *ABA National Security Law Reports*, 2006, p. 3.

⁹⁴ Moran, 2013, p. 14.

⁹⁵ Paragraph 7.49.

94. Of course, there will be hard cases. Juries will have to decide whether the disclosure, for example, of the fact that the Government has failed to deal some weakness in its defences was in the public interest, as against the damage potentially done by the revelations of these gaps in capability. In many cases, the revelation of culpable negligence on the part of Government will have been necessary to bring change. In other cases, it may not be, especially where the leaks involve specific technical details of real use to state enemies. Publishing the *fact* that the Government has been grossly negligent in purchasing faulty defence equipment may well fall within the public interest, whilst publishing the *precise details* of those faults may not; whilst the latter information could be of real benefit to our enemies, the former may amount to public interest journalism which helps Government remedy its errors and keep Britain safe.⁹⁶

95. This is precisely what a public interest test is designed to assess. Individuals may, as the Law Commission suggests, wrongly disclose information which it was not in the public interest to be revealed. They would still face the powerful deterrent of criminal prosecution. Individuals should still be incentivised to seek “advice” and resolution through internal mechanisms – as Sir David Omand recommends, cited by the Law Commission – before thinking about making any disclosure, where those mechanisms are trustworthy.⁹⁷ But the public interest test must sit behind all these mechanisms as an ultimate safeguard.

96. The Law Commission appears to selectively present material to justify its suggestions – but which ultimately undermines its claims. It cites third-hand the citations of Professor David Pozen, offered to exemplify the suggestion that information revealed in criminal trials may sometimes be “of value” to terrorists. But it ignores the very point for which that example is adduced in Pozen’s paper: that such claims are “unfalsifiable”, “speculative”, and “deeply susceptible to abuse and overbreadth”.⁹⁸ Courts should approach such claims “with extra scrutiny and scepticism on account of their susceptibility to misuse” and the “fundamental errors”

⁹⁶ It is also important to note that, were the Government to prosecute such a leaker, they would be very unlikely to have to present in evidence anything the disclosure of which would genuinely damage national security. For one, the disclosure may fall within section 1 of the 1989 Act and therefore require no proof of damage. Otherwise, it is likely that any information as to defence capabilities and weaknesses would fall into the loose tests of damage set out elsewhere in the Act, requiring only that the information or a category into which it falls is “likely” to cause damage. As a result, it is unclear why the Law Commission believes cases such as these justify their proposed changes.

⁹⁷ See paragraph 7.44.

⁹⁸ See paragraphs 7.46 and 7.47, citing Pozen, D., ‘The Mosaic Theory, National Security, and the Freedom of Information Act’, 2005, 115 *Yale Law Journal* 628, available here: http://www.yalelawjournal.org/pdf/358_fto38tb4.pdf. For quotes see pp. 632, 663,

on which they are based – since it is extremely difficult, if not impossible, to know how any one item of innocuous information may be used by terrorists, since it is precisely that – innocuous.⁹⁹ The theory appears to countenance the concealment of all information even tangentially related to intelligence or national security, for fear that it could somehow ‘add up’ to information whose disclosure is dangerous – an extraordinary claim for any transparent and accountable government to make and one that would effectively ban all investigative journalism in this crucial area.

97. Pertinently, the Law Commission examines the model used in Canada to protect whistleblowers. No claim is made to the effect that Canada’s national security is rendered unsafe by its public interest defence to unauthorised disclosure. Indeed, it would be surprising if this were so, since Canada remains part of the ‘Five Eyes’ intelligence alliance between it, the UK, the USA, New Zealand, and Australia – a network of shared intelligence collection which appears to coexist with Canada’s public interest defence.

98. Relatedly, the Law Commission claims that the defence would “open the floodgates” leaving “no information” “guaranteed to be safe”.¹⁰⁰ In so claiming, the Law Commission contradicts itself – since it accepts that information would be protected where an individual’s disclosure would not be in the public interest, leaving the discloser liable for a serious criminal offence.¹⁰¹ But, regardless, the claim is false. As it accepts, even under the current regime, unauthorised disclosures take place – often by individuals with lawful and security-cleared access to the material they later disclose. No system can ever “guarantee” the safety of information, and for the Law Commission to suggest otherwise demonstrates a surprising naivety as to the nature of unauthorised disclosures.

