PROTECTION OF OFFICIAL DATA: A CONSULTATION PAPER OVERVIEW

Introduction

In 2015 the Cabinet Office, on behalf of Government, asked the Law Commission to review the effectiveness of the criminal law provisions that protect official information from unauthorised disclosure. Our work commenced in 2016.

The focus has been primarily upon the Official Secrets Acts 1911 – 1989. We have also analysed the numerous other offences (over 120) that exist to criminalise the unauthorised disclosure of information. In addition, we have examined matters that might arise in the investigation and prosecution of Official Secrets Act cases. Finally, we have examined the argument that could be made for the introduction of a statutory public interest defence.

We published a consultation paper on 2 February 2017. The consultation will run until 3 April 2017 and we aim to submit our final report to Government this Summer. This overview provides a brief outline of the content of each chapter of the consultation paper.

It is available at: http://www.lawcom.gov.uk/project/protection-of-official-data/.

Chapter 2 – Official Secrets Act 1911

This Chapter examines the fact that the Official Secrets Act 1911 was drafted with a very narrow focus, namely the threat from Germany before WW1. In fact, most of the provisions in the 1911 Act have their origin in 1889, so the legislation is even more outdated than it might at first seem.

Currently the offences require proof that the defendant, when engaged in the espionage type conduct, must have intended for it to benefit an "enemy". This is problematic, however, as declaring at a criminal trial that a state is an "enemy" could have negative diplomatic consequences. We suggest ways the espionage offence could be reformulated to make it more effective by replacing the concept of "enemy".

Some of the 1911 Act offences are deigned to provide protection to specific locations in the UK. Reflecting the period in which they were drafted, the focus is on sites that store munitions of war. In the modern world, the sites that need protection may include very different places such as data centres which may store vast quantities of information. We suggest the introduction of a new statutory mechanism by which sites can be designated as protected by the law if it is in the interests of national security to do so.

More generally, the antiquity of the 1911 Act is reflected in its anachronistic and archaic terms. We believe these ought to be replaced by modern language that would future-proof the legislation. Ensuring the legislation reflects modern challenges also explains our suggestion that the territorial ambit of the offences be expanded so that they can be committed by non-British nationals abroad.

We believe the Official Secrets Act 1911-1939 ought to be repealed and replaced by more modern legislation that is designed to reflect 21st century challenges, rather than those of the 19th. A more appropriate label might be – the Espionage Act.

Chapter 3 – Official Secrets Act 1989

Although not as dated as the 1911 Act, the Official Secrets Act 1989 was still enacted prior to the digital era, and this is reflected in many of its provisions. For example, the maximum sentence for the most serious offences contained in the 1989 Act is two years' imprisonment. This does not reflect the relative ease with which individuals may, by digital means, disclose vast amounts of sensitive information.

Our review of the offences focussed on the fact that currently the prosecution must prove that the information disclosed damaged or was likely to damage specified interests. A prosecution would, therefore,

involve public confirmation that the unauthorised disclosure did cause or risk harm. That would compound the damage caused by the initial disclosure. We suggest remodelling the offences so that they focus not upon the consequences of the unauthorised disclosure, but upon whether the defendant knew or had reasonable cause to believe the disclosure was capable of causing damage. It is the culpability of the defendant in making an unauthorised disclosure being aware of the risk of damage that should be the core of the offence; not whether damage did or did not occur.

To ensure the offences apply irrespective of whether the information is disclosed outside of the United Kingdom, we also suggest clarifying that the offences can be committed irrespective of whether the individual who disclosed the information was a British citizen.

As with the Official Secrets Act 1911, we propose that, rather than piecemeal reform, new legislation replacing the 1989 Act is the optimal solution.

Chapter 4 – Miscellaneous Unauthorised Disclosure Offences

The project was never about only the OSA. We examined the scores of other offences criminalising the unauthorised disclosure of information in a wide variety of contexts. These tend to focus upon the disclosure of personal data, but some relate to security issues such as uranium and the nuclear industry. We ask whether a broader review is desirable to bring greater coherence to this range of offences across the statute book.

Chapter 5 – Procedural Matters relating to investigation and trial

Investigations and prosecutions for offences contrary to the Official Secrets Acts involve unique challenges. We examined these and suggest amendments to the power to exclude the public from a trial: that should only be exercisable if it is “necessary” to ensure national safety. In addition, we suggest a further review to assess the effectiveness of the mechanisms that exist to safeguard sensitive information that may be disclosed during a trial.

Chapter 6 – Freedom of Expression

Enshrined in Article 10 of the European Convention on Human Rights, freedom of expression is a fundamental right. We consider whether compliance with Article 10 requires the introduction of a statutory public interest defence for those who make unauthorised disclosure. Our conclusion is that Article 10 does not require the introduction of a statutory public interest defence. Our view accords with that the House of Lord in *R v Shayler.*

Chapter 7 – Public Interest Defence

Aside from the Article 10 considerations, other arguments for introducing a statutory public interest defence can be advanced. We examine these and conclude that a statutory public interest defence is not the best solution. Such a defence would allow someone to disclose information with potentially very damaging consequences. The person making the unauthorised disclosure is not best placed to make decisions about national security and the public interest; the person would not be guaranteed the defence if they did make the disclosure because the jury might subsequently disagree that it was in the public interest and by then the damage has been done. Our provisional conclusion is that the public interest is better served by providing a scheme permitting someone who has concerns about their work to bring it to the attention of the independent Investigatory Powers Commissioner, who would have statutory abilities to conduct an investigation and report.