Sent by email enquiries@lawcommission.gsi.gov.uk

Dear Professor David Ormerod

Global Witness is writing to outline some of its major concerns at the recommendations and approach made by the Law Commission (LC) in its Protection of Official Data Consultation report.

While we welcome the fact that the LC has extended the time for responses to its proposals, we note that these proposals were drawn up without meaningful input from civil society groups or human rights organisations.

Global Witness is a UK based not for profit campaigning organisation that campaigns on corruption, natural resources and conflict. Through journalistic investigations (sometimes undercover) and long term research we publish reports to drive strategic advocacy by targeting decision-makers, campaigning to change laws, demanding accountability from political leaders and justice for perpetrators of crime and human rights violations. Over twenty years of campaigning has convinced us that that the only way to protect peoples' rights to land, livelihoods and a fair share of their national wealth is to demand total transparency in the resources sector, sustainable and equitable resources management, and stopping the international financial system from propping up resource-related corruption. We have seen at first hand the importance the role that whistle-blowers from around the world play in exposing corruption and holding to account the institutions that fail to prevent, or in some instances are complicit in, corrupt practices. We are deeply concerned at many of the proposals in the Consultation Report which we believe will be detrimental to protecting the public interest in the long term.

Key concerns:

- The case for the proposed reforms is far from clear. The Law Commission (LC) claims that the Official Secrets Act (OSA) language is archaic and yet it has used the opportunity to go much further than updating the language of legislation and has instead proposed changes that widen the scope for prosecuting campaigning journalists and those engaged in exposing wrongdoing. If these proposals are adopted, whistle-blowers will be deterred from revealing misconduct in government or official institutions.

- There is a need to reform the existing legislation to protect disclosures that have an overriding public interest. We accept that there is a need for secrecy laws to prevent leaks that are damaging to national security, but the proposals weaken even further the poor protection for those who disclose state information in the public interest.

- The proposals will inhibit public scrutiny of the state and its institutions. They are ill-defined and create legal uncertainty and threaten to have a chilling effect on whistle-blowers and journalists thereby reducing scrutiny of official institutions and the Executive. The proposals are wide-ranging and we are highlighting only some of these issues in this short response and not addressing every question raised in the consultation document.

- The LC argues that developments in digital technology mean that mass disclosure of information is a serious threat to national security. Yet the Commission fails to produce evidence to support this claim nor has it seriously considered the other side of the coin: the examples of leaks of official data that lead to the exposure of wrongdoing, such as the unlawful mass surveillance of citizens, or the scandal of the MPs' expenses that led to the successful prosecutions of some MPs. If these proposals had been in place, such disclosures may never have happened, and yet they resulted in the conviction of MPs engaged in fraudulent claims and the overhaul of legislation about surveillance (not only in the UK but across Europe too)[1]. Instead, campaigners, journalists and whistle-blowers would face trial for breaches of the proposed new legislation.

- There are flaws in the LC's reasoning: 1) the courts have handled the wording of the OSA without an issue so far; 2) other legislation such as the Computer Misuse Act 1990 and the various Terrorism statutes have created offences that meet many of the LC's concerns; and 3) the focus should be on setting up systems to keep data secure, rather than increasing the punishment for disclosure and creating a chilling effect. In recent cases[2] allegedly sensitive information was available to an extremely wide range of people, and it could be argued that the discloser had greater access than they should have done. So this is a matter of tighter government safeguarding of information rather than higher penalties for disclosure. Indeed this has been the response of the National Security Agency in US, after it realised the security failings that led to the Snowden leaks[3].

- Any reform needs to include a public interest defence. This is particularly so, when there is no longer a requirement to prove damage as the LC proposes (there is no public interest test in the current legislation but it has been considered a relevant factor in deciding whether the disclosure of information is 'damaging').

- The LC 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 coming into contact with sensitive government information. However, the question of public interest arises in many areas of the law. The LC has overlooked the fact that our courts and laws already grapple with the question of what is in the public interest and are well placed to apply a public interest test. For example, the CPS takes into account the public interest before proceeding with a prosecution.

- It is incorrect to assume that 'public interest' is difficult to determine because it relates to the motive of the person accused, (although that might be relevant). It is capable of being an objective test as in defences to official secrets offences in Germany, Netherlands and Canada.[4]

- Parliament has not shied away from allowing for judgment of what is and what is not in the

[1] http://www.bbc.co.uk/news/world-us-canada-23123964
[2] Such as Snowden and Manning for example
[3] http://uk.reuters.com/article/us-usa-security-snowden-intelligence-idUKBRE96H18F20130719
[4] Tom Hewitson "For your eyes only: reform of the Official Secrets Act 1989" http://www.barcouncil.org.uk/media/241809/_47__tom_hewitson.pdf

public interest in other areas of the law. In addition this is a recommendation in the Tshwane Principles which set out the gold standard for the classification of information and the circumstances needed for public interest disclosures of this information[5].

- Removing the need to prove damage in prosecutions for disclosure. The need to prove damage exists for many of the offences in the current OSA 1989.The LC have argued that there should be no need for the prosecution to prove damage in cases of disclosure of sensitive information even where the issue at hand is not one of deliberate espionage. It also lowers the test to 'capable of damage'. When this is combined with the decision not to implement a public interest defence the effect is even more draconian as there will be no consideration of the public interest at all in a trial, whether as a potential defence or as a factor in determining whether a disclosure was in fact 'damaging'. In effect, the proposed changes would mean that we are moving towards strict liability[6]. The LC claims that proving damage can cause further harm. However, there are already mechanisms to avoid this.

