

25 July 2017

NMA RESPONSE TO LAW COMMISSION
PROTECTION OF OFFICIAL DATA
A CONSULTATION PAPER

The News Media Association is the voice of national, regional and local news media organisations in the UK- a £5 billion sector read by 48 million adults every month in print and online. The NMA and its members have long campaigned against official secrecy and for freedom of information, open government and open justice. The Cabinet Office must abandon its attempts to reverse past reforms and revert to a punitive culture of official secrecy which has led to the retrograde Law Commission proposals. Any attempt to revise or replace the Official Secrets Acts 1911- 1989 ought to be focused solely upon liberalization of the regime.

The NMA and its members consider that the Law Commission's consultative proposals would create damaging and dangerous inroads into press freedom, freedom of information and freedom of expression.

Whistleblowers, media organisations, journalists and their sources would be prime targets for state surveillance, criminal prosecution and conviction, with the prospect of harsher sentences including longer prison terms for individuals.

A new regime based upon the Cabinet Office's terms of reference and the Law Commission's proposals would legitimize state secrecy without regard to the public interest, prior publication or harmlessness of the disclosure.

The consultation paper fails to provide evidence of any necessity for radical overhaul and tightening of the law.

The NMA opposes any changes that would increase the potential scope for prosecution and conviction of whistleblowers, journalists and media organisations, broaden the scope of police and other agencies' powers to require information or their investigatory powers that compromise journalistic activity, material and sources, or decrease press and public access to court proceedings and documentation. The NMA therefore opposes the Law Commission's proposals for changes to the Official Secrets Acts 1911-1989, Data Protection Act 1998 section 5, miscellaneous unauthorized disclosure offences including personal information disclosures offences and national security.

The NMA and its members appreciate their meetings with the Law Commission following publication of the consultation paper and would be willing to meet to clarify and discuss any matters arising from the representations made at the meetings or in the responses submitted.

Overview

Openness, accountability and freedom of expression enable democracy to thrive. The press plays a vital role as the public's watchdog, by scrutinizing government and in holding power to account, through investigation and reporting of 'official data'. The government should seek to improve openness and accountability. Instead the Cabinet Office initiative and Law Commission's proposals could result in a chilling of freedom of expression, through deterring investigation and reporting by threat of criminal sanctions for media and source alike.

Press freedom, freedom of information and freedom of expression are core concerns of the NMA and its members. The NMA and its members oppose the use of the criminal justice system to deter, prevent and punish unauthorized obtaining and disclosure of official information. The Law Commission's proposals, as set out in 'Protection of Official Data- a consultation paper' would foster state secrecy and facilitate the state's surveillance, prosecution and punishment of media organisations, their journalists and their sources. The NMA therefore strongly objects to the cumulative effect of the proposals.

On publication of the report, the NMA wrote to the then Minister for the Cabinet office to express its surprise and deep concern at the succession of Cabinet Office instigated reviews, governing freedom of information legislation, the offence of misconduct in public office and protection of official data, all highly relevant to the news media- indeed apparently triggered by cases involving it- all apparently aimed at strengthening the government's control over information, obliterating public interest overrides and restricting the public's right to know.

We pointed out that the Cabinet Office had set terms of reference for the Law Commission's review of the protection of official data framed to criminalise not liberalise and which were hugely threatening to publishers, journalists and their sources. Furthermore, everything fell within scope from the Official Secrets Acts 1911-1989 to data protection, to scores of miscellaneous statutes, with the review of the offence of misconduct in public office also subsumed into the project.

The past pursuit of journalists and their sources under all these laws is well documented. The NMA has previously advocated reforms that would respect freedom of expression and enable public interest investigations and disclosures. Instead, the Law Commission, as charged by the Cabinet Office, proposes yet more efficient tools for government prosecution, criminal sanctions and suppression of public interest investigation and disclosures by the media. There is no evidence to justify new repressive criminal laws to protect official data. The NMA hopes that the Law Commission will reconsider its proposals as a result of the consultation. It is in any event vital that the new government - or any future government- does not seek to introduce such restrictive changes to the criminal law.

1.Principal concerns - threat to public right to know

The Law Commission's consultative proposals, if adopted, would have deeply disturbing consequences for the public right to know and the role of the press in public scrutiny of the state. Despite the Commission's suggestion of some elements beneficial to the defence, its overall approach would comply with its terms of reference and make it easier for the government to prosecute, convict and imprison anyone involved in obtaining, gathering and disclosing information, even if no damage were caused, and irrespective of the public interest, which might indeed outweigh any such damage. However, a new legislative framework setting limits on the right to obtain, impart and receive of information should not be predicated upon the ease with which Government, police, prosecution can despatch those involved in any unauthorised disclosure to prison. The proposed new regime threatens to be both retrograde and repressive. It would extend

and then entrench official secrecy. It would be conducive to official cover up. It would deter, prevent and punish investigation and disclosure of wrongdoing and matters of legitimate public interest.

Principal concerns: Under the Law Commission's proposals there would continue to be no limits on who could be accused of certain wrongdoing, official secrets offences would be broadened, protected information widened, requirements that disclosure be damaging dropped, territorial ambit and citizenship rendered irrelevant and the prospect of longer prison sentences imposed. A public interest defence is rejected, despite its underpinning of the public right to know and the protection that it would give to whistleblowers and media. A prior publication defence is proposed-but too narrowly formulated, such that it could not be relied upon, even if all the world was already aware of the material disclosed and its disclosure had done no harm. Indeed, the consultative proposals would even criminalise the disclosure of information that could be lawfully released under the Freedom of Information Act. The report suggests that certain current sanctions are inadequate and posits review, pointing out the maximum sentences of 14 years possible in other jurisdictions. That would raise the prospect of offences committed through mere receipt of information or its harmless disclosure being punishable by many years of imprisonment beyond the current limits.

Indirect effects eg surveillance The NMA is also disturbed by the potential indirect effect of the proposals. Media organisations, journalists and their sources would be put in greater jeopardy because widening the potential ambit of offences through the changes proposed also widens the potential use of state surveillance powers against the media, under guise of investigating suspected media involvement or collusion in offences, rendering its confidential sources vulnerable and chilling investigative journalism into government activities.

