NUJ response to the Law Commission consultation on reforming official secrets legislation and the protection of official data

June 2017

Introduction

The National Union of Journalists (NUJ) is the representative voice for journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members. We represent staff, students and freelances working at home and abroad in broadcasting, newspapers, news agencies, magazines, books, public relations, communications, online and as photographers.

The union is not affiliated to any political party and has a cross-party parliamentary group.

The union welcomes the opportunity to respond to the Law Commission's consultation on reforming the official secrets laws and protection of official data. The NUJ has a proud history of defending a free press and the public's right to know.

We are gravely concerned about the new proposals contained within the consultation documents and we would urge the Law Commission to reconsider their recommendations and offer additional safeguards for journalists and journalism.

The consultation seems to be underpinned by a desire to reinforce government secrecy, to dissuade people working in government from disclosing information showing wrongdoing and to make it less likely that the media will report on national security issues. No explanation is given as to why this is the Law Commission's point of departure and/or why such aims should be considered desirable today.

We are concerned that the Law Commission has demonstrated little or no awareness of the public interest served and the broader benefits which can arise from unauthorised and unlawful disclosures. Notably, there is no critical appraisal of the role of prominent US whistleblowers such as Edward Snowden, Chelsea Manning, Bill Binney and Thomas Drake who have revealed serious wrongdoing and precipitated essential public debate and legislative reform. Equally, there is no recognition of the role played by the media in uncovering serious human rights violations (such as the Washington Post's exposure of extraordinary rendition and secret prisons in November 2005[1]) or reporting information disclosed by whistleblowers in the public interest.

We consider the vague references in the consultation to 'stakeholders' as unhelpful when seeking to understand and respond to the different views expressed. While it may not be appropriate to name individuals, it is difficult to understand why the Law Commission cannot attribute comments to, for

[1] CIA holds terror suspects in secret prisons (2005)
http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html

example, the Crown Prosecution Service (CPS) or the security service. This would assist consultees in understanding the range of perspectives expressed and improve our ability to respond accordingly. It is ironic that in a consultation on a subject raising concerns about transparency and accountability, there are government bodies that are unwilling to be publicly associated with their submissions.

We are also concerned that the Law Commission seems to have cited resources, examples and arguments selectively so as to support its own preconceptions regarding both the need for and shape of legal reforms. Many of the consultation questions are phrased as assertions in search of endorsement, which suggests that the Law Commission has prejudged the findings of the consultation.

Our silence on any particular question does not imply that we agree with the Law Commission's view on the issue concerned.

Summary of the NUJ response

Primarily we do not want our members, journalists and other media workers, including those at home and abroad, to face the threat of prosecution for upholding our long-standing ethical principles of reporting in the public interest.

Journalists who receive and impart information should not be prosecuted for simply doing their job.

- There has been no convincing evidence put forward that journalists, who have been threatened with the official secrets acts in the past, have harmed public safety or national interests/security of the state.
- Journalists who obtain or gather information (including information about prohibited places) for the purposes of journalistic activity should not be deemed to be committing an espionage offence.
- The category of secondary disclosers includes journalists and media workers. There should be a public interest defence for people who are not subject to the Official Secrets Act 1989 when prosecuted for secondary disclosures under section 5. There should also be a public interest defence for people who are not subject to the Official Secrets Act 1911 when prosecuted for secondary disclosures under section 1. This should also apply to any successor legislation.
- There needs to be a public interest defence for the publication or republication of classified/protected data received from whistleblowers and/or sources, as well as for obtaining such material/data.
- The unauthorised secondary disclosure of information (i.e. the publication of information provided by a primary discloser) should not be criminalised save in highly exceptional circumstances.
- Legislation proscribing unauthorised primary disclosures of classified/protected data should include a public interest defence for persons making such disclosures.
- There should be a defence of prior publication where the information published has either been lawfully placed in the public domain or has already been widely disseminated.
- It should be recognised that journalists can often communicate with a 'foreign agent' and/or terrorist groups and this activity can be a legitimate part of their work.
- We are strongly opposed to the proposals relating to changing the need to prove damage and the recommendations on disclosure causing further damage.
- Sentences should not be increased to 14 years imprisonment.

- We are opposed to any further expansion of closed courts proceedings, especially in regard to cases involving journalists and journalistic activities.
- The prohibited places restrictions proposed are outdated.
- There should be limits on the use of any new extra-territorial offences in regard to journalists and media organisations abroad.
- The definition of national security is not sufficiently precise and we do not support the inclusion of economic matters as official secrets. Broadening the remit, scope and/or definitions could be harmful to reporting in the public interest and it is likely to restrict the parameters of legitimate public discourse. There is a need for further clarity and guidance on defining sensitive economic information and we want absolute assurances that the definition of economic well-being could not be used in relation to information, material and/or data linked to the legitimate activities of trade unionists and trade unions.
- The staff counsellor model, if maintained, should be extended to cover all those who are working for the relevant organisations regardless of their specific employment status. Therefore this should include employees and contractors.
- We endorse the proposal for a statutory whistleblowing commissioner but would like to suggest that in the first instance, the Law Commission should consult the staff representatives and the trade unions officially recognised in those organisations affected[2].
- The NUJ questions the need to introduce new legislation in addition to the existing contractual obligations for staff in regard to seeking authorisation to make a disclosure. Before any further recommendations are considered; the relevant trade unions, TUC and other expert organisations should be asked to provide best practice examples to the Law Commission.

British secrecy

The prime minister, Margaret Thatcher, was the first of our government leaders to pass legislation to constitute the security service (MI5) as a proper legal entity and it was only in 1992 that another prime minister, John Major, officially acknowledged the existence of Secret Intelligence Service (SIS and MI6) for the first time in the House of Commons (Dorril 2000, cited by Lashmar 2015[3]).

According to Banisar and Fanucci (2013[4]):

> "Up until a little more than 20 years ago, the secrecy of government information was the extreme default. Virtually every bit of information that government created, collected, or held was considered off limits to the public unless the government decided to release it.
>
> "Government phone directories, cups of tea consumed at government commissaries, and new carpets in ministers' offices were all official secrets, protected from public disclosure by threat of imprisonment. Even public buildings such as the BT Tower, obvious to everyone in the city of London, were not on maps."

[2] PCS marks 20th anniversary of restoration of union rights at GCHQ
http://www.pcs.org.uk/news/pcs-marks-20th-anniversary-of-restoration-of-union-rights-at-gchq

[3] Paper presented by Paul Lashmar at the Institute for Policy Research conference June 2015: Understanding conflict: research, ideas and responses to security threats

[4] Wikileaks, secrecy, and freedom of information 2013: The case of the United Kingdom by David Banisar and Francesca Fanucci; in Brevini, Hintz, McCurdy (eds), Beyond WikiLeaks: Implications for the future of communications, journalism and society, Pallgrave MacMillan

NUJ ethics

The NUJ code of conduct was first established in 1936 and it is the only ethical code for journalists written by journalists[5]. The code is part of the union rules; members support the code and strive to adhere to its professional principles. Our ethical code states:

> "A journalist at all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed."

The union's code also compels journalists to do their "utmost to correct harmful inaccuracies" and it repeatedly highlights the importance of the "public interest". Furthermore, it calls on journalists to protect the identity of their sources who supply material and information in confidence.

In addition to the code, the union strongly believes that it is the duty of journalists to hold the powerful to account. This duty can involve gathering and obtaining information that can verify or refute allegations relating to dangers that threaten the public, abuses of power and/or serious crimes and misconduct.

The union's ethical framework underpins our response to the Law Commission's consultation and a free press is essential for any functioning democracy. We robustly contend that democracy is under attack when a government does all it can to ensure it is able to carry out its business in secret.

The context of the Law Commissions proposals

The Law Commission consultation repeatedly cites and without critique the 1988 white paper, which is now historic and which was drafted at a time when the levels of transparency and government accountability were considerably lower. The agencies were not publicly avowed until the late 1980s, they were not placed on a statutory footing until 1989 (security service) and 1994 (GCHQ and secret intelligence service/SIS). There was no statutory oversight until the Intelligence Services Act 1994. At the time of the white paper, there was no Freedom of Information Act 2000 and human rights under European Convention could not be relied on in UK courts. With this context in mind, the 1988 white paper should be treated with caution and as a product of its time.

The Law Commission consultation should be considered and analysed alongside other more recent controversies, legislative changes and the existing political climate. The key recent developments we want to highlight in this regard include:

In 2014, six NUJ members discovered that their lawful journalistic and trade union activities were being monitored and recorded by the Metropolitan Police. Our members have been listed on the secret "domestic extremist database" and those involved continue to take legal action against the metropolitan police commissioner and the home secretary to challenge this surveillance[6].

In 2014, we discovered that the authorities had been misusing the Regulation of Investigatory Powers Act (RIPA) to access journalists' communications without their knowledge[7]. There have been a series of cases where the authorities have misused this law. The latest was reported in January

[5] NUJ code of conduct https://www.nuj.org.uk/about/nuj-code/
[6] NUJ members under police surveillance mount collective legal challenge (2014) https://www.nuj.org.uk/news/nuj-members-under-police-surveillance-mount-collective-legal/
[7] NUJ general secretary condemns 'outrageous criminalisation of sources' after police seize phone data (2014) https://www.nuj.org.uk/news/stanistreet-condemns-outrageous-criminalisation-of-sources/

2017 when judges ruled that Cleveland Police had acted unlawfully when they put journalists under surveillance in an attempt to identify the source of their stories[8].

