CHAPTER 8
LIST OF CONSULTATION QUESTIONS AND PROVISIONAL CONCLUSIONS

CHAPTER 2: THE OFFICIAL SECRETS ACTS 1911, 1920 AND 1939

Provisional conclusion 1

8.1 We provisionally conclude that the inclusion of the term "enemy" has the potential to inhibit the ability to prosecute those who commit espionage. Do consultees agree?

Provisional conclusion 2

8.2 Any redrafted offence ought to have the following features:

(1) Like the overwhelming majority of criminal offences, there should continue to be no restriction on who can commit the offence;

(2) The offence should be capable of being committed by someone who not only communicates information, but also by someone who obtains or gathers it. It should also continue to apply to those who approach, inspect, pass over or enter any prohibited place within the meaning of the Act.

(3) The offence should use the generic term "information" instead of the more specific terms currently relied upon in the Act.

8.3 Do consultees agree?

Consultation question 1

8.4 Should the term "safety or interests of the state", first used in the 1911 Act, remain in any new statute or be replaced with the term "national security"?

Consultation question 2

8.5 Do consultees have a view on whether an individual should only commit an offence if he or she knew or had reasonable grounds to believe that his or her conduct might prejudice the safety or interests of the state / national security?

Consultation question 3

8.6 Is the list of foreign entities contained in the Espionage Statutes Modernization Bill a helpful starting point in the domestic context? Do consultees have views on how it could be amended?

Provisional conclusion 3

8.7 We have provisionally concluded that an offence should only be committed if the defendant knew or had reasonable grounds to believe his or her conduct was capable of benefiting a foreign power. Do consultees agree?

Provisional conclusion 4

8.8 The list of prohibited places no longer accurately reflects the types of site that are in need of protection. Do consultees agree?

Consultation question 4

8.9 We consider that a modified version of the approach taken in the Serious Organised Crime and Police Act 2005 is a suitable alternative to the current regime. The Secretary of State would be able to designate a site as a "protected site" if it were in the interests of national security to do so. Do consultees agree?

Provisional conclