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FAO Professor David Ormerod QC
The Law Commission,
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12th May 2017

Dear Prof. Ormerod QC,

Response to the Law Commission's consultation: 'Protection of Official Data'

The Open Government Network (OGN) is a coalition of over 400 active citizens and civil society organisations who are committed to making government work better for people.[1] In line with the principles of open government, the OGN holds that there are three important principles that should underpin the workings of government:

- **Transparency:** the public can understand the workings of their government;
- **Participation:** the public can influence the workings of their government; and
- **Accountability:** The public can hold their government to account for its actions.

We recognise that some information held by government is sensitive, and protections against disclosure of this information are needed. However, access to information is a vital part of a functioning democracy. Members of the OGN have some serious concerns about the content of the consultation paper *'Protection of Official Data'* published by the Law Commission (LC). These are laid out below:

1. **These are the wrong reforms at the wrong time:**

The case for reform is far from clear. The consultation has concluded that the Official Secrets Acts (OSAs) language is archaic and developments in digital technology have meant mass disclosure of information is a threat to national security [See paragraphs 2.164-2.168, and Provisional Conclusion 5, for example]. We believe there are flaws in this reasoning. The courts have handled the wording of the OSA without an issue so far, and there is little evidence that the existing language is having an impact on the application of the law.

[1] Open Government Network website: www.opengovernment.org.uk

If the issue at hand is the increased risk of disclosure of data in a digital age, there is a case for the focus being on safeguarding data, as opposed to increasing the punishment for disclosure [see Provisional Conclusion 13]. While some who make disclosures do have the necessary security clearance to access the information released, in many cases[2] the discloser had greater access than they should have done. As such, this may prove a need for greater internal safeguards to protect sensitive data, instead of harsher, more draconian, penalties for disclosure. This could be an issue that sits with the Information Commissioner's Office, instead of being covered by the Official Secrets Acts.

2. **The proposals will inhibit public scrutiny:**

A vital part of government accountability is the freedom of both the press and citizens, to highlight information that is in the public interest. The reforms, by imposing harsher penalties, threaten to have a chilling effect on whistle-blowers and journalists, thereby reducing scrutiny of the Executive. This could have a detrimental effect on the way in which our democracy functions.

3. **Any reforms need to include a public interest defence:**

The Law Commission have ruled out a public interest defence on the basis that it would cause legal uncertainty due to the difficulty in defining the public interest test for judges, juries and more importantly individuals who come into contact with sensitive government information [see Provisional Conclusions 23-28]. However, there is precedent in English Law for the testing of a public interest. The Crown Prosecution Service (CPS) already decides if a prosecution is in the public interest, so individuals are already subject to the same legal uncertainty that this consultation is wary of.[3] Furthermore, our courts and laws already grapple with the public interest and are well placed to apply this defence. For example, the courts already interpret the public interest when deliberating on cases involving the Law of Confidence, Data Protection or the Public Interest Disclosure Act. The Government has passed previous legislation which allows individuals to judge what is (and is not) in the public interest.

In addition, the Tshwane Principles, which set out best practice for the classification of information and the circumstances needed for public interest disclosures of this information, suggest that a public interest defence is a necessary part of any legislative protections.[4]

4. **Removing the need to prove damage in prosecutions for disclosure:**

The Law Commission have argued that there is no need for the prosecution to prove damage in cases of disclosure of classified information even where the issue at hand is not one of deliberate espionage [See Consultation Question 6]. This moves the legislation toward strict liability[5]. We contend that this

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[2] Such as Snowden and Manning for example

[3] CPS Code for Crown Prosecutors: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

[4] The Tshwane Principles: https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles - see principle 43

[5] Law Commission Provisional Conclusion 10 states "that proof of the defendant's mental fault should be an explicit element of the offence contained in OSA 89." This builds on *Keogh* which ruled that the prosecution need prove beyond reasonable doubt that the defendant knew or had reasonable cause to believe the information fell within a category encompassed by the Act and they had reasonable cause to believe its disclosure would be damaging. Given the Law Commission propose removing the damage requirement it seems the mental fault element will solely consist of whether the defendant knew, or had cause to believe, the information fell within a category encompassed by the Act. Proving such mental fault should be trivial in most

is not justified by the Law Commission's claim that proving damage can cause further harm [see paragraph 3.139]. There are already mechanisms in place to mitigate this risk [see paragraph 3.142]. Removing the requirement to prove damage risks removing any mechanism by which disclosures made in the wider public, and democratic, interest can be defended in court.

5. **The case for extending protected information to economic matters has not been made:**

The Law Commission have argued that economic information should be added to the list of sensitive information protected by the OSA where it *"relates to national security"* [see paragraph 3.213]. The Consultation paper the new Investigatory Powers Act (2016), which extends the scope of investigatory powers to include economic issues. However, it is not clear that this justifies this extension to be mirrored in the OSA. This issue has been previously assessed, and rejected; the Franks Committee considered whether information regarding fixed interest rates, a matter which was an accepted part of foreign relations at the time, should be included under the OSA. However, this rational fell away once interest rates were reformed and there was no longer a need to protect this information.

In conclusion, the reforms to the Official Secrets Act proposed by the consultation *'Protection of Official Data'* must work to balance the requirements of a genuinely open government – that is, accountability, transparency and participation – against the need for protection of sensitive information. In our view, this need has not been met. The concerning lack of a public interest defence, coupled with the removal of a need to prove damage alongside harsher custodial sentences, risks deterring disclosures which are in the public interest, and preventing the defence of any such disclosures. In a functioning, open democracy, the public have a right to information held by public bodies. The proposed reforms risk disproportionately restricting this right; they are the wrong reforms, at the wrong time. The UK Government has committed to becoming the most transparent and open in the world. Adoption of these proposals would seriously undermine the UK's international standing on open government.

Yours sincerely,

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Tim Davies, Practical Participation
Paul Bradshaw, Birmingham City University
Alexandra Runswick, Unlock Democracy
Paul Holden, Corruption Watch UK
Cathy James, Public Concern at Work
Duncan Hames, Transparency International UK
Michelle Brook, The Democratic Society

cases. It is hard to envisage a scenario where a whistleblower could argue they were unaware the information fell within a protected category meaning the offences are in effect strict liability.