In 2015, the Guardian reported that GCHQ information security assessments listed investigative journalists alongside terrorists and hackers in a threat hierarchy[9].

It is also important to recognise the impact of the Investigatory Powers Act (IPA) on the media. The act was passed into law in 2016. Although there were some limited safeguards for journalists secured during the parliamentary debates, we believe this legislation remains one of the most draconian of its kind in the world. It has put journalists and their sources at risk because it enables the authorities to go fishing through vast quantities of information. It allows the state to legally access journalistic communications and material in secret (including information capable of identifying journalistic sources), and there are no judicial hearings at which the interests of the journalist are represented[10]. The cumulative impact of these developments for our industry is both detrimental and profound.

During debates in parliament about the draft Digital Economy Bill, the NUJ managed to secure amendments to this legislation. The changes were agreed by Matt Hancock MP and include a defence for publication of information for the purposes of journalism where the publication of the information is in the public interest[11]. Having conceded this change, we were shocked by the subsequent lack of a defence for public interest journalism in the Law Commission's proposals.

Matt Hancock MP, at the time the minister of state for digital and culture at the department for culture, media and sport, said to Helen Goodman MP, chair of the NUJ parliamentary group:

> "I thank the hon. Lady for raising a point during the passage of the Digital Economy Bill about the importance of ensuring that whistleblowers and journalists are protected from the tightening-up of the enforcement of data protection rules. The Digital Economy Bill is a very positive step, in terms of data protection. The hon. Lady and a couple of other members rightly raised the important matter of ensuring that the law is explicit, rather than implicit, in the protection of journalism and journalists, and I am very grateful to her for bringing that to my attention[12]".

Taking into account the various examples cited above, we fear the impetus for reforming official secrets laws is an attempt to ensure the authorities are better able to punish journalists and media organisations who report on state misconduct as well as big data leaks.

---

[8] Cleveland police's use of RIPA on my personal mobile phone (2017)
http://www.thenorthernecho.co.uk/features/15005721. Paranoid police force monitored my phone
[9] GCHQ captured emails of journalists from top international media (2015)
https://www.theguardian.com/uk-news/2015/jan/19/gchq-intercepted-emails-journalists-ny-times-bbc-guardian-le-monde-reuters-nbc-washington-post
[10] NUJ submissions and briefings on RIPA
https://www.nuj.org.uk/about/nuj-resources/nuj-submissions/
[11] NUJ wins safeguards for journalists in the Digital Economy Bill (2017)
https://www.nuj.org.uk/news/nuj-wins-safeguards-for-journalists-in-the-digital-economy-bill/
[12] Hansard transcript of the debate https://hansard.parliament.uk/commons/2017-03-30/debates/B069F48A-DFC6-48A8-A1BD-BA9AB827E5E9/LocalAndRegionalNews

Definitions of journalists and journalism

Law enforcement, intelligence, and/or security officials should not be responsible for having to determine whether or not someone is a journalist. It is not the role of governments or state agencies to decide.

Journalism has been defined broadly by both the European and UK courts and in the following terms:

> Activities whose "object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them."[13]
>
> The "communication of information or ideas to the public at large."[14]

The Law Commission should not attempt to define journalism or engage in debates about defining the professional functions of a journalist. Many of the existing definitions are too narrow and tend to emphasise contractual employment relationships, publication record and/or income. None of these indicators provide sufficient or suitable clarity for a comprehensive definition in law or guidelines.

In December 2013, the UN general assembly adopted a resolution which outlined a broad definition of journalistic actors that acknowledged:

> "...journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression" (UNGA 2013: A/RES/68/163 quoted by UNESCO[15]).

In 2014, the intergovernmental council of UNESCO's international program for the development of communications welcomed the UNESCO director general's report on the safety of journalists and the danger of impunity, which uses the term journalists to designate the range of "journalists, media workers and social media producers who generate a significant amount of public interest journalism" (UNESCO 2014).

Snowden, 2013

The Law Commission's consultation falls short of its claim to be comprehensive because it does not mention Edward Snowden. The NUJ believes that Snowden's decision to disclose information was legitimate and justified because the extent of mass surveillance had not previously been acknowledged or discussed.

Snowden's ability to access the information clearly demonstrates the inadequate preventative, internal security measures that were in place at the time within the relevant organisations.

The reporting of the disclosures was vindicated by the ruling from the European Court of Justice that said some of Britain's surveillance laws are illegal. This ruling would not have been possible without

[13] C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy & Satamedia Oy, EU:C:2008:727, [61]. The ECHR cited this definition in its judgment arising from the same dispute: Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland (2015) no. 931/13, [69]. This case has been referred to the ECHR grand chamber.
[14] Law Society v Kordowski [2011] EWHC 3185 (QB) at [99].
[15] Protecting journalism sources in the digital age, UNESCO report (2017) http://en.unesco.org/news/unesco-releases-new-publication-protecting-journalism-sources-digital-age

the legitimate, public interest, media reporting of Snowden's disclosures. Nor would it have been possible to bring any of the profoundly significant cases that are currently before the European Court of Human Rights: *Bureau of Investigative Journalism & Alice Ross v UK; 10 NGOs vs UK, and Big Brother Watch vs UK*. These are not the only examples highlighting the media are often the only group in society able to reveal the intelligence and security forces have exceeded their legitimate powers and remit.

The International Federation of Journalists (IFJ) is the world's largest organisation of journalists representing 600,000 journalists in 140 countries worldwide. The NUJ and IFJ fully supported the decision of the Guardian's former editor, Alan Rusbridger, to publish the Snowden stories.

Jim Boumelha, IFJ president at the time, said:

> "The IFJ and all the journalists worldwide are fully behind the Guardian and its journalists. It is mind-boggling that the revelations by the Guardian about the programme of mass surveillance are considered in some circles to be similar to aiding and abetting terrorism. This is an outrageous suggestion that must be quashed. The Guardian's investigation is clearly in the public interest and the courageous journalists at the Guardian should be congratulated for doing what a free press does to inform our citizens."

The IFJ response was accompanied by a public statement issued by the workplace NUJ chapel:

> "The Guardian and Observer NUJ chapel, representing the overwhelming majority of journalists at both titles, strongly supports the editor's decision to publish this information of vital public interest and his defence of the freedom of the press to hold government and corporate interests to account. The chapel emphatically rejects the attacks on the Guardian over the Snowden leaks and welcomes the support offered from all over the world for the Guardian's role in bringing this information into the public domain. We believe publication of the NSA/GCHQ stories is exactly what independent media organisations should be doing. The editor's stand has the full backing and confidence of Guardian News and Media journalists"[16].

Despite the support from within our industry both at home and abroad, the story inevitably provoked a strong reaction from others. Those opposed to the reporting have often held positions of authority at the state agencies involved and/or have been responsible for their organisational oversight.

Paul Lashmar (2015) has highlighted the potential for conflict between the different parties involved and it is possible to argue that this forms part of the healthy checks and balances in any functioning democracy.

> "Intelligence seeks to operate secretly, while the news media seeks to publish. Part of the media's fourth-estate role is to monitor the intelligence community as an unseen, but now extremely powerful, arm of the state which has also grown enormously during the 'war on terror'" (Lashmar 2015).

[16] IFJ offers support to Guardian editor at parliamentary committee (2013) https://www.nuj.org.uk/news/offers-support-to-guardian/

Not all of the Snowden documents have been published or reported by the media. Some of the information will remain unreported because it deals with operational matters about Russia, China, the Middle East and anti-terrorism activity, and may harm national security if it was published.

The Guardian believes it behaved responsibly throughout. All the Snowden documents, or parts of documents, were sent to the US intelligence agencies or the UK agencies before publication except one, relating to GCHQ spying on a G20 meeting in London. The Guardian was fearful that if it alerted the government about the G20 story, an injunction would be taken out to stop publication. There is no such prior restraint in the US and the UK should consider following suit.

We are extremely concerned that a Metropolitan Police investigation into the Guardian journalists (involved in the media coverage about the Snowden disclosures) still remains open.

Responsible, effective and consistent oversight of the intelligence agencies has come from journalism acting in the public interest. Additional examples include the media's reporting of torture, rendition, and the allegations of British collusion with foreign dictatorships[17].

Other prominent cases involving official secrets legislation and journalism reveal public danger, abuses of power and/or serious crimes and misconduct. We highlight some of these historical examples below.

GCHQ, 1976

The first journalists to report the existence of GCHQ were Duncan Campbell and Mark Hosenball. They wrote about electronic state surveillance in Time Out magazine in May 1976. Hosenball, who had been working for the Evening Standard, was subsequently deported on the grounds that he was a danger to national security.

ABC trial, 1977

According to Geoffrey Robertson QC[18], the trial involved charges under sections 1 and 2 of the Official Secrets Act 1911. It was the first time the existence of GCHQ had been reported and two of the three defendants were journalists. Crispin Aubrey worked as a Time Out reporter, and Duncan Campbell was working as a freelance journalist. In February 1977, they were arrested, prosecuted and held in police cells for two days without being allowed to see their families or their solicitors. They were refused bail and Campbell's home was raided.

Campbell (2015[19]) has said:

> "Aubrey and I were arrested on suspicion of possessing unauthorized information. They said we'd be taken to the local police station. But after being forced into cars, we were driven in the wrong direction, toward the centre of London … We were then locked up overnight, denied bail and sent to London's Brixton prison."

[17] Documents reveal Libya US/UK rendition details (2011)
https://www.hrw.org/news/2011/09/08/us/uk-documents-reveal-libya-rendition-details
[18] The Justice Game by Geoffrey Robertson. Chapter five: Ferrets or Skunks? The ABC Trial (1999)
http://www.duncancampbell.org/menu/biography/abccase/Ferrets%20or%20Skunks.pdf
[19] GCHQ and Me by Duncan Campbell (2015)
https://theintercept.com/2015/08/03/life-unmasking-british-eavesdroppers/

Campbell added:

> "Our discussion was considered so dangerous that we - two reporters and a social worker - were placed on the top floor of the prison maximum security wing, which guards told us had formerly held terrorists, serial murderers, gang leaders and child rapists. Meanwhile, police stripped my home of every file, every piece of paper I had, and 400 books."

The information taken from his home had been gathered from published sources and it was alleged that the information was of "direct or indirect" use to a potential enemy and prejudicial to the state.

Like similar claims made about Snowden's information, at the committal in November 1977, the prosecution claimed Campbell's activities could: "even put at risk lives in Northern Ireland" but it was eventually conceded that there was "no suggestion that he was in the employ of a foreign power" (Robertson 1999).

> "In March 1977, one month after our night-time arrest, we were all charged with breaking Britain's Official Secrets Act, for the 'unlawful receipt of information'. Then we were charged with espionage. Each espionage charge carried a maximum of 14 years. I was also charged with espionage for collecting open source information on UK government plans. In total, I faced 30 years." (Campbell 2015)

The case involved the use of jury checks therefore the NUJ agrees with the Law Commission's proposal that any checks of this kind should be brought to the attention of the defence.

At the second trial, a new judge, Justice Mars-Jones, announced himself "extremely unhappy" at what he called an "oppressive prosecution". The section 1 charge was dropped and although the three had no defence to the section 2 charges, the judge conditionally discharged Aubrey and Campbell (Greenslade 2012[20]).

There are striking similarities with the Snowden case, as Campbell has explained:

> "In my 40 years of reporting on mass surveillance, I have been raided three times; jailed once; had television programs I made or assisted making banned from airing under government pressure five times; seen tapes seized; faced being shoved out of a helicopter; had my phone tapped for at least a decade; and - with this arrest - been lined up to face up to 30 years imprisonment for alleged violations of secrecy laws. And why do I keep going? Because from the beginning, my investigations revealed a once-unimaginable scope of governmental surveillance, collusion, and concealment by the British and US governments - practices that were always as much about domestic spying during times of peace as they were about keeping citizens safe from supposed foreign enemies" (Campbell 2015).

Zircon, 1987

Duncan Campbell was also involved in another case a decade after the ABC trial, in February 1987. Police special branch teams were sent to search his home again and this time, according to Campbell, the authorities were responding to the creation of a BBC documentary program called "Secret Society".

Campbell's documentary revealed GCHQ wanted to build a British spy satellite called Zircon. The BBC director general, Alasdair Milne, agreed to ban the programme and Campbell arranged to show it in

[20] Crispin Aubrey, campaigning journalist who stayed true to his principles (2012) https://www.theguardian.com/media/greenslade/2012/oct/05/investigative-journalism-official-secrets-act

parliament, and print the story in the New Statesman magazine. The authorities spent days searching the magazine's offices and the government ordered a raid on the BBC.

The programme was aired a year later, and the Zircon project was never completed.

Scotland, 1990

When journalist Ewen MacAskill was the political editor for the Scotsman, he worked on a story with the headline "Trident base safety fears". A whistleblower provided him with 100 pages of documentation, including an internal Ministry of Defence (MoD) memo expressing concern about a shiplift at Faslane naval base that took nuclear submarines out of the water. The information warned of the consequences if it should fail and included many examples of collapses from around the world.

A primary disclosure/whistleblower working at the base had leaked this information and the MoD argued that it posed a security threat and they wanted to find the source. The MoD said the documents had been stolen and gave MacAskill a deadline for their return, which he ignored. He has said: "As far as I was concerned, I had no doubt the public, not least those in the West of Scotland, should be aware of the danger."

Libya, 1996

In March 2000, the Metropolitan Police and the government launched a legal case against the Guardian and its sister paper, the Observer, to try to obtain documents relating to its dealings with David Shayler. Shayler, a former MI5 officer, had disclosed information alleging that MI6 had attempted to assassinate Colonel Gaddafi in 1996. Shayler had first made these allegations in August 1997 in the Mail on Sunday.

After reports that the names of the agents involved in the Gaddafi plot had been disclosed to the Observer (but not published at the time[21]), the police contacted the paper and asked the reporter, Martin Bright, to hand over his notebooks, copies of emails, dates of meetings with Shayler and the details of any financial transactions.

The police told Bright he was being investigated under the Official Secrets Act and the police also asked for the letter from Shayler that had been published by the Guardian. The newspaper refused to hand over the material.

At the hearing at the Old Bailey and using the Police and Criminal Evidence Act (PACE), lawyers for the police argued that the full text of the letter might contain evidence that could be used by investigating officers. Detective Sergeant John Flynn, from special branch, said the full letter might reveal offences by Shayler as well as his email address, possibly opening up further lines of inquiry.

In court, Michael Tugendhat QC, representing the newspaper, said:

> "Save in most exceptional circumstances they should not be the subject of compulsive orders from investigating authorities because such orders constitute an interference with freedom of expression,"

[21] Defiant spy names two in plot to kill Gaddafi (February 2000)
https://www.theguardian.com/world/2000/feb/27/martinbright.theobserver

On 17 March 2000, the judge ruled against the newspapers, and ordered them to hand over the material. In response the newspaper said the letter "broke no new ground and revealed no new secrets.[22]" and went on to add:

> "We will challenge this judgment. There ought, in a free country, to be a presumption that people can contact newspapers without the fear that their communications will be handed over to the police. If the legal authorities do wish to impose this chill on freedom of expression there ought to be a heavy onus on them to prove the exceptional nature of the circumstances. It is our belief that the police came nowhere near proving such circumstances in this case."

The case went to judicial review and on 21 July 2000 the Guardian won at the appeal court. Lord Justice Judge ruled that "inconvenient or embarrassing revelations, whether for the security services or for public authorities, should not be suppressed"[23].

Otherwise, he said: "legitimate inquiry and discussion" and the "safety valve of effective investigative journalism" would be "discouraged, perhaps stifled".

> "Unless there are compelling reasons of national security, the public is entitled to know the facts and, as the eyes and ears of the public, journalists are entitled to investigate and report the facts".

The judge also said that the two principles of freedom of speech and the right of protection against self-incrimination were "bred in the bone of the common law"[24].

Martin Bright, at the time of the case, said:

> "I wrote about alleged crimes by agents of the state, but instead of investigating a plot to kill a foreign leader, this government has chosen to attack the liberty of the press. No journalist can genuinely claim to represent the public interest if the police have access to everything they do. We will never know how many whistleblowers are silenced by the treatment of people like David Shayler. But as soon as journalists start handing over their notes no one will speak out." (Bright 2000, quoted in Journalism: principles and practice, by Tony Harcup 2004)

Shayler was charged with three offences under the Official Secrets Act 1989, and during the case Lord Bingham explained the importance of freedom of expression whilst highlighting the vital role of the press in exposing misconduct. Lord Bingham defined democratic government as:

> "...government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments ... there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated."

---

[22] A pointless pursuit (March 2000)
https://www.theguardian.com/politics/2000/mar/18/freedomofinformation.uk
[23] Phone hacking, the Met police and the David Shayler case (September 2011)
https://www.theguardian.com/theguardian/from-the-archive-blog/2011/sep/20/phone-hacking-met-police-david-shayler
[24] Papers win Shayler MI5 case (July 2000)
https://www.theguardian.com/uk/2000/jul/22/davidshayler.richardnortontaylor

He also said that those involved in government can be guilty of "error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice", adding:

> "Those concerned may very strongly wish that the facts relating to such matters are not made public ... Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied ... The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one."[25]

Northern Ireland, 2000

In 2000, journalist Richard Norton-Taylor reported that prosecutors had dropped charges against a retired army officer who had been accused of passing information to a journalist about surveillance operations in Northern Ireland.

The MoD argued for evidence against Lieutenant Colonel Nigel Wylde to be heard in secret and under the Official Secrets Act. Wylde was charged with providing information for a book called "The Irish War", which described the use of computers by military intelligence in identifying targets.

The evidence included information relating to "damage assessments" and an initial MoD assessment concluded the book did not endanger any operations.

The CPS went on to say that there was insufficient evident for a conviction and all the material passed to the journalist was shown to already be in the public domain[26].

Phone hacking, 2011

The following account was sent to the NUJ from the journalist Amelia Hill:

> On Friday, 16 September 2011, Scotland Yard announced that it intended to take the Guardian to court to force us to reveal how I obtained the information that, at the time of her disappearance, police thought that the mobile phone of missing schoolgirl, Milly Dowler had been hacked.
>
> The order against the Guardian was sought under the Police and Criminal Evidence Act (PACE) but the application said that potential offences may have been committed under the Official Secrets Act.
>
> Scotland Yard believed my source was a serving detective on Operation Weeting, the police's phone hacking investigation. They claimed that I could have incited my source to break the Official Secrets Act and, in doing so, had broken the act myself.
>
> The application for the production order required the Guardian and me to hand over material which would disclose both my source for the Milly Dowler story and my source for the information which had enabled me to reveal almost immediately the identities of those arrested in the hacking scandal.
>
> The Old Bailey hearing was scheduled but the police abandoned the case following widespread condemnation and discussions with Keir Starmer QC, the Director of Public

[25] Human rights and the Official Secrets Act (September 2011)
https://www.theguardian.com/law/2011/sep/19/official-secrets-act-human-rights-act
[26] Charges dropped in secrecy case (2000)
https://www.theguardian.com/uk/2000/nov/02/northernireland.freedomofinformation

Prosecutions at the time (who had not been contacted by officers before the application was made).

However, the statement put out by the Met announcing its retreat left open the possibility that the production order could be applied for again. They also continued to use the word 'gratuitous' to describe my Milly Dowler story, implying that it was not in the public interest.

This was a story that almost defined public interest journalism. The authorities' ambiguous statement and use of the word gave rise to concern that, in trying to clean up some of the worst practices of the media, they might try again to clamp down on reporting.

In this case there was no threat to national security and at the time the union argued that official secrets laws should never be used in an attempt to try and force journalists to disclose their sources.

Undercover police, 2014

In 2014, the police tried to compel Channel 4 to hand over documents and un-shown footage from the investigative current affairs programme Dispatches. The information related to the police whistleblower, Peter Francis, who claimed undercover police officers had spied on the Stephen Lawrence family.

The police said they were investigating a potential breach of the Official Secrets Act and were concerned about the naming of specific locations in the programme (although these locations had not been use by the police for more than a decade), they also suggested police officers and their families may have been put at risk.

Francis offered to speak to Operation Herne if the police withdrew their repeated threats to use the Official Secrets Act[27].

Imran Khan, Doreen Lawrence's lawyer, said: "Doreen Lawrence and I are astonished that the police are employing such strong-arm, threatening tactics against someone who has exposed, on the face of it, serious misconduct in a public institution."[28]

Francis did eventually give evidence to another official inquiry. He gave testimony to Mark Ellison QC, the barrister tasked by the home secretary at the time, Theresa May, to examine issues linked to the murder of Stephen Lawrence.

Ellison obtained immunity from prosecution for Francis, granted by the then attorney general Dominic Grieve[29].

Quality journalism

We have highlighted some of the examples where journalists and their sources have been threatened with official secrets laws. Each of these cases demonstrates the importance of quality journalism, reporting in the public interest, and the threats that the official secrets laws can pose to journalists and journalism.

---

[27] Police demand notes from Channel 4 on Lawrence spying whistleblower (2014) https://www.theguardian.com/uk-news/2014/jan/13/police-channel-4-stephen-lawrence-undercover-spying

[28] Police chief issues partial apology over Lawrence whistleblower documents (2014) https://www.theguardian.com/uk-news/2014/jan/14/police-chief-apology-lawrence-whistleblower-documents

[29] Undercover whistleblower Peter Francis gives evidence to official inquiry (2014) https://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2014/jan/17/undercover-police-and-policing-police-and-crime-commissioners

It is also important to understand the distinction between assertions about the threats to national security and the vested interests of the authorities when attempting to use the existing laws to protect themselves from legitimate scrutiny and criticism.

The consultation demonstrates an insufficient awareness and understanding of the impact the proposed measures are likely to have on the exercise of journalistic activities and the consequences for investigative journalism. As mentioned in the examples cited above, the government has used the threat of prosecution under section 5 of the Official Secrets Act 1989 (and in some cases section 1 of the Official Secrets Act 1911) as a tool for seeking to silence journalists.

The changes proposed will make it much harder for editors and journalists to investigate and report on wrongdoing where the official secrets acts (or any successor(s) thereto) may be engaged. The consequences of chilling the willingness of journalists to perform these functions should not be underestimated.

Existing laws and practice

British official secrecy laws are not the only legal mechanisms available to the authorities. For example, Banisar and Fanucci (2013) argue there are powers under the Contempt of Court Act that can ban the discussion of trials and legal powers exist to allow judges to exclude the public if "publication of the evidence to be given would be prejudicial to the national safety."

The government can also use public interest immunity certificates to prevent disclosure of information in national security related trials (The Scott Report 1996). When using the certificate, ministers can ensure information is withheld if its disclosure "would cause a real risk of serious prejudice to an important public interest and the relevant agency's minister believes properly ought to be withheld". Other provisions feature in existing laws relating to confidentiality, employment, misconduct in a public office, and data protection.

We strongly agree with the Law Commission that open justice is a fundamental principle. British justice should not operate behind closed doors and the media has a crucial role in ensuring public accountability of the judicial system and the right for a fair and open trial.

In 2013, the highly controversial Justice and Security Act came into force and it has allowed the government to hear civil proceedings behind closed doors, insulated from the press, the public and even the person bringing the case.

At the time the new law was introduced, the barrister Eric Metcalfe, said:

> "Since 1997, the use of secret evidence has spread from national security appeals in asylum cases into many different areas of law, from parole board hearings to employment tribunals. With the coming into force of the Justice and Security Act 2013, it has now become part of our civil justice system and threatens to undermine the essential features of a fair trial."

Isabella Sankey, former director of policy for Liberty, said:

> "Brilliant investigative journalism helped uncover some of the war on terror's ugliest excesses, but the Justice and Security Act now keeps the press and public in the dark on government wrongdoing. This secrecy creep has serious implications for media freedom and will likely be used as a cloak for illegality, embarrassment and abuses of power."

The government has successfully applied for the secret courts procedures, known as "closed material procedures", in a case concerning the UK's alleged complicity in torture[30].

The Justice and Security Act saw the wholesale implementation of closed material procedures across the UK civil justice system, with very limited exceptions. The experience and knowledge gained from previous cases has allowed Special Advocates to say that closed material procedures represented "a departure from the foundational principle of natural justice" and as "fundamentally unfair".

Tshwane principles

It is regrettable that the Law Commission has not taken proper account of the detailed recommendations contained in the global principles on national security and the right to information (Tshwane principles). These international 'soft law' principles were developed (in close consultation with the UN special rapporteurs on freedom of expression and on counter terrorism and human rights) with input from more than 500 experts from around the world, including a range of experts who have worked within intelligence agencies, law enforcement and the armed forces. Significantly, the parliamentary assembly of the Council of Europe has twice passed resolutions, by large majorities, endorsing these principles. The assembly has stated that:[31]

> "The assembly welcomes the adoption … of the 'global principles on national security and the right to information' ("the Tshwane principles"), which are based on existing standards and good practices of states and international institutions. The Tshwane principles are designed to give guidance to legislators and relevant officials throughout the world with a view to reaching an appropriate balance between public interests both in national security and in access to information (para 7).
>
> The assembly supports the Tshwane principles and calls on the competent authorities of all member states of the Council of Europe to take them into account in modernising their legislation and practice concerning access to information (para 8).[32]

In our view, the principles ought to carry considerably weight in shaping any proposals for reforming the criminal law in this field, particularly when compared to white papers and reports drafted 30 or

[30] Rendition: government evidence to be heard in secret in UK for first time (2017) https://www.theguardian.com/world/2017/mar/23/rendition-government-evidence-heard-secret-uk-first-time

[31] Parliamentary assembly of the Council of Europe, resolution 1954 (2013) on national security and access to information, 2 October 2013; Improving the protection of whistle-blowers, resolution 2060 (2015), 23 June 2015. Support has been expressed for the principles by the European parliament: see report on the US NSA surveillance programme, surveillance bodies in various member states and their impact on EU citizens' fundamental rights and on transatlantic cooperation in justice and home affairs, A7-0139/2014, 21 February 2014, para 77.

[32] Additionally, the special rapporteurs on freedom of expression of the UN, Organisation of American States and the African Commission on human and peoples' rights; the OSCE representative on freedom of the media; and the UN special rapporteur on counter-terrorism and human rights (Lord Carlile) and the UK's former reviewer of counter-terrorism legislation have all endorsed or expressed their support for the Tshwane principles: https://www.opensocietyfoundations.org/press-releases/new-principles-address-balance-between-national-security-and-publics-right-know

more years ago (such as the 1988 white paper). We urge the Law Commission to reconsider carefully the Tshwane principles and the extensive body of documentation developed during their creation.

Official Secrets Act 1911

Section 1 of the Official Secrets Act 1911 is capable of being used against journalists obtaining and publishing information. A journalist could be liable for such actions if they are done for any purpose prejudicial to the safety or interests of the state, if the information obtained and/or published might be (in)directly useful to an enemy.

We are seriously concerned that the Law Commission appears to be recommending reforms which would make it easier to prosecute journalists under section 1 of the 1911 Official Secrets Act[33]. The union seeks clarification as to whether this is the intention (or potential consequence) of these proposals.

The union also urges the Law Commission to make it clear that section 1 should never be used to prosecute journalists who are not proven to be agents of foreign states or organisations. It is crucial that journalism is not equated with espionage and media workers should not be criminalised under the 1911 Official Secrets Act or any future related laws.

Official Secrets Act 1989

We understand that the Law Commission's (unpublished) remit does not permit questioning the assumption that the unauthorised disclosure of specific categories of information by people who are security cleared and/or notified under the 1989 Official Secrets Act (primary disclosures) should be criminalised.

The NUJ is concerned by the absence of any discussion as to merits of criminalising the (re)publication of classified/protected data by journalists or others who are not subject to such obligations (secondary disclosures). Criminalisation of the latter should not be regarded as beyond discussion and we strongly encourage the Law Commission to properly analyse the merits of using the criminal law to regulate secondary disclosures. It is regrettable that the Law Commission's analysis of section 5 of the 1989 Official Secrets Act includes no such analysis.

The starting point should be that secondary disclosure of classified or other protected information should not be criminalised save in exceptional circumstances. This should apply to information that is (re)published by journalists working in accordance with accepted standards of responsible journalism (see further below regarding the relevance of these principles to a public interest defence).

Germany has abolished the crime of aiding and abetting unauthorised disclosure and a journalist can now only be prosecuted for inciting the unauthorised disclosure of classified information.[34] We would suggest that the statutory offences in part 2 of the Serious Crime Act 2007, including

[33] Law Commission consultation paper, 2.121
[34] National Security and the Right to Information in Europe (April 2013) http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen_nat-sec-and-rti-in-europe/view p57

intentionally assisting or encouraging a crime, would be sufficient to deal with situations in which someone could be prosecuted for a secondary disclosure.

Prior publication

The media should not be foreclosed from reporting on information that is already in the public domain, regardless of whether the person making it public did so lawfully. Given that primary disclosures of classified information increasingly take place through anonymised online platforms which can be viewed by in multiple jurisdictions, it does not make sense to criminalise the republication of such information by the UK media in circumstances in which it has already been widely disseminated.

We can only assume that the Law Commission has made a mistake in suggesting that, in addition to the need for information to have been placed into the public domain lawfully, there ought to be a requirement that it has been widely disseminated before a defence of prior publication would apply[35].

If information is lawfully in the public domain (for example, a response to an FOI request), then there should be no question of criminal liability arising from its republication. We urge the Law Commission to clarify this.

Requirement to prove damage

The NUJ strongly condemns the proposal to remove the requirement for prosecutors to prove that a disclosure was damaging[36]. A requirement to prove damage must remain a prerequisite to establishing criminal liability in the area of unauthorised disclosures of information under the official secrets laws (or any successor). While we also oppose the recommendation to remove the damage requirement for primary disclosers, it is deeply disturbing that the Law Commission envisages a journalist could be prosecuted without any requirement for the authorities to prove that the disclosure caused damage. Anything short of a clear requirement to prove damage is likely to have a serious chilling effect on the exercise of public interest journalism. We urge the Law Commission to make it clear that there will be no recommendations or support for legal changes that would relax or abandon the requirement to prove damage before a journalist could be prosecuted.

Section 5(3) of the 1989 Official Secrets Act provides an important safeguard for journalists and we implore the Law Commission to recommend its preservation. Removal of this safeguard would pose an existential threat to journalism focused on investigating national defence and security.

Our concerns are in no way assuaged by the Law Commission's recommendations on the introduction of a requirement to prove subjective fault[37].

The case of the Snowden disclosures provides an instructive illustration as to how the state could manipulate the type of *mens rea* test proposed by the Law Commission. Journalists held the material disclosed by Snowden for weeks as they analysed the material and decided what they could publish. During this period, the government was constantly warning that publishing any of this material was

[35] Law Commission consultation paper, 3.204
[36] Law Commission consultation paper, 3.148
[37] Law Commission consultation paper, 3.151 - 3.164

capable of damaging national security. Had the Law Commission's proposed provisions been in force, the issuing of warnings to journalists is likely to have created the opportunity for the authorities to argue later that the *mens rea* existed on the basis that the journalists involved had ignored what the government was saying about the potential risk to national security. This is why the NUJ is extremely concerned by these proposals.

Journalists facing such pre-publication warnings, and with the authorities claiming a monopoly on defining what amounts to a threat to national security, many journalists would have reservations about publishing the information. Such reservations would exist notwithstanding the public interest, and it would be detrimental to journalists' ability to report on sensitive issues, in accordance with the standards of responsible journalism and without causing demonstrable harm to national security. Applying the latest proposals to past incidents helps to exemplify the substantial chilling effect that may arise from the removal of a requirement to prove damage and its replacement with a subjective fault element.

We are also opposed to the lack of a requirement to prove damage in section 1 of the Official Secrets Act 1989. Criminal liability founded on the basis of the class or category of information disclosed is in our view excessively broad, insufficiently discriminating, and criminalises the disclosure of potentially trivial information. The justifications for having no damage requirement set out in the 1988 white paper are recited without analysis[38].

Although we do not want to encourage the further use of in camera proceedings, it should not be ignored that the official secrets laws (and the common law) permits courts to hear evidence in private. Where there are concerns that proving damage would require the authorities to adduce sensitive evidence, there is no reason that such powers could not be used where essential and appropriate. The Law Commission has declined to explain why this option is not sufficient to meet the alleged difficulties with adducing evidence to prove damage.

If the Law Commission is true to its commitment not to lower the threshold of culpability before an individual commits a criminal offence[39], it should abandon the proposals to remove the requirement to prove damage.

The necessity of a public interest defence

The NUJ strongly supports the introduction of a statutory public interest defence for primary disclosers (including government employees, contractors and anyone else notified under official secrecy laws) and for secondary disclosers of information (including but not limited to journalists and media workers). This should apply to all offences under the official secrets acts and/or any successor legislation.

A public interest defence is an essential safety net for whistleblowers/primary disclosures who are prosecuted for exposing wrongdoings the government would prefer to keep secret. Making these kinds of disclosures will always be fraught with risk, and a public interest defence would offer succour to individuals considering raising concerns.

[38] Law Commission consultation paper, 3.25
[39] Law Commission consultation paper, 3.159

Secondary disclosures should not be criminalised, but if they are, a public interest defence is essential. It would strengthen democracy and offer improved safeguards for journalists who investigate and expose wrongdoing in or by the state.

The availability of a public interest defence would strengthen the media when facing threats of prosecution aimed at using official secrets laws to supress legitimate, public interest journalism.

We would suggest that separate defences are likely to be required for each category of discloser. To the extent that the Law Commission considers itself unable to recommend a public interest defence for government employees and contractors (primary disclosers), we hope that a recommendation will be made for a statutory defence for secondary disclosures (including journalists). This defence would not need to exist exclusively for journalists and therefore journalists would not be receiving exceptional treatment.

The Law Commission's discussion of a potential public interest defence which could be relied upon by journalists is notable for its paucity of analysis and reasoning. The consultation cites, without critical discussion, conclusions of Lord Justice Leveson which were formulated in an entirely different context and in a report that was not concerned with the interaction between public interest investigative journalism and official secrecy law. The NUJ supported many of the recommendations contained within the Leveson report but we would not support their applicability in this context.

The Law Commission has taken passages from the Leveson report out of context[40]. It is axiomatic that the press cannot sit outside, above or beyond the law. This is not what a public interest defence would achieve; it would be embedded within the law and only available if specific criteria were met.

By stating that journalists are not prosecuted routinely[41], the Law Commission fundamentally misunderstands the implications of the official secrets acts for journalism. Public interest journalism is chilled primarily by the possibility or threat of prosecution under official secrecy laws which can be used whilst there is no recourse to a public interest defence. The Law Commission has failed to acknowledge this critical point.

Official secrets laws have been used to threaten journalists and editors to prevent them from publishing material and/or in an attempt to force media workers and organisations to surrender journalistic sources and/or material. The need for a public interest defence for journalists cannot properly be considered without analysing the use of official secrecy legislation as a means for threatening and/or controlling journalists.

We urge the Law Commission to revisit this issue and to use its privileged access to law enforcement bodies and prosecutors to assess the ways in which the official secrets acts have been used in the past in relation to journalistic activity. Only then can the need for a public interest defence for secondary disclosers be properly appreciated. The union would welcome the opportunity to respond further once such an analysis has been undertaken.

[40] Law Commission consultation paper, 7.67
[41] Law Commission consultation paper, 7.64

Any consideration of whether the criminal law should encompass a public interest defence for primary and/or secondary disclosures should be underpinned by an analysis of what the relevant public interest(s) are. This is largely absent from the consultation.

The Law Commission's unstated premise appears to be that the public interest is defined primarily by the need to prevent the unauthorised disclosure of information by those working within government and to foreclose the media from reporting on such disclosures. Little attention is paid to the reality that there is a public interest in:

1) The investigation and exposure of government wrongdoing and abuses of power for the purposes of ensuring accountability. This is demonstrated by recent revelations in areas ranging from undercover policing to the provision of military equipment to regimes which violate human rights, mass surveillance and intelligence sharing practices. Facilitating and protecting the disclosure of wrongdoing is especially important in an area of government which is characterised by opacity and in which the potential for wrongdoing to be covered up is heightened.
2) Transparency regarding public bodies' interpretation and use of their statutory powers, and their expenditure of public funds.
3) Reducing unnecessary government secrecy.
4) The right to the truth in regard to human rights violations.[42]
5) Security sector bodies which are accountable and governed by the rule of law.