The proposals could facilitate state agencies' bypass of the intended journalistic and source protections in the Investigatory Powers Act 2016, (IPA) to the detriment of press freedom. This could apply to day to day reporting, far removed from espionage offences or leaks raising real national security concerns. After all, the 1911 Act has previously been deployed against protestors occupying an airfield. The 1920 Act was also used to try to force journalists to disclose sources. Where OSA 1911-1989 offences, if amended as proposed by the Law Commission, also coincide with the IPA 2016 grounds for use of investigatory powers, the police and other services would be able to use those augmented powers, perhaps without the journalistic safeguards. This is because they could deem their inquiries to be an investigation of a suspected criminal offence in which media and/or source were engaged, so that journalistic safeguards fell away. The powers could be used against the media reporting the demonstrations or other incident on or near a 'prohibited place'. They could be deployed against investigative journalists reporting on organisations responsible for such protests.

The proposals would assist the exploitation of investigatory powers for the purposes of reputation management and leak inquiries, more embarrassment than security threat, with reference to an investigation into a suspected unlawful unauthorized disclosure under the proposed reforms to the 1989 Act. The source, journalist and media organisation could more easily be conveniently deemed to be suspected of jointly furthering a criminal purpose – the unlawful disclosure. Under the 2016 Act, that would negate all the procedural and substantive protections otherwise applicable to safeguard journalists and to protect their sources, against the unjustified use of investigatory powers. The services would not even have to reveal that the investigation and powers were directed against journalists and journalistic sources. But they would be able to lawfully deploy powers of interception of communication, communications data and equipment interference (enabling access to anything from reporters' mobiles and computers to media organisations' encrypted databases of unpublished and unbroadcast journalistic material). This would represent an unjustified inroad into press freedom, detrimental to investigative journalism and protection of confidential sources.

Chilling effect of proposed data protection sanctions: The Law Commission was also tasked with identification and review of miscellaneous unauthorized disclosure offences, resulting in its identification of around 124 assorted criminal offences. These include the Data Protection Act 1998 section 55 and various 'national security offences.

The NMA opposes the Law Commission's proposals for review of the Data Protection Act 1998 section 55 and introduction of prison sanctions.

Section 55 creates a very broad range of criminal offences, such that the criminal law provides strong but flexible protection of personal data, in addition to all the legal safeguards, backed by civil remedies and regulatory sanctions provided by the Data Protection Act 1998. The data protection regime is to be toughened yet further and backed by even more severe regulatory sanctions, with implementation of the General Data Protection Regulation in May 2018. There is no need for introduction of prison sanctions or other amendment of the offence.

The Law Commission has ignored the strong freedom of expression arguments against the introduction of custodial sentences. The NMA, the national and regional press, the major broadcasters, the MLA, Society of Editors have been steadfast and united in sustained opposition to the introduction of prison sanctions for section 55 offences, as contrary to ECHR Article 10 and its chilling effect upon investigation, reporting and the public right to know. The media has set out detailed arguments against imposition of prison sanctions in a succession of submissions over many years. For avoidance of doubt, the Law Commission's consultation does not fulfil the specific statutory consultation requirements under section 77 of the Criminal Justice and Immigration Act 2008, relevant to commencement of prison sanctions.

The NMA also stresses the importance of the two public interest defences contained in section 55. The fact that the s 55(2) (d) defence is very rarely pleaded or mentioned in judgments does not detract from its importance and relevance to investigative journalism .

The NMA and media have also consistently argued for commencement of section 78 to bring into effect the additional public interest defence to section 55, necessary for Article 10 compliance, irrespective of whether section 77 is brought into force. However, we also stress that commencement of that section 78 defence would not be sufficient counterbalance to the chilling effect of prison sanctions under section 77.

The Law Commission's proposals also fail to recognize and address the underlying issue- the variance between the regulator's desire for harsh criminal sentences and the lighter approach adopted by the CPS and courts- summary trial, conditional discharge, low fine. These are issues relating to prosecution and sentencing policy that can be addressed under existing powers. The regulator might consider that the ability to make even an empty threat of imprisonment is a worthwhile deterrent, but that ought not take precedence over freedom of expression. The Law Commission also fails to take into account the scope of criminal sanctions- from unlimited fine to confiscation of proceeds of crime- or the deterrent effect of the ICO's own enforcement powers and sanctions. The ICO will be able to impose even larger punitive fines, based on global turnover, when the GDPR comes into force.

Thus, the NMA opposes the Law Commission's proposals for introduction of prison sanctions and any watering down or removal of public interest defences and public interest exemptions to the current data protection regime. The Law Commission's approach runs counter to the General Data Protection Regulation, which now mandates governments to make robust, comprehensive and

effective freedom of expression and journalistic exemptions under the forthcoming data protection regime.

No public interest defence serving the public right to know and state accountability: The NMA strongly supports the inclusion of a robust and comprehensive public interest defence to OSA 1989 (see below). Most worryingly, the Law Commission's consultative report not only rejects any introduction of a public interest defence to OSA offences, but also favours the removal of the existing public interest safeguards, irrespective of their importance to whistleblowers and to the press, in its role as public watchdog over the activities of the state.

The report postulates removal of both explicit and implicit public interest protections in the criminal law. It suggests review of Data Protection Act 1998 section 55 offences and sanctions to increase protection of personal data. It describes the wrongful disclosure legislative landscape as 'irrational, dispersed and lacking in uniformity' and then ominously contrasts the inclusion of public interest defences of section 55 with the absence of any such defence in the Digital Economy Bill at the time the report was written. (Subsequently, of course, the Bill was helpfully amended to provide a public interest defence on which the media could rely). Its recommendation of a review of wrongful disclosure offences aimed at 'rationalisation and simplification' would be deeply damaging if such a review were conducted upon similar cabinet Office terms of reference- and set out to achieve uniform law by removing the existing vital public interest defences in data protection, digital economy or other criminal legislation.

We fear a repressive wider agenda. The Law Commission's arguments (which we contest) against the introduction of a statutory OSA public interest defence, such as lack of mandate under Article 10, undermining coherence and certainty of the criminal law, are already of deep concern. This approach could be deeply damaging to freedom of expression if it were also to be deployed in the Law Commission's recommended reviews of the other miscellaneous disclosure offences and data protection offences. It would be extremely detrimental to press freedom if any such review resulted in recommendations for removal of explicit defences of public interest and reasonable belief in public interest to criminal offences, whether general or journalistic, such as the longstanding Data Protection Act 1998 provisions and the very recent Digital Economy Act 2017 exclusions.