- One of the most dangerous proposals is to extend prosecution to sensitive information that could affect the 'economic wellbeing of the UK as it relates to national security'. This opens up the threat of prosecution to a whistle-blower who reveals sensitive economic statistics. It could be used by Government to suppress revelations that are merely embarrassing or inconvenient.

- Rejection of the Canadian Model. The LC has rejected the Canadian Model[7] because it has a public interest defence which they have also rejected; they prefer creating a system where concerns can be taken to the Intelligence Services Commissioner. LC also state the Canadian model would bring no additional benefits, ignoring the fact that it allows wrongdoing to be brought to public attention if all other attempts at resolution have failed. We would ask the LC to reconsider a model of this type, although further consultation would be required - there are risks that this process could be used to thwart the public receiving information about wrongdoing by the state.

- The defence of prior publication or that the information is already in the public domain is ill-defined, it is only relevant if the information is 'lawfully' in the public domain. This threatens to lead to satellite litigation about the lawfulness of related publication. It could lead to absurd situations, reflecting the *Spycatcher* litigation – Peter Wright's book was judged

[5] https://fas.org/sgp/library/tshwane.pdf

[6] LC 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 LC 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 – not whether it was damaging. It is hard to envisage a scenario where a whistle-blower could argue they were unaware the information fell within a protected category meaning the offences become, in effect, strict liability offences.

[7] Note the Canadian model is under scrutiny at present and is being criticised on the basis that it hasn't been used (amongst other reasons).

lawful and published in Australia, and after years of costly Government litigation, eventually the House of Lords ruled that 'the ice cube had melted' and the information was no longer confidential and not damaging to national security.

- The proposed increase in prison terms to 14 years is excessive and will have a seriously chilling effect, particularly given that the proposals widen the definitions of criminal disclosures and increase the scope for prosecution of those involved in journalistic investigations. There is no evidence that the lower prison term has led to more breaches, and there have been several convictions under the current legislation[8].

- Journalists, campaigning investigators and editors should not face prosecution for receiving or handling secret data that might fall within the broad category of 'sensitive information'. The handlers, recipients and journalists involved with the sensitive information will now be captured by the LC reforms[9]. This creates a situation where investigators cannot even receive information and consider whether it should be published or not, without risking prosecution. This is a serious threat to the freedom of the press, and all those that publish in the public interest, and freedom of speech and should be resisted if we are to maintain this vital element of our democratic system.

- Extraterritorial ambit: The LC propose increasing the territorial ambit for the offences in OSAs 1911-89 so that they can be committed outside the UK irrespective of whether the individual is a British Officer or subject, so long as there is a 'sufficient link' with the UK. Increasing the scope of those affected by secrecy laws will stifle the willingness of people with information of public interest from coming forward; either because such individuals will face prosecution or may have the perception they might.

- Widening the scope of s1 OSA 1911 as proposed threatens the work of GW and others who expose global corruption. The combined effect of removing the requirement that information must be calculated to be useful to, and passed on to, an 'enemy' or 'enemy state' and also taking out the specific details of the prohibited information and replacing it with 'information is dangerous'. The proposal is that this offence is committed simply by 'gathering' such information. In addition, the LC proposed replacing 'national security' with 'safety or interests of the state'. It is easy to imagine situations where those gathering information about corrupt business dealings in, say, Saudi Arabia or Nigeria could risk prosecution if this is seen to be against the interests of the UK.

- The LC also proposes a review despite the fact that there has been an earlier review to introduce a custodial penalty for a s55 offence, which was rejected. These matters have been the subject of parliamentary scrutiny and public consultation and there is no need to revisit them.

- Broadening the scope of offences under OSA laws increases the risk of wrongful prosecutions. We have already seen inappropriate threats of prosecution under official secrets laws such as that threatened against Guardian journalist Amelia Hill, concerning her

[8] http://www.dailymail.co.uk/news/article-1308718/MI6-worker-Daniel-Houghton-jailed-trying-sell-secrets.html; http://news.bbc.co.uk/1/hi/uk/2400389.stm

[9] For example, journalists of editors simply receiving documents from whistle-blowers in order to assess the risks of publishing the material, could be imprisoned.

journalism about phone hacking[10]. Too often, threats of prosecution under the Official Secrets Act have been used to suppress embarrassing information such as the bugging of Sadiq Khan's phone when he was an MP (before his election as Mayor of London)[11]. If the legislation is broadened as proposed, it creates a serious threat to any form of investigation into wrongdoing on the part of Government or official institutions.

In summary, the proposals go much further than the suggested 'modernising' of official secrets and other legislation. Overall, the proposals create much broader definitions of these criminal offences and, if adopted would increase the scope for prosecuting those involved in journalistic investigations or those who wish to expose wrongdoing in the public interest. Increasing the scope for prosecution will result in the shutting down of legitimate investigations into global corruption, and undermine the free flow of information that is so essential to democracy.

Should you have any questions please do not hesitate to contact me at cgooch@globalwitness.org

Yours sincerely,

Charmian Gooch, Co-Founder Director.

[10] https://www.theguardian.com/media/2011/sep/20/metropolitan-police-drop-action-guardian
[11] https://www.theguardian.com/politics/2008/feb/06/uk.humanrights