Definitions of public interest

The Law Commission's concerns about a statutory public interest defence appear to be based on what we regard as a misplaced concern that the public interest is an elusive concept. The Law Commission describes the public interest an "amorphous" and "inherently ambiguous" concept which implies making arbitrary value judgments[43]. The implication is that the public interest is incapable of providing the foundation for a workable defence. For the reasons that follow, we fundamentally disagree and consider that this reasoning is deployed as an excuse for failing to engage properly with this issue.

To the extent that there are concerns about defining the public interest, the NUJ recommends that consideration is given to the public interest criteria already included in legislation (some of which is cited in the consultation), as well as guidance and industry codes, resolutions of international organisations and international principles. There are now well-established lists of issues whose disclosure is *prima facie* in the public interest. Both domestically and on an international level there is considerable convergence on this issue and the concept is not amorphous or based on arbitrary value judgments.

We have set out the established examples below, and we would encourage the Law Commission to have a closer look at the broad range of documents that are already available.

The Law Commission has referenced section 43B of the Employment Rights Act 1996 (ERA 1996), which is part of the protected disclosure provisions introduced by the Public Interest Disclosure Act

[42] El-Masri v Former Yugoslav Republic of Macedonia (2012) [GC], application no. 39630/0, para. 191.
[43] Law Commission consultation paper, 7.51-7.52 and Law Commission summary, 7.5.

1998. So-called qualifying disclosures are defined in part by a requirement that the information disclosed tends to show one or more of the following categories of wrongdoing:

1) That a criminal offence has been committed; is being committed or is likely to be committed.
2) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which s/he is subject.
3) That a miscarriage of justice has occurred; is occurring or is likely to occur.
4) That the health or safety of any individual has been; is being or is likely to be endangered.
5) That the environment has been, is being or is likely to be damaged, or
6) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Additionally, for a disclosure to be regarded as a protected disclosure under the ERA 1996, a worker must have a reasonable belief that making the disclosure is in the public interest. These are categories of information that parliament has determined may be disclosed in the public interest - they define the parameters of what is meant by the public interest when it comes to the disclosure of information[44]. In addition to including some of the categories set out above, the DPP guidelines for prosecutors on assessing the public interest in cases affecting the media includes the following category:

> "[A disclosure/conduct] raising or contributing to an important matter of public debate … examples include public debate about serious impropriety, significant unethical conduct and significant incompetence, which affects the public."[45]

The Tshwane principles add human rights violations and violations of international humanitarian law to this list[46].

Existing public interest tests

The Law Commission appears to have ignored the reality that public interest tests, defences and exemptions exist throughout English law. This includes statutory public interest tests contained within statutes governing the disclosure or publication of information, including the protected disclosure provisions of the Employment Rights Act 1996, section 4 of the Defamation Act 2013, section 32 of the Data Protection Act 1998, section 55(2)(ca) of the Data Protection Act 1998 (as amended but not yet in force). In addition there are various public interest provisions in the Freedom of Information Act 2000. There are also long-established common law public interest defences or justifications in, among other areas, the law of breach of confidence and copyright. The courts have considerable experience of applying such tests.

[44] In addition to the examples we have cited here, see also: the section of the editors code of practice referring to the public interest; principle 37 of the Tshwane principles, and the Director of Public Prosecutions' guidelines for prosecutors on assessing the public interest in cases affecting the media, para 31; the parliamentary assembly of the Council of Europe, resolution 1954 (2013), 2 October 2013, para 9.5.
[45] Paragraph 31(d).
[46] Tshwane principle 37

It is surprising that the Law Commission has not given detailed consideration to the operation of public interest tests in these areas of law before dismissing the possibility of a public interest defence in this context. In particular, the Law Commission has offered no evidence to suggest that the public interest has proved elusive and/or public interest tests are impossible to apply in practice using the existing legislative framework. There can be little doubt that the abovementioned statutory provisions provide a sufficient foundation to draft a statutory public interest defence under an amended version of the Official Secrets Act 1989 (or its successor).

Parliament has taken the view that the courts are capable of applying public interest defences in criminal law, as is demonstrated by the abovementioned amendments to section 55 of the Data Protection Act 1998. This section provides a defence for people who obtain or disclose personal data or the information contained in personal data, or procure the disclosure to another person of the information contained in personal data. The fact that parliament has seen it fit to legislate for a public interest in an area of criminal law, which is also concerned with the (mis)use of information, undermines many of the Law Commission's arguments.

Proposals for a public interest defence

There are clearly a variety of ways in which a public interest defence could be constructed. Contrary to the choice presented by the Law Commission[47], this does not amount to a binary choice between a subjective and objective defence. Any statutory public interest defence would invariably include both elements. It is therefore unrealistic for the Law Commission to raise concerns that a discloser could defend themselves wholly on the basis of what they believed to be in the public interest.

The Law Commission hints at the possibility of developing a list of factors to be included in a public interest defence but fails to discuss such factors or to solicit consultees' views on this critical issue.[48] In our view, this exercise should be central to any consultation on a public interest defence. It is not possible to properly consult on the potential introduction of a public interest defence without considering its content and structure. We urge the Law Commission to revisit this issue and to consult again on any proposals it formulates. What follows are our preliminary observations on this issue, and we would welcome the opportunity to respond further once the Law Commission has developed any future proposals.

As a starting point, it seems likely that any defence would need to include a list of categories of wrongdoing whose disclosure is *prima facie* in the public interest (for more details see the above section on definitions of the public interest), together with a requirement that the discloser reasonably believed that the disclosure/publication tended to show wrongdoing falling into one or more the specified categories as mentioned above.

Concerning the factors which could be included in a statutory public interest defence, the Tshwane principles offer a guide and include a mixture subjective, objective and hybrid considerations - some of these are relevant only to the public interest defence as it applies to primary disclosures[49]:

[47] Law Commission consultation paper, 7.3
[48] Law Commission consultation paper, 7.64.
[49] Tshwane principle 43 (b)

1) Whether the extent of the disclosure was reasonably necessary to disclose the information of public interest.
2) The extent and risk of harm to the public interest caused by the disclosure.
3) Whether the person had reasonable grounds to believe that the disclosure would be in the public interest.
4) Whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body.
5) The existence of exigent circumstances justifying the disclosure.

If there is a reluctance to recommend any public interest defence for secondary disclosures because of the complexities inherently involved in attempting to define a journalist or journalism, it is not essential to reference journalists in the definition. The focus of such a defence could be on a secondary discloser's actions and not their identity. In this regard, we recommend that an assessment of a discloser's adherence to established principles of responsible journalism could be incorporated into the statutory defence available. By way of an analogy, when a public interest defence is relied on in the law of defamation, the assessment of whether or not a defendant reasonably believed that publishing the statement was in the public interest centres on whether the publisher acted in accordance with the principles of responsible journalism[50]. We also note that in the libel case of *Economou v De Freitas,* Justice Warby held that the public interest defence, which includes an assessment of responsible journalism (or responsible pre-publication), is sufficiently adaptable to be applied in situations in which the publisher is not a journalist or traditional publisher. This could equally be recognised in a criminal law public interest defence for secondary disclosures.

The union urges the Law Commission to consider the defamation case law on responsible journalism and to address how such a test could be adapted for inclusion in a statutory public interest defence for secondary disclosures. Relevant considerations might, for instance, include whether a journalist undertook appropriate steps to assess the veracity of information provided, the amount of sensitive information disclosed, the extent to which reporting removes information capable of endangering individuals, and (where appropriate) whether responses were sought from the agencies and/or individuals concerned. This responsible journalism criterion would complement and sit alongside the criteria set out above.

We believe our proposals would address concerns that people who are not genuinely engaged in journalism might try to exploit the availability of a secondary discloser's defence.

Refuting public interest defence objections and misconceptions

The NUJ wishes to confront a number of additional objections and misconceptions relied on by the Law Commission for rejecting a public interest defence for both primary and secondary disclosers.

[50] Section 4(1)(b) Defamation Act 2013. For the principles that apply to this assessment, see for example: Economou v De Freitas [2016] EWHC 1853 (QB) at [241]; Flood v Times Newspapers Ltd [2012] UKSC 11 at [113]. Reynolds v Times Newspapers Ltd and others [1999] UKHL 45; [2001] 2 AC 127, at p204 (Lord Nicholls)

As to the Law Commission's concern[51] that the existence of a public interest defence would undermine the relationship of trust between ministers and civil servants, we wish to make the following points:

1) This concern is founded on an unacknowledged assumption that the availability of a public interest defence would increase the number of unauthorised disclosures made to the public at large. No evidence is cited that this has, for example, occurred since the introduction of a public interest defence in Canadian law in the Security of Information Act 1985.
2) The relationship between ministers and civil servants should not be permitted to prevent the disclosure of wrongdoing. The public interest in the exposure and investigation of information showing wrongdoing (particularly where it has not been properly investigated) is likely to outweigh the public interest in maintaining the trust between civil servants and ministers.
3) There is a need to acknowledge the fact that the extent to which leaks come from ministers rather than their civil servants - this too is capable of undermining this relationship yet the consultation fails to acknowledge the issue of politicians leaking sensitive information for their own purposes.