The Law Commission's current recommendations would remove the implicit public interest protections against conviction for many OSA disclosure offences, through its recommendation to recast the offences removing the requirement of damaging disclosure, under OSA 1989 (which must be proved by the prosecution). Its recommendations would also therefore remove the current public interest element in misconduct in public office offences that impact upon the media under the current law.

This overall effect is completely at odds with the previous Government's statement that it would never be its policy to restrict the freedom of investigative journalism or public service whistleblowing.

Proposed prior publication defence inadequate: The NMA strongly supports the introduction of an explicit, effective, statutory prior publication defence. The Law Commission's recommendation is welcome, but its proposal is deeply flawed, since it suggests that it only apply if the information in questions was already in fact already lawfully in the public domain and widely disseminated to the public. This would allow pursuit of repressive UK criminal action, inimical to freedom of expression, irrespective of either whether the information was already, or could be, lawfully released, or whether the information was already publicly available, irrespective of the precise number who

access it . Indeed, it would also revive the spectre of Spycatcher, enabling state action to prosecute despite the information being known to those sharing a community of interest or widely disseminated or freely available to the local community, or nationally or globally.

Adverse effect upon freedom of information: The counterproductive impact of proposed reforms upon open government and clash with Freedom of Information Act 2000 also causes the NMA concern. The Law Commission fails to consider the interrelation of its proposals with the Freedom of Information Act 2000. As the Campaign for Freedom of Information has pointed out, the proposals by the Law Commission to reform the 1989 Official Secrets Act would enable the imprisonment of civil servants and journalists for disclosing information that would be available to anyone asking for it under the Freedom of Information Act 2000. As the CFI points out, whistleblowers and journalists could be convicted for revealing information about defence, international relations or law enforcement that is unlikely to cause harm and furthermore, leaking information that anyone could obtain by making an FOI request could be an offence

Counterproductive impact of proposed Official Secrets Act reforms- greater risk of damaging disclosures, through bypass of responsible publishers and media checks for fear of prosecution: As NMA members have stressed to the Law Commission, the proposed changes to the OSA 1911- 1989 could be dangerously counterproductive, by leading to bypass of the responsible media and its pre-publication checks, in favour of direct, comprehensive, unchecked, unedited, harmful disclosure by whistleblowers and other disclosers. Whistleblowers currently come to the trusted mainstream media, which exercises editorial judgement as to what should properly be disclosed with the benefit of long established, informed advisory mechanisms such as the DSMA Notice system and specialist legal advisors, with reference to the law and media Codes. The media acts responsibly and the current law allows it to avoid any publication that would constitute harmful unlawful disclosures. If such responsible media publication is deterred or prevented by changes to the criminal law, or protection of journalistic sources made more difficult, then whistleblowers will seek alternative platforms enabling direct, unchecked, unedited publication that results in damaging disclosures.

Undermining of DMSA system safeguard of national security: The Law Commission also fails to consider the cumulative counterproductive effect of the proposals, making damaging disclosures more likely, due to its undermining of voluntary media systems of safeguards against damaging disclosures. The DMSA Notice system and the MoD Green Book are both formal industry/government mechanisms, wholly overlooked by the report. The current media/government regime is properly focused upon deterrence of harmful disclosure. NMA members and the wider media do strive to avoid harm and ensure lawful publication. They use the long established voluntary systems, specifically designed to reduce the risk of inadvertent harm.

The NMA is party to the Defence Security and Media Advisory Committee www.dsma.org and the MoD' Green Book' operational arrangements for the media and armed forces. <https://www.gov.uk/government/publications/the-green-book>. The NMA nominates the national and regional press members of the DMSA Committee. The NMA conducts negotiations with the MoD on behalf of its members on the Green Book.. The DMSA Committee oversees a voluntary code which operates between the UK government departments which have responsibilities for national security and the media using the DSMA Notice system as its vehicle. Its objective is to prevent inadvertent public disclosure of information that would compromise UK military and intelligence operations and methods, or put at risk the safety of those involved in such operations, or lead to attacks that would damage the critical national infrastructure and/or endanger life. The report of the recent Independent review of the system upheld the value and relevance of the DCMS system and it confirmed that the DMSA system had the full support of the Government and the media. Changes proposed in response to evolving social, media and security challenges were adopted.

It is highly likely that adoption of the Law Commission's proposals would undermine such responsible, voluntary arrangements, because of the proposed broadening of the offences and consequent increased risk of criminal liability and fear of prosecution, even for those involved in the official operation of the DSMA scheme.

NMA opposition to any Government's adoption of the consultative proposals and introduction of legislative initiatives based upon them

The NMA would strongly object to the Government asking the Law Commission to draft a dedicated Bill based upon any of its consultative proposals that restrict freedom of expression, for introduction into Parliament. We would also strongly object to the Government selecting and taking forward any such particular consultative proposals for incorporation into any relevant Bill or other suitable legislative vehicle. If the government contemplated any reform of criminal offences relating to unauthorized disclosures relevant to the Law Commission's consultative proposals, then there must be further and very detailed public consultation and scrutiny. In relation to any reform of the OSA 1911- 1989, then there must be consultation on detailed proposals in Green and White Papers, further public consultation on any draft legislative proposals and full pre-legislative scrutiny and public consultation on any final draft-all to precede any introduction of any actual Bill.

NMA opposition to adoption of Law Commission consultative proposals or for the repeal and replacement of the OSA 1911- 1989 in accordance with the Law Commission's consultative proposals

In the NMA's view, any reform of the laws governing disclosure of official information must result in liberalization, not repression. New and different terms of reference for any such review would be necessary, as it should be predicated upon decreasing the scope for prosecution and conviction of the media and whistleblowers. At minimum, there should be comprehensive and robust defences of public interest and prior publication to disclosure offences. Any reform should ensure that any journalist or media organisations are not at risk of criminal liability. Nor should they be put at risk of conviction as a result of any direct or indirect dealing with the discloser or the information disclosed. They should not be liable for any inchoate offences- incitement, conspiracy, aiding and abetting - offences relating to receipt or dissemination or publication. Any reform should ensure that journalists or media organisations are not required to provide on demand any information requested by regulators, investigation or enforcement authorities, with better recourse to the courts or tribunals, and better protections against court and tribunal orders. This is particularly but certainly not exclusively, important where such demands for information might compromise a confidential journalistic source. Any reform of the laws should ensure that journalistic material, activities and sources are properly protected in compliance with ECHR Article 10 (with no lesser protections than PACE production order protections for journalistic material). No journalistic material should be accessible-whether by use of investigatory powers, search warrant or court order-without prior judicial authorization after satisfaction of Article 10 ECHR compliant and very strict relevant criteria (eg as set out in PACE protections against production of journalistic material), requiring an application to a court, prior notification of the application to the media, including the grounds, media rights to contest the application before the court, the necessity for the satisfaction of strict criteria, media rights of swift appeal.

Fresh consultation, on new terms of reference intended to liberalise the law would be necessary-replacing the Cabinet Office/Law Commission 2015 terms of reference. Radical reform of official secrets legislation should aim to narrow the ambit and operation of the criminal law, not expand it.

2.Other proposals

Review of miscellaneous unauthorized disclosure offences: The Law Commission has identified some 124 miscellaneous disclosure offences. It suggests that the number and variety would

necessitate a separate review. The NMA is not aware of any particular media problems caused by the miscellaneous offences and would obviously be concerned by any proposals for reform that created new restraints upon investigation and reporting. The NMA stresses that it would not be appropriate for any such review to be undertaken on the same or similarly repressive Cabinet Office terms of reference, or any terms likely to result in criminalization of journalism and new restrictions upon the public right to know.

Misconduct in public office: For avoidance of doubt, the NMA continues to support the abolition of the offence of misconduct in public office. We refer you to our past submissions to the Law Commission, including the matters quoted by the Law Commission consultation documents. The offence should be abolished. If a new offence is postulated, then it must be defined with precision. It must not regulate the disclosure or acquisition or publication of information. It must not regulate journalistic activities or journalistic sources. It should not be framed to overlap or add to the existing law that impacts upon these areas. There must be a broad and unqualified public interest defence. It must be Article 10 compliant.

Open Justice review:

NMA supports the promotion of open justice and opposes any extension of court secrecy. Obviously, the NMA would oppose any review that resulted in recommendations for new powers to bar press and public from the courts and new powers to impose reporting restrictions. The criminal courts already have extensive powers to restrict access and reporting. The NMA would be particularly concerned about any proposals for new restrictions upon press and public access to criminal court proceedings, or court documentation or upon reporting such proceedings in cases involving some aspect of Government or agencies. Such powers would be open to abuse and deployed to minimize Government embarrassment or cover up mismanagement or wrongdoing, or in attempts to damp down protest and publicity about the prosecution of a whistleblower or journalist.

The Law Commission suggests that a separate review ought to be undertaken to ‘evaluate the extent to which the current mechanisms that are relied upon strike the correct balance between right to a fair trial and the need to safeguard sensitive material in criminal proceedings’. The Law Commission refers to the common law power to hold trials in private, in addition to section 8(4) OSA 1920 and reporting restrictions under section 4(2) and 11 of the Contempt of Court Act 1981 and contrasts it with the systematic review of civil proceedings resulting in the Justice and Security Act 2013 closed material procedures, applicable where disclosure would be damaging to the interests of national security, and closed material procedures under other legislation, where material may be withheld if disclosure would be contrary to the public interest.

Given the tenor of the Cabinet Office terms of reference, the NMA fears that any such review would result in recommendations enabling increased court secrecy, not less. The reference to the civil system intensifies such concerns. The NMA and others opposed the proposals for extension of secrecy in the civil courts and the introduction of closed material procedures, especially given the few cases necessitating any such protections.

The NMA has long engaged in extensive and detailed discussions with the Government and senior judiciary on open justice in criminal and civil proceedings. We do not believe that the criminal courts lack powers to exclude the press and public or impose reporting restrictions in cases involving national security. We are not aware of cases thwarted by the current regime. The NMA would be utterly opposed to any review that opened up any possibility of new restrictions upon open justice whether in respect of access to court proceedings, access to court documentation or reporting of court proceedings or rights to prior notice of any such application for restrictions and its grounds,

right to challenge any such application and to obtain swift variation and lifting of any discretionary or automatic restriction.

We appreciate that the Law Commission's separate proposal for amendment of section 8(4) OSA 1920 is intended to make it more difficult for courts to exclude press and public from proceedings, by requiring that members of the public can only be excluded if 'necessary' to ensure national safety is not prejudiced.

However, we understand that the caselaw under OSA 1920 does already require that any derogation from open justice, so as to enable the court to exclude the public and press and to hear evidence in private, must be 'necessary for the due administration of justice'. If the section were to be amended, then express incorporation of this requirement would be necessary in addition to that suggested by the Law Commission. However, all such amendments must be subject to pre-legislative checks to ensure that the proposed amendments would unequivocally extend open justice and not inadvertently lower the thresholds for exclusion of press and/or public. For avoidance of doubt, the NMA does not consider that any such change would justify removal of the 1989 OSA requirements for damaging disclosures: the court would still be able to go into private session and so prevent the public disclosure of any sensitive information adduced in the course of the proceedings.

The NMA does support the Law Commission's proposal for the guidance on authorized jury checks to be changed to require the defence to be informed of such checks have been undertaken. Obviously, this should apply to all potential defendants including any media representatives.

3.NMA comments upon specific Law Commission's proposals for reform of the Official Secrets Act 1989

The NMA and its members are strongly opposed to the combination of key changes proposed by the Law Commission to the Official Secrets Act 1989. These would strengthen official secrecy at the expense of proper public scrutiny of state activity and Government accountability.

They are inimical to freedom of expression. Unnecessary and unjustified restrictions would result from the proposed shift of focus from protection of the state against damaging disclosure to deterrence of officials from doing something without authorization. The criminal law should not be used as a substitute for employment contract or internal management procedures. There is no evidence of a lacuna in the law or examples of cases going unpunished to justify such changes. The proposed consultative amendments would widen the scope for prosecution, conviction and imprisonment of whistleblowers and journalists, for disclosures that caused no harm, were in the public interest and already legitimately released or widely known.

The NMA and its members, national and local news media organisations, actively campaigned for reform of official secrets legislation up to and during the passage of the 1989 Act. It fears that the Cabinet Office approach represents an attempt to revert back to the culture of official secrecy that the 1989 Act and the Freedom of Information Act 2000 were supposed to change.

Wider impact of the proposals: greater media vulnerability to investigation and prosecution:

Media organisations and journalists are most at risk of prosecution under section 5 offences, relating to information resulting from unauthorised disclosure or entrusted in confidence and section 6

offences relating to information entrusted in confidence to other states or international organisations.

However, the media can also be at risk of prosecution for involvement in others' offences under section 1- 4, under the commonlaw in respect of secondary participation in crime, and sections 44 to 46 of the Serious Crime Act 2007 which create offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed.

Broadening of the disclosure offences does not just put the media at greater risk of prosecution. Journalists and editors are also subject to statutory state powers to require information or of surveillance that lead to compromise of confidential journalistic sources. These include statutory duties to answer police questions, to produce journalistic material, including in certain cases confidential journalistic material and statutory powers enabling use of investigatory powers against journalists and media organisations.

Refusal to answer police questioning is an offence under OSA 1920, which has been deployed against journalists, despite the requirement for consent of the Secretary of the State. The police have powers to obtain journalistic material under Police and Criminal Evidence Act 1984 to investigate offences. The police, security services and intelligence agencies have a range of surveillance powers under Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016, when in force. The latter's safeguards for journalistic material fall away if the journalist or media organisation is considered to be furthering a criminal purpose. The Act and draft Codes do not trigger the Act's safeguards and do not even require the applicant to declare that the application relates to the media or its sources.

Changing key protections in the 1989 Act to facilitate prosecution therefore has a directly chilling effect upon whistleblowers and the media alike, preventing publication of matters of public interest and creating a chilling effect upon investigation and reporting.

The Law Commissions' proposals directly and indirectly broaden the media's vulnerability to prosecution under OSA 1989. It also increases the risk of undeclared, unjustified exportation of police powers, surveillance powers and investigatory powers in respect of journalistic activity, material and sources, with a chilling effect upon investigation and reporting.

Retention of Damage essential

The NMA is particularly concerned about the Law Commission's proposals to shift the focus of relevant OSA 1989 offences from proof of disclosure likely to cause damage, to enable the prosecution, conviction and imprisonment for longer term of those whose disclosures did not cause harm- and were not likely to do so.

The Act's prime intention was not to punish any unauthorised disclosure by any official- it was meant to abolish that section 2 'blunderbuss' approach. Hence it was framed to address and deter damaging disclosure, aside from the deemed special case of members of the security and intelligence services. The Law Commission's proposals would obstruct a responsible media which strive to avoid 'damaging disclosures.

The damage tests in the 1989 Act are vital protections for freedom of expression, allowing disclosures that are unlikely to harm, enabling public attention properly to be alerted to official misconduct or mismanagement or abuse of powers.

The NMA would not object to the addition of a mental element, such that the Act would require the prosecution to prove both the new element of damaging intent and that damage was caused by the disclosure made with such intent. However, the substitution of the former for the latter is unacceptable.

The Law Commission suggests that the current damage tests weights the proceedings in favour of the prosecution, since the Government alone has access to all information relevant to damage assessment. However, the same argument would also assist the prosecution case on 'capability' of damage.

The NMA strongly opposes the proposed shift of the focus from whether the damage did or was likely to occur to whether the defendant knew, or had reasonable grounds to believe that the disclosure was capable of damaging a specified interest.

'Capable of damage' is a very low threshold. It would allow conviction and imprisonment for a disclosure that did no damage at all. It would enable the prosecution to build highly speculative scenarios, including as to damage, that are likely to be accepted by courts.

The NMA would have a further concern if the Law Commission's proposals for 'authorised' disclosure procedures were introduced, irrespective of whether this was by an improved Civil Service Commission, or the creation of an additional tier through recourse to the Investigatory Powers Commissioner, or adoption of the Canadian model or otherwise. The prosecution might simply rely on the defendant's failure to use any authorized disclosure procedure and then claim that the intent or recklessness element was satisfied. The absence of any public interest defence would exacerbate the danger.

The Law Commission proposal that the offences should require proof that the defendant should know or believed that the disclosure is capable of damaging a specified category of information, provides no compensatory safeguard, since it also can so easily be satisfied.

The NMA would also be very strongly opposed to any change to the OSA 1989 that broadened the test for all the offences and diluted the harm requirement to showing that the information was of a category or type that its unauthorised disclosure would be likely to be damaging, as opposed to the Act's requirement that the disclosure is damaging.

The Law Commission's consultation paper suggests that the current damage tests present major obstacles to the Government's pursuit of offenders and criminal prosecutions. However, the report fails to provide evidence of this. There is no information on number or types of cases, whom they involved- officials or others involved in secondary disclosures- why they were not brought or why they failed and at what stage. There is no analysis of the effectiveness of alternative action, such as prosecution of alternative criminal offences, or civil action, disciplinary action in relation to employment, termination of contracts, improvement of internal procedures, improvement of awareness, understanding and enforcement of them.

The NMA is unconvinced by the Law Commission's suggestion that there are numerous officials who make disclosures with impunity, because the Government fears that prosecution would merely

compound the problem, because confirmation and information about the damage would be revealed in the court proceedings.

Similar concerns would in any event presumably arise from the proposed new 'capable of damage' test. However, any such problem can already be avoided entirely by the court going into closed session under existing powers.

The OSA 1920 s 8(4) enables all or part of the public including the media, to be excluded from court during evidence or statements in the course of proceedings whose publication would be prejudicial to national security. These powers are used by the courts. Moreover, freedom of information tribunals also go into closed session when they have to consider similar issues – such as whether the information is likely to prejudice defence or international relations.

There is no need for the radical change to the OSA 1989. There is no need to tighten the courts' powers to go into private session- and the Law Commission's proposed amendment to OSA 1920 s 8(4) would continue to allow the courts to exclude press and public in appropriate circumstances.

Interaction with the Freedom of Information Act

The NMA is concerned that the Law Commission's proposals could subvert the freedom of Information Act 2000. The Campaign for Freedom of Information points out that information relating to international relations, defence and law enforcement that would be disclosable on request under the Freedom of Information Act 2000, (due to the operation of the public interest provisions, or because the information would not be considered to be 'likely to prejudice' and exemption from release apply), could yet found a successful prosecution, conviction and imprisonment under the OSA consultative proposals. It also highlights how a FOIA release if only to one person is normally treated as a general release of the information- yet that would not satisfy the Law Commission's proposed prior publication test, requiring wider dissemination even for information previously lawfully released.

Comprehensive Prior Publication Defence Essential

The NMA strongly supports the introduction of a prior publication defence. Prior publication defence is not alien to the 1989 OSA. It is already implicit in the assessment of 'damage', as acknowledged by the White Paper 1988 and the then Home Secretary.

However, we disagree with the Law Commission's proposal that the defence ought only to be available if the defendant proved that the information was already lawfully in the public domain and widely disseminated to the public. This would unduly limit the availability of the public domain defence, give rise to legal issues (meaning of 'lawfully', 'widely') generating satellite litigation

The defence should be available if the information was already lawfully in the public domain or was widely disseminated to the public, irrespective of the lawfulness of the initial disclosure.

Where the information is lawfully in the public domain, where it was released, why it was released or to how many it was released should be irrelevant. Information disclosed in response to a single, individual's request under the FOIA 2000 ought to be considered as information lawfully in the public domain for the purpose of the defence. It would seem uncontroversial. The Digital Economy Act 2017 section 41 has criminal sanctions to backs up its provision for safeguarding the confidentiality of personal information. However, its list of disclosure exclusions from criminal liability under section 41(2) does not require wide dissemination to the public:

'(d)of information which has already lawfully been made available to the public,'

Undue restriction of the prior publication defence to enable government to pursue prosecutions would be repressive.

Public Interest Defence Essential

The NMA strongly supports the introduction of a public interest defence to the OSA 1911-1989. This would be a development of the 1989 Act's 'damaging disclosure' requirements, which already allows some public interest considerations, (eg Derek Pasquill) and which the NMA maintains should remain the focus of the Act.

A public interest defence enhances public accountability. It enables matters of public interest to be brought to public attention for public scrutiny and debate, as well as allowing any malpractice to be exposed and addressed.

Neither whistleblower nor media should be at risk of prosecution or imprisonment for revelation of wrongdoing or other matter of public interest. A robust defence of public interest should protect both journalist and source. A statutory public interest defence provides more certain safeguard for any individual, against prosecution and conviction, than reliance upon the discretion of the Attorney General, or DPP, or CPS not to bring proceedings.

The defence should be set out in the primary legislation and operate in addition to the retention of requirements for the consents to prosecution to be given by the Attorney General or, where appropriate, by the Director of Public Prosecution and in addition to any relevant DPP guidance for Crown Prosecution Service including the current guidance on prosecution in cases involving the media.

The Act itself should set out a simple, clear and unrestricted public interest defence that should be available to all, including the media.

A statutory robust public interest defence is necessary for public policy reasons. It promotes the public interest and safeguards whistleblowers and the media against conviction. It is a different and far stronger protection than reliance upon discretion of the Law Officer (Attorney General or Director of Public Prosecutions as appropriate under the Act) or prosecutor as to whether a prosecution should be brought or the interpretation of guidance that could be varied or withdrawn at any time.

The introduction of a public interest defence is unlikely to open the 'disclosure' floodgates, so that no information could ever be guaranteed safe, as the Law Commission suggests. No such guarantee exists now. The relationship of trust between civil service, agencies and government is long established and is not so precarious. It has after all been maintained through not only through the cultural and technological changes of the past thirty years, but also survived two major legislative reforms, both actually intended to change the culture by repealing criminal legislation and requiring greater openness. The relationship was unaffected by the narrowing of criminal liability by OSA 1989. It has accommodated the 2000 freedom of information legislation and exemptions. It is also legally reinforced by the combination of civil and criminal law far beyond the OSA. In addition to employment contract and internal procedures, there is a panoply of civil and criminal measures able to deter and enforce, through regulatory action, civil remedies including injunction and criminal prosecution and sanctions.

Those bound by the Act would be well aware of the personal consequences of unauthorized disclosure. This is not confined to -prosecution under the OSA 1911-1989. It could expose them to prosecution for other criminal offences, including the Computer Misuse Act 1990 and Data Protection Act 1998. They could be subject to disciplinary action and lose their job or contract. They could be subject to civil action.

The civil law can also be deployed to prevent dissemination and publication of damaging information, backed by contempt sanctions of unlimited fine and imprisonment, operative against media organisations and editors – sufficient to close a title.

The public interest defence is still essential whatever improvement were made to any system of internal reporting, or if approaches could be made to the Investigatory Powers Commissioner with upward report to the Prime Minister, or any other model established.

A public interest defence does not require any statutory definition of ‘public interest’. It must be as broad as possible, ensuring that it is as flexible and adaptable as possible, applicable to the circumstances of any case where a public interest defence is appropriate. Given the broad scope of the Act, an unqualified public interest defence is essential.

This will not create any difficulties in drafting or application. There are statutory precedents in the criminal law, OSA public interest defences could follow the approach of the public interest defences to the DPA 1998 s 55 unauthorized obtaining and disclosing offences, by encompass both subjective and objective defences: a defence that the disclosure etc was in the public interest and a defence of ‘reasonable belief that the disclosure etc was in the public interest’.

We disagree strongly with the Law Commission’s suggestion that a public interest defence would engender uncertainty in the law and its application.

Far from confusing the jury, there are good public policy justifications. Its introduction would enable the jury to acquit on the basis of a public interest defence, in accordance with the statute rather than forcing the jury to appear perverse and fly in the face of judicial direction on the law, by acquitting defendants whose actions they do not believe deserve criminal sanction, in the particular circumstances of the case.

The criminal law already includes statutory public interest defences to offences of unauthorized disclosure and obtaining, some specific to journalism. The Law Commission’s list has of course now been overtaken by the Government’s amendment of the Digital Economy Bill.

The Digital Economy Act 2017 section 41 governs the confidentiality of personal information, backed by criminal sanction. However, the categories of disclosure excluded from the criminal offence under section 41 (2) include:

i) consisting of the publication of information for the purposes of journalism, where the publication of the information is in the public interest

The Data Protection Act 1998 section 55 contains a general defence of public interest and a defence of reasonable belief in the public interest if acting for the journalistic, literary or artistic special purposes. As set out above, (the NMA maintains that section 78 Criminal Justice and Immigration Act 2008 must be commenced and the defence brought into force as soon as possible to ensure Article 10 compliance and proper protection for freedom of expression, but prison sanctions under section 77 must not be brought into effect.

(d)that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest

“(ca)that he acted—

(i)for the special purposes,

(ii)with a view to the publication by any person of any journalistic, literary or artistic material, and

(iii)in the reasonable belief that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest,”

The concept of public interest is hardly novel or unknown in the law.. The civil law of confidence and the circumstances in which the law allows public interest disclosures in this and other areas of law relevant to whistleblowers and the media is very well established. Editors, journalists and their legal advisers continuously consider and apply the public interest requirements of media codes, criminal law and civil law.

No changes necessary to criminal sentences and criminal sanctions

The NMA disagrees with the Law Commission’s suggestion that the maximum sentences currently available under OSA 1989 are not capable of reflecting the potential harm and culpability that may arise in a serious case. Indeed, the prison sentences threatened or imposed upon whistleblowers, journalistic sources and journalists are a major deterrent.

The NMA strongly opposes any increase in severity of sentences, whether by increasing the maximum term of any prison sentence, or by enabling custodial sentences to be imposed where fines alone can currently be imposed, or by enabling any offence currently only triable as a summary offence and subject to summary limits, to be tried in the Crown Court.

There are no grounds for any such increase in the severity of sentences available. There is no evidence to suggest that sentences are too lenient. The prosecution might also choose to pursue other criminal offences with differing sanctions in appropriate circumstances. The media is of course also vulnerable to the threat of civil or criminal action intended to force disclosure of a source. That might in itself lead to imprisonment, or unlimited fine, or huge legal costs, sufficient to close a title.

The NMA and media are opposed to the introduction of custodial sentences for offences under section 55 of the Data Protection Act 1998 (see above).

Authorised disclosures

The NMA supports a statutory, broad and unqualified public interest defence open to all (see above). The law must enable and protect swift disclosure of matters of public interest and enable government and its agents to be brought swiftly to account.

We have no objection in principle to the introduction of improved systems for report, investigation and address of officials’ concerns, nor of authorized disclosures. However, they are no substitute for a public interest defence.

The systems proposed by the consultation paper, such as an improved Civil Service Commission, the addition of a tier to provide recourse to the Investigatory Powers Commission, a system of internal authorized disclosure or adoption of the Canadian model, would not protect the whistleblower and allow matters of major public importance of legitimate public interest, to be quickly brought to the public attention, subjected to effective scrutiny, and be promptly and efficiently addressed, assisted by proper public oversight.

Under the systems proposed, the person wishing to make the alert, is identifiable to their employers. This is likely to be a major deterrent. The systems also seem unlikely to be trusted by the would be whistleblower. They do not offer any way for the matters of concern to be taken up, receive rapid independent scrutiny and rapidly addressed, with appropriate public disclosure, even if they are issues of major significance or require requiring urgent address. Reformed processes would still be, or perceived to be, prone to delay, obfuscation and, at worse, enable cover up. There are no practical means to speed up processes or challenge refusal to pursue or ineffective outcomes that would be open to the would be discloser. Few would be determined or resilient enough to take up legal action against their employer and the government. Few could afford the financial or costs of judicial review, win or lose, The system of authorized disclosure is very narrow.

There is no legal force to recommendations resulting from any investigations and inquiries pursued under the proposed systems. Issues are not subject to outside scrutiny and debate. The Civil Service Commission retains the discretion as to whether matters are taken up with the permanent secretary, or will be included in any report to Parliament or made public in any way. The addition of an extra tier of recourse to the Investigatory Powers Commission would not address this – the report might not even feature in the Commissioner’s report to Parliament.

The Canadian model described is far too narrow, relating only to disclosure of offences, and provides inadequate protection for anyone forced to make a public disclosure at the end of the process, requiring adherence to all procedural steps, irrespective of the circumstances.

The NMA would also be concerned if the existence of ineffective systems actually penalized whistleblowers or the media which published material resulting from unauthorized disclosures. This could compound the problems with the changes advocated by the Law Commission to the OSA offences. It would be unjust and unacceptable if the failure to use any such system could be exploited by the prosecution as evidence of intent or recklessness to cause a damaging disclosure.

A public interest defence must be available to all.

Thus any mechanism for authorized disclosure should exist in conjunction with a general, broad statutory public interest defence. Failure to use the mechanism at all, or making a disclosure at any time whilst pursuing the process, or after its conclusion, must not prevent reliance on the public interest defence, nor assist the prosecution to build a criminal case against the discloser or any third party, including the media.

Exempt disclosures

The proposal is welcome but would be too narrow in practice as it appears to be confined to the ‘defendant’ official whistleblower. An official is not the only person who might be charged and may wish to seek legal advice- any defendant would need to do the same (eg a journalist recipient charged.). However, wider categories of exempt disclosures and normal operation of legal professional privilege should apply. That must include the ability to seek pre-publication advice- which of course may lead to no publication specifically to avoid any commission of a criminal offence or damaging disclosure. Recipients of information such as the media may wish to avoid damaging disclosures, comply with the law and wish to seek advice internally from editorial and legal teams and externally from DMSA Committee, external experts and external lawyers.

Narrowing categories of protection information

The categories of information protected by the OSA 1989 are widely drawn. However, the Act's deliberate focus upon 'damaging' disclosure help to avoid undue restrictions upon freedom of expression. Narrowing the categories would not counteract the chilling effect of the Law Commission's other proposals. In any event, even if the OSA were otherwise unchanged, any change to the categories would have to be carefully analysed to ensure that the intended 'narrowing' did not create new problems of legal uncertainty or inadvertently increase the potential for prosecution of journalists.

Sensitive information relating to the economy insofar as it relates to national security, or is the formulation too narrow?

The NMA opposes any extension of scope of the OSA 1989. This proposal would result in a very broad and uncertain category that could impinge upon media reporting in a wide range of areas.

Aside from adoption of one of the grounds for use of investigatory powers under the Investigatory Powers Act 2016 no explanation is given as to why any category and extension of criminal offence are necessary? No evidence is put forward of any problem that requires address by the criminal law or justifies the potential restrictions upon freedom of expression.

The category is very vague and could impact upon a wide range of reports that contained 'unauthorised' information. Would it encompass reports based upon budget leaks of spending cuts on defence, counter terrorism, government cybersecurity? Would it encompass reports based on leaks foreshadowing spending cuts that would reduce the police forces or armed forces or emergency services? Could it impact upon reports of Brexit negotiations, other international trade negotiations or views on NATO spending? Might any change of the exchange rate, perhaps due to accurate forecasting henceforth prompt a criminal investigation under OSA 1989, even though it would not currently prompt any inquiry or investigation by the Office for National Statistics?

The proposal appears far too uncertain to form the basis of any criminal offence.

Officials etc subject to OSA 1989

The criminal law requires certainty and it is important that it is clear to whom the Act applies to any potential subject and to any third party.