99. The Law Commission provides little evidence to suggest that internal mechanisms for reporting security and intelligence service wrongdoing command confidence of staff and work effectively. In fact, it cites evidence which suggests that “the total number of approaches civil servants have made to the Civil Service Commission has remained low since it gained the power to investigate”.¹⁰² As the Public Administration Select Committee heard during its investigation of Whitehall leaks, civil service leaks “mostly came about because the civil servant was concerned about a specific issue and

⁹⁹ Pozen 2005, p. 664.

¹⁰⁰ See paragraph 7.63.

¹⁰¹ See paragraph 7.49.

¹⁰² Paragraph 7.83.

became exasperated with internal processes.”¹⁰³ As the Committee stated, “The civil servants from whom we took evidence did not have much faith in internal whistleblowing procedures.”¹⁰⁴ This suggests that the system is still not working as it should, and that individuals still do not feel comfortable bringing their concerns to those in authority.

100. We are also concerned as to the efficacy of the internal reporting mechanisms of the security and intelligence services. As the Law Commission comments, there is very little available evidence as to agency mechanisms for reporting staff concerns over errors and wrongdoing.¹⁰⁵ The Law Commission claims that it has received “confirmation” from “stakeholders” as to the existence of “ethical counsellors” to whom staff can report their concerns, but an academic expert also cited in the paper states that he is actually unsure about whether the post is real.¹⁰⁶

101. Whilst the Law Commission cites a description of the post of ‘Staff Counsellor’ established by former Prime Minister Margaret Thatcher, it can point to no independent assessment of agency internal review mechanisms, and instead relies on claims from “stakeholders” that the system works adequately.¹⁰⁷ At the same time, however, it notes the reports of those who have worked within the agencies – and some who have blown the whistle on wrongdoing, such as Katharine Gun – who claim that these mechanisms are faulty and do not have the confidence of staff.¹⁰⁸

102. We believe an independent, statutory channel for agency staff to report their concerns would be a useful addition, but only in tandem with a public interest defence. The availability of a public interest defence would ensure that the new body – along with the agencies themselves – would be maximally incentivised to be rigorous and scrupulous in dealing with staff concerns. They will know that their mechanisms must command the confidence of staff, since individuals would know that they had the means of informing the public as a last resort – although always in the knowledge that they risk prosecution for so doing.

103. The record of existing methods of agency oversight have not proven effective, as the discussion of mass surveillance and rendition above demonstrates. The work of the Intelligence and Security Committee, for example, has not inspired confidence

¹⁰³ Public Administration Select Committee, 2009, p. 22.

¹⁰⁴ Public Administration Select Committee, 2009, p. 23.

¹⁰⁵ See paragraph 7.90.

¹⁰⁶ See paragraph 7.90, and Savage, A., *Leaks, Whistleblowing and the Public Interest: The Law of Unauthorised Disclosures*, Edward Elgar Publishing, 2016, p. 210.

¹⁰⁷ Paragraphs 7.91 and 7.96.

¹⁰⁸ Paragraph 7.95.

in its ability to render the intelligence and security services more accountable. It reports to the Prime Minister, rather than to Parliament as would a Select Committee, with the Prime Minister holding an absolute veto over its membership, the evidence it examines, and what it publishes. Its reports are often heavily redacted. By its very nature, such a body – and any body similar to it – cannot provide independent review of alleged Government wrongdoing. We have serious concerns that future bodies will suffer the same lack of independence – especially an Investigatory Powers Commissioner whose remit is only to report to the Prime Minister, whose government the Commissioner is meant to be assessing.