A further reason cited for rejecting a statutory public interest defence is a concern that its availability would open the floodgates[52]. This assertion is little more than hyperbolic speculation. No evidence is provided of this having happened in either Canada or Denmark, the two states mentioned in the consultation and where the criminal law includes public interest defences for disclosures of classified and/or protected information. We would suggest that this alarmist statement also misunderstands national security whistleblowing and the purposes of a public interest defence. Making a primary disclosure outside prescribed channels is and would remain fraught with risk, including career-ending consequences, and the risk of criminal proceedings in which a public interest defence may not succeed. We believe these are considerable deterrents and very few people risk making public disclosures. It is likely that a public interest defence may be regarded by a very small number of would-be whistleblowers as a potential safety net that would reduce some of the risks, so as to justify making a disclosure.

Some disclosures of information about the security services have the potential to endanger individuals' safety or harm nebulous national security interests. Such disclosures may take place and harm may occur regardless of whether a discloser had recourse to a public interest defence. The Law Commission has offered no evidence to suggest that there is a correlation between the availability of a public interest defence, and the level or frequency of genuinely harmful disclosures. Furthermore, primary and secondary disclosures made in an irresponsible, untargeted or cavalier manner are less likely to be accepted as meeting the criteria specified as part of the statutory public interest defence. The same is true of disclosures which have caused harm.

We reject the insinuation that juries would be incapable of applying a public interest test[53]. Judges frequently provide directions on the application of legal tests which are arguably more complex than

[51] Law Commission consultation paper, 7.39 - 7.42
[52] Law Commission consultation paper, 7.63
[53] Law Commission consultation paper, 7.52 – 7.53

a public interest test. For example, directions on self-defence, bad character, hearsay and identification are all examples of potentially complex directions provided to juries.

The NUJ disagrees that concerns about legal certainty can be used to validate arguments against the adoption of a public interest defence. While neither a primary or secondary discloser could be certain as to whether a public interest defence would succeed before a jury, a level of unpredictably is inherent in all decisions made by juries (or magistrates/district judges) on culpability and the application defences in criminal proceedings. Equally, the experiences of both whistleblowers and journalists demonstrate that there is uncertainty as to whether any prosecution will be threatened, initiated and maintained in respect of disclosures. It should also be kept in mind that reliance on a public interest defence would be an option of last resort.

The Law Commission's analysis of the Canadian model is perfunctory. Remarkably, the Law Commission states that the model exhibits many of the problems identified with the statutory public interest defence model but includes no evidence or Canadian references as to the application of the model[54]. The Canadian approach is dismissed without reference to the views of Canadian legal experts (or to those of the security intelligence review committee who are the core oversight body in Canada) on the implications and operation of the public interest defence (and the authorised disclosure procedures).

A public interest defence has been present in Canadian law for 30 years, and the Law Commission provides no evidence or opinions to suggest the availability of this defence in Canadian criminal law is associated with the problems highlighted by the Law Commission as reasons to reject a public interest defence here. We strongly encourage the Law Commission to obtain the views of eminent Canadian national security legal experts and to engage directly with the Canadian oversight bodies.

Moreover, the Commission also cites (with disapproval) an instance of the application of a public interest defence in Danish criminal law[55]. Given that Denmark is a second example of a NATO ally whose official secrecy law contains a public interest defence, it is surprising that the Law Commission has not set out the terms of this defence. Nor has there been any attempt to engage with Danish legal experts and/or assess the relevant literature. We believe the Law Commission's concerns that are founded on the Danish example are misplaced. Danish criminal law does not contain a structured public interest defence along the lines of the defence which exists in Canadian law, and it is entirely unremarkable that two courts (whether the tribunal of fact is a judge or jury) reached different conclusions.

British espionage within the media

The Law Commission's consultation does not consider the state utilising journalists or journalism for its own espionage purposes. Journalists who work for intelligence organisations and/or intelligence officers who use journalistic cover represent a grave threat to the integrity and safety of our profession.

The NUJ general secretary from 1992 until 2001, John Foster, has highlighted the union's position on this important issue:

[54] Law Commission consultation paper, 7.129
[55] Law Commission consultation paper, 7.54

> "If spies pose as journalists some people will see journalists as legitimate targets" (Lashmar 2017[56])

In 2015, Paul Lashmar attended an event where David Omand, the former director of GCHQ said intelligence agencies had used journalistic cover, and that "used to be the case in Britain". He went further to add that it had "stopped some years ago because it put the whole journalistic profession at risk".

The NUJ is not aware of any other statements made by current or former senior intelligence officials on this controversial issue. There have been no official government statements on any historic and/or existing practices or policy so it is not been possible to confirm or refute such a ban. However, there are a range of examples that demonstrate the use of these tactics.

According to Lashmar, during the Second World War a global network of news agencies was established and operated by the secret service and some of this activity continued during the Cold War. One example was the Cairo based Arab News Agency and in 1948, the Foreign Office set up the Information Research Department (IRD) specialising in covert international propaganda.

> "One early recruit by British intelligence of a foreign journalist was that of Benito Mussolini, later the Italian fascist dictator. In 2009, archive documents revealed that Mussolini got his start in politics in 1917 with the help of a £100 weekly wage from MI5. In return, Mussolini, then an editor, published propaganda in his paper encouraging Italians to remain in the war alongside the Allies." (Kington 2009 cited in Lashmar 2017)

At the South African Truth and Reconciliation Commission in the mid-1990s, John Horak said that whilst he was working as a journalist for 27 years, he was also a South African police spy. He claimed it was standard practice to use newspapers as cover for intelligence gathering:

> "In 1970 I was in contact with an MI5 individual and by then more than three- quarters of all foreign correspondents of Britain were in some way sponsored by the British intelligence services, because it was so prohibitively expensive to put a man in the field." (Lashmar quoting Beresford 1997).

After the Watergate scandal in the US, the Church committee was established by the Senate, and the Pike commission was established by the House of Representatives. Both the Church and Pike reports mention the use of the media by the CIA. The Church report concluded:

> "In examining the CIA's past and present use of the US media, the committee finds two reasons for concern. The first is the potential, inherent in covert media operations, for manipulating or incidentally misleading the American public. The second is the damage to the credibility and independence of a free press which may be caused by covert relationships with the US journalists and media organizations." (The Church report 1976 quoted by Lashmar 2017)

[56] Putting lives in danger? Tinker, tailor, journalist, spy: the use of journalistic cover. Paul Lashmar (2017), awaiting publication, *Journalism*

The Church committee report condemned the practice and unequivocally called on the intelligence community to "permit American journalists and news organisations to pursue their work without jeopardising their credibility in the eyes of the world through covert use of them".

The Pike report explained why journalistic cover is attractive to the authorities:

> "Intelligence agencies have long prized journalists as informant and identity-covers. Newsmen generally enjoy great mobility, and are often admitted to areas denied to ordinary businessmen or to suspected intelligence types. Not expected to work in one fixed location, both bona fide journalists and masquerading intelligence officers can move about without arousing suspicions. They also have extraordinary access to important foreign leaders and diplomats" (The Pike report 1977, quoted in Lashmar 2017).

The CIA has alluded to using British journalists but we do not know how many or who they were. The New York Times has reported that in the 1970s the CIA owned or subsidised more than fifty newspapers, news services, radio stations, periodicals and other communications facilities, and most of them were abroad. The British government should be seeking assurances now that this is no longer the case.

Lashmar (2017) maintains:

> "At the heart of the discussion … is the tension between two fundamental rights - to life (security), and to free speech. If the freedom of the press is an extension of the right to free speech and is meant to be vital to the maintenance of democracy, the misuse of journalism raises ethical questions for the intelligence community who have to justify any diminution of that freedom."

The NUJ supports journalists exercising their fourth-estate duty including the monitoring of intelligence agencies in the public interest, not least because of the vast powers and capabilities these agencies now wield in secret.

The agencies have a long history of acting incompetently, illegally, unethically and immorally. They have repeated suffered internal betrayal and sought to disguise it. Journalists have proved to be the most effective champions of accountability, oversight and reform because the media has consistently exposed state misconduct.

Unfortunately journalists also need to monitor these agencies to make sure they are not utilising journalists' independence for their own purposes. British intelligence has a long history of using journalistic cover and suborning journalists. These actions fundamentally undermine the right to freedom of expression, one of the core democratic values these agencies are tasked to protect.

Evidence is available to show that British intelligence organisations have forged NUJ press cards to provided cover to their agents in the past (Lashmar, 1999[57], 2001[58] and forthcoming). In 1989, the author and spy John le Carré said: "…the British secret service controlled large sections of the press, just as they may do today" (Dorril 1993, quoted in Lashmar 2017). Ian Fleming, an intelligence officer and the author of the James Bond books, ran a news agency that was used as journalistic cover in the early 1950s. Some of those involved became famous Fleet Street figures employed at the Sunday Times (Lashmar 2017). The historian and biographer, Alistair Horne, has also admitted he had three

[57] Lashmar, P. (1999) MI6 officers use forged press passes. The Independent. 14 June. Page 8.
[58] Lashmar, P. (2001) The name's James Bond – Here's my NUJ Card. The Independent. 30 Jan. Page 9.

agents working for the secret service at the same time he was employed by the Daily Telegraph in the 1950s. The most famous example of a secret service official working as a journalist is Kim Philby. He was employed by the Observer and the Economist magazine. The most recent example came to light in 2015 when Frederick Forsyth admitted he had worked for the intelligence service for two decades and was also a correspondent for the BBC and Reuters.