Members of the security and intelligence services

The Law Commission might confine any further consideration to the operation of the Act in relation to the security and intelligence services, in addition to any internal systems. However, that would still require detailed consideration of Article 10 and other ECHR rights and public policy considerations relating to proper oversight. It would also have to take into account the scope of criminal and civil law, employment contracts etc. There might well be very strong grounds for reduction in scope and liberalisation of the OSA 1989, to enable disclosure of wrongdoing or other matters of legitimate public interest relating to the work of the security and intelligence service and protection of whistleblowers and the media. Those may entail amendment of the 1989 Act to require proof of actual intention to make disclosures damaging to the work of the security and intelligence services, proof of actual damage thereby caused to that work, the introduction of a public interest defence, the introduction of a prior publication defences and review of sanctions with view to decrease severity rather than increase.

4.NMA Comments on proposals for reform of the Official Secrets Acts 1911-1939

The Law Commission's proposals fail to address aspects of the legislation that affect the media, as due to the very wide scope of the OSA 1911 which the Law Commission's proposes should remain unchanged. The Act renders journalists liability to prosecution for mere receipt of information-such as an unopened, unsolicited email (1911 OSA) or for refusal to disclose the identity of a confidential source (1920 OSA- provisions which have been deployed against journalists) or even for straightforward reporting of some incident, such as protest at a protected site, that requires proximity. The Law Commission's suggested amendments are likely to revitalise the acts and increase the risk of its chilling effect upon journalism.

The Law Commission stresses that reformulated OSA 1911 offence must be capable of being committed in inchoate form- attempt, conspiracy, assisting etc. The media and its sources would therefore remain vulnerable to threat or actual use of the offence against them- or abuse of investigatory powers claiming suspicion of media and source furthering a criminal purpose.

The NMA notes the archaic nature, overwide scope and rare use of the 1911-1939 legislation and its continuing potential for abuse. It notes that the legislation is little used and parts have been rendered otiose by a century of subsequent criminal legislation governing computer misuse, data protection, criminal damage, criminal trespass, terrorism and development of the civil law. The DMSA Committee provides a mechanism for the media to avoid inadvertent disclosures that might harm national security or endanger life.

The NMA is disappointed that the Law Commission has not proposed repeal or amendments which would reduce the risk of media prosecution.

If the OSA 1911 were to be amended, the NMA considers that OSA 1920 s6 should be amended so that media organisations and journalists are not, (subject to the Secretary of State's consent or unless urgency requires bypass), under a duty to give information to the police as to commission of offences, backed by criminal offence punishable by imprisonment for refusal. This would safeguard freedom of expression and press freedom, through better protection of sources and of journalistic and excluded material.

We disagree with provisional conclusion 2 points 1,2,3 that there should be no restrictions on who can commit the offence and the Law Commission's view that it should continue to apply to someone who communicates, obtains, gathers information and who approach, inspect, pass over or enter any prohibited place.

The substitution of the generic term 'information' could also broaden the interpretation and application of the offences and increase uncertainty of application of the 1911 Act, to the detriment of the media and freedom of expression

In our view, any amendment of the 1911 Act should narrow offences so as to exclude journalists and the media from scope. s 1 (c) 'obtains, collects, records, publishes, communicates' are media catch -alls and should be narrowed. Mere receipt of an unsolicited, unopened email by a journalist would otherwise continue to fall within that description. A journalist merely reporting a demonstration might approach a prohibited place and find themselves at risk of prosecution or targeted for surveillance.

Widening the scope of the 1911 Act by substitution of 'foreign power' for 'enemy' could also be problematic. The very broad ranges of possible meanings of 'foreign power' at 2.139 show how far the interpretation of such a substitution could extend, from business reporting to reporting of

terrorism. This might create uncertainty unacceptable in relation to the criminal law and impose further unnecessary restrictions in practice, given the remit of later counter terrorism and other criminal legislation and the civil law. It could transform an already unacceptably wide criminal liability to virtual catch-all offence. The requirement for consent of the Attorney General to prosecution is helpful but neither Law Officer consent requirements or any prosecution guidelines issues by the Director of Public Prosecutions would be an effective cure for overwide statutory offences.

Narrowing 'safety or interests of the state' would be helpful, but more detailed consideration and consultation on the meaning and ambit of 'national security' or any other term substituted is necessary.

The introduction of a fault element into the 1911 Act- but only in addition to objective requirements for conduct to be actually prejudicial -might be a helpful development. However, the Law Commission's proposed tests: - the knowledge or reasonable belief that conduct 'might prejudice' the safety or interest of the state/national security, be 'capable of benefiting' a foreign power and intends thereby or is 'reckless' as to whether national security/safety or interests would be prejudiced might be too easily satisfied and provide no safeguard for the media and whistleblowers. 'capable' could mean whatever might be just conceivable. Any information could prove of political or commercial benefit especially given the wider definition of foreign power. If politicians exhort the media to report Brexit more patriotically, the prosecution could make much of dubious claims that certain material was somehow conceivably 'capable of benefiting' a foreign power or constitute recklessness as to whether the interests of the United Kingdom would be prejudiced.

These problems would be compounded, criminalising disclosures that are of legitimate public concern, because there is no countervailing public interest defence.

The list of prohibited places might be archaic However, difficulties could be created by the Law Commission's proposal of replacement by the creation of such a wide ministerial power to designate any site as a 'protected site' if it were in the interests of national security to do so. There would be few checks upon ministerial designation, despite the serious consequences that flow from that. It could result in absurdly wide designation of government and government contractors' sites and premises- re-inventing offences wider than the old section 2 OSA- whilst of course, some sites might be too secret to designate or to be known to be designated.

The Law Commission considers whether the territorial ambit of the 1911 Act should be extended beyond British officers or subjects to any individual where there is deemed to be a 'sufficient link' with the United Kingdom. That is very uncertain and widens the scope for prosecution of the media and its source or threat to deter embarrassing revelations.

The provisions contained in the OSA 1911 and 1920 intended to ease the prosecution's burden of proof should be repealed, as the Law Commission helpfully suggests. The presumption of innocence and burden of proof upon prosecution must prevail. After all, any investigative reporter or any political, foreign, diplomatic, business, cultural, defence correspondent, might legitimately have contacts who are ostensibly legitimate foreign diplomats, business, press, military with whom the correspondent deals for investigative or reporting purposes but, unknown to the correspondent, have some role related to espionage.

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