104. The record of the Intelligence and Security Committee provides an instructive example. Its 2007 report into rendition “found no evidence that the UK agencies were complicit in any ‘extraordinary rendition’ operations”¹⁰⁹ – an extraordinary claim in view of the subsequent (and even contemporary) evidence. Evidence later emerged of UK complicity in torture and the High Court found that the intelligence and security services had failed to disclose 42 documents to the Inquiry on these very subjects.¹¹⁰ The Committee also provided no effective oversight of UK agencies’ involvement in mass surveillance revealed in 2013. As the Home Affairs Select Committee found, the Snowden revelations were “an embarrassing indictment” of the UK’s intelligence and security oversight bodies.¹¹¹

105. We are also concerned as to the Law Commission’s extremely selective quotation of our and Article 19’s previous report on this subject.¹¹² We did not, and do not, suggest that the need for proper internal mechanisms entails that whistleblowing should remain unprotected, yet this is what the Law Commission falsely implies. We believe that “properly effective structures of accountability and scrutiny, both external and internal,” would render dangerous errors and wrongdoing less likely, reducing the need for whistleblowing, and provide a proper procedure for the airing and addressing of concerns. A public interest defence, which protects those who reveal serious wrongdoing in the public interest, is a crucial component of these structures, and will do nothing but strengthen the internal and external mechanisms for raising concerns that the Law Commission suggests.

¹⁰⁹ Intelligence and Security Committee, ‘Rendition’, July 2007, p. 29, available here: <http://isc.independent.gov.uk/committee-reports/special-reports>.

¹¹⁰ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 2549 (Admin), paragraph 88.

¹¹¹ *The Guardian*, ‘MPs: Snowden files are ‘embarrassing indictment’ of British spying oversight’, 9 May 2014, available here: <https://www.theguardian.com/uk-news/2014/may/09/edward-snowden-mps-commons-report-spying>.

¹¹² Paragraphs 7.117 to 7.118, quoting Liberty and Article 19, 2001, paragraph 7.3.

106. We believe that the approach of the European Court of Human Rights is best. It requires a holistic assessment of the public interest, an assessment which will include the efficacy of the independent body and whether the whistleblower went through those channels before making the disclosure. We oppose making the defence only available to those who have gone to the independent body: whilst in many cases, the failure to go to that body may vitiate the public interest defence, in other cases it may be unreasonable to expect them to have done so, or the public interest in disclosure is so overwhelming as to outweigh the failure. A holistic assessment, in which juries may look at all the circumstances, is needed.
107. Such an approach could be implemented through legislation amending the Official Secrets Acts to provide a public interest defence to *all* charges brought under any of its provisions. A public interest defence could be available to any individual charged with an offence under the Official Secrets Acts where they reasonably believed that the public interest in the disclosure of the material outweighed any real and identifiable harm to national security. This would provide an objective test, leaving individuals without a defence where there is no public interest in disclosure. Where, however, the material is such as to ground a reasonable belief, then the defence would be available.
108. This would be in accordance with the Tshwane Principles, the global standard for the protection of whistleblowers and national security.¹¹³ These rightly establish that the public has a right to know, which can only be overridden where a real and identifiable national security concern overrides the public interest in disclosure. It also provides that some forms of information merit protection – such as details as to military capabilities or critical infrastructure – whilst others should carry a presumption in favour of disclosure, such as violations of human rights.
109. Trustworthy internal review mechanisms and independent bodies may in some cases provide real scrutiny and relieve those who discover wrongdoing of the risk of prosecution. But experience shows that whistleblowers need more than this. The threat of wrongdoing is often so urgent, or trust in other mechanisms so low, that public disclosure remains the only means of redress. Whistleblowers will always need the protection of a public interest defence.

¹¹³ The Global Principles on National Security and the Right to Information, available here: <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>.

CONCLUSION

110. We urge the Law Commission to abandon its proposals. They are misconceived, poorly evidenced, and decades out of date. The UK public demands real transparency and accountability – especially where matters of national security are at stake. The public is made more safe when the intelligence and security agencies publicly correct their mistakes. Without whistleblowers who reveal wrongdoing, we cannot be secure.
111. The Law Commission’s suggested need for a reassessment of the law on official secrecy is based on faulty assumptions as to ‘modernisation’ and risk. But there is a more fundamental flaw in their suggestions, namely, failure to recognise the urgent need for a public interest defence to charges under the Official Secrets Acts. We urge the Law Commission to think again, and to recommend a public interest defence for whistleblowers and journalists who speak out against wrongdoing.

Sam Hawke