Politicians and senior intelligence officials have accused journalists of putting lives in danger whilst the intelligence agencies themselves have a long history of putting journalists' lives in danger. When journalists are killed or kidnapped, they are often accused of being spies. If new legislation is announced in future, the NUJ will seek support to ensure the authorities, both at home and abroad, are no longer able to use journalists as their agents or cover.

DA-Notices

We would urge the Law Commission to consider and assess the existing defence and security media advisory committee and defence advisory notice system (DA-Notices) as part of its remit and recommendations.

This existing scheme is voluntary and includes representatives of the media, government departments, military and security services. Together they discuss information relating to national security and the safety of individuals.

The committee secretary advises on the public disclosure of information, can be contacted directly for advice and offers help to resolve disagreements. Currently, there are five categories of information covered by DA-Notices:

1) Military operations, plans and capabilities.
2) Nuclear and non-nuclear weapons and equipment.
3) Ciphers and secure communications.
4) Sensitive installations and home addresses.
5) UK security and intelligence services and special services.

Each of these five categories has guidance on the types of information that should not be published. The guidelines are not mandatory and, as the DPBAC notes: "Compliance with the DA-Notice system does not relieve the editor of responsibilities under the Official Secrets Act" (defence, press and broadcasting advisory committee 2011, quoted in Banisar and Fanucci 2013).

Although the NUJ is excluded from participation and our members have mixed views about its effectiveness, we remain convinced that in the first instance, the system should be properly considered as part of the Law Commission's consultation.

The system was first established in 1912 and a review was announced in 2014[59]. The review was led by the vice-chancellor of Essex University at the time, Anthony Forster, and included the former Guardian editor Peter Preston as well as Peter Wright, the editor emeritus at Associated Newspapers. They decided the system still broadly worked but needed modernising.

Simon Bucks, the vice chair of the defence and security media advisory committee and chair of the media side said the system helps the media "...avoid inadvertently jeopardising national security or

[59] D-notice system to be reviewed in wake of Edward Snowden revelations (2014) https://www.theguardian.com/uk-news/2014/jan/26/d-notice-system-reviewed-edward-snowden

endangering life. From the media side, it has to be better than any coercive alternative amounting to overt government censorship (Bucks 2015[60]).

An alternative to this system would be to adopt mechanisms that are closer to the US model in which the intelligence agencies could deal more directly with journalists and they could also, like their US counterparts, be more transparent.

Statutory commissioner model

The NUJ welcomes the proposal that members[61] of security and intelligence agencies should be permitted to make disclosures to a statutory commissioner without risking criminal proceedings. This recommendation rightly recognises that staff counsellors or similar internal mechanisms are, alone, insufficient mechanisms for the disclosure and effective investigation of allegations of wrongdoing. It is important that these proposals are developed in consultation with the organisations representing workers employed within these organisations.

The existence of an external, independent mechanism for making disclosures has the potential to constitute an important improvement in the accountability of the agencies. The efficacy of any such mechanism would, however, depend significantly on the details contained within any new legislative proposals, as well as the extent to which the availability of the commissioner is known to staff/contractors, the resources available for the commissioner to operate, and the commissioners' powers to be able to access information and investigate allegations.

Should this model be advanced further, it is essential that it is accompanied by proper consideration of the employment law implications as this is absent from the current consultation. Without concomitant changes to employment legislation there is a real risk that the creation of a statutory commissioner could encourage employees to contact the commissioner without any guarantees that this contact would not lead to detrimental consequences for their employment.

There would need to be amendments to the protected disclosure provisions under the Employment Rights Act 1996 to ensure that workers within the security and intelligence agencies would have full employment protection in the event that they make disclosures to the statutory commissioner. This would include amending/repealing section 193 of the ERA 1996 to ensure that such persons are not excluded from the protections conferred by part VIA of the ERA 1996; and it would also require including the designated commissioner within the schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014.

For the statutory disclosure route to be effective, any potential new legislation must make it clear that the right to make protected disclosures to a commissioner is not predicated on having first raised concerns internally. There are many situations in which workers or contractors cannot reasonably be expected to disclose alleged wrongdoing or concerns internally. Neither their criminal liability nor their liability to employment detriments (including in relation to their security clearance) should depend on a disclosure having first been made internally.

[60] The D-notice is misunderstood but its collaborative spirit works (2015) https://www.theguardian.com/media/2015/aug/02/d-notice-national-security-blackout

[61] Reference is made to 'members' of the security and intelligence agencies - this is too narrow and must also include contractors.

The Law Commission has not stated whether or not the proposals on the statutory commissioner model are limited to members of the security and intelligence agencies. It is essential that these proposals are considered carefully to ensure that there are no gaps. Anyone who is notified under the law must have an equivalent independent channel through which they can make disclosures. Furthermore, we urge the Law Commission to review the position regarding armed forces personnel because it is not clear that they have an equivalent channel (such as the Service Complaints Ombudsman) outside the armed forces' service complaints procedure.

As with members of the security and intelligence agencies, appropriate changes would need to be made to the ERA 1996. Regarding the need for a designated statutory commissioner, the same concerns apply to law enforcement personnel who may wish to disclose information within the meaning of section 4 of 1989 Official Secrets Act. It would be helpful if the Law Commission could clarify whether the Independent Police Complaints Commission (IPCC) would be the equivalent body for these purposes.

In developing proposals regarding disclosures to a statutory commissioner, we would strongly encourage the Law Commission to pay close regard to the detailed principles contained in 37 - 41 of the Tshwane principles.

The proposed statutory commissioner model and the introduction of a public interest defence should not be regarded as mutually exclusive options. These safeguards would enhance each other and serve discrete functions. They are equally important for ensuring that wrongdoing is exposed, investigated and addressed.

The right to make protected disclosures to a commissioner is, of course, primarily relevant to insiders. From the perspective of NUJ members and the media, we emphasise that the commissioner model does nothing to improve the protections available to journalists investigating and reporting in the public interest.

Attorney general oversight

We urge the Law Commission to revisit the question of whether prosecutions under the Official Secrets Act and any successor legislation should require the consent of the attorney general. It should not be appropriate for a member of the executive to be involved in prosecutorial decisions in this field.

Official secrecy prosecutions are likely to arise in circumstances in which information has been disclosed which may be embarrassing and/or damaging to the government. In these circumstances, there is an obvious potential for a conflict of interest between an attorney general's prosecutorial functions and their political role and interests.

Notwithstanding the principle that the attorney general's legal functions are intended to be separate from their party-political role as a member of the government, we question the ability to truly separate such functions.

Conclusion

We have consulted extensively with NUJ members prior to responding to the Law Commission's proposals. One of our members, an investigative journalist working at the BBC said:

> I fully support your draft submission, especially the emphasis on the need for a public interest defence. I can imagine many stories where journalists might fall foul of a new law: it is not inconceivable of course that at some point we might be contacted by a whistleblower from inside the secret intelligence service (MI6) or the security service (MI5) and that the whistleblower might wish to inform us of wrongdoing. In this case, journalists would face the full force of the law but exposing this information would be very much in the public interest.
>
> In cases such as this, it is vital that we can test these arguments in the courts. The courts are the last bastion of freedom in a democracy and the power of the state must be tempered by proper legislation that, at least, leaves the avenue of responsible challenge open.
>
> There have been occasions in the past where my work - and the wider work of the BBC - has been protected by the existing law. But we have had to go to court to do this. I give you one example. Not long after the 7/7 London bombings, the Metropolitan Police served a production order on me and my programme seeking access to my research material following an investigative story about extremism that we broadcast on Newsnight. This production order was drafted in such wide terms that, in effect, it would have made me as an investigative journalist an agent of the state if we had complied.
>
> From memory the order sought journalistic materials such as notes, recordings - and crucially - any other relevant material. Now that last clause in particular would cover absolutely everything and would give the state disproportionate power (in our view). The BBC successfully challenged the breadth of this production order and won in court, though we couldn't challenge the order itself.
>
> I'm telling you about this because it is vital to retain some avenue for legal challenge in cases like these. In the case I've just highlighted, under the Terrorism Act, there was no public interest defence. We had to rely on the judgment of the court - which in this case was useful. However, if a public interest defence is included in legislation, this makes a legal challenge a more realistic avenue for us.
>
> There is a tension between the state and investigative journalism - and we need to be able to seek protection from the courts. In my view, if the Official Secrets Acts are repealed with no public interest defence, it would have a chilling effect on investigative journalism and a detrimental effect on a key freedom enjoyed by citizens of the UK.

In conclusion, we hope that the Law Commission will seriously consider and reflect upon the range of issues and examples we have raised. We believe the consultation proposals show a lack of media expertise and we want to increase the Law Commission's understanding of the detrimental impact the current proposals would have if implemented.

Editorial matters relating to national security, official secrets and the public interest are decisions best left to journalists.

Making it easier to prosecute journalists; increasing the likelihood of conviction; and increasing sentences are all measures that will exacerbate the chilling effect that official secrecy legislation has on public interest journalism.

Journalists should not be criminalised for upholding long-standing ethical principles and it is not the responsibility of law enforcement, intelligence, and/or security officials to define the role of a journalist or journalism.

The Law Commission should abandon the proposals to remove the requirement to prove damage and prevent the media from reporting information that is already in the public domain.

If the authorities continue to pursue legal reforms then they should prevent the use of journalists as intelligence agents or cover, and propose a public interest defence that would underpin and strengthen our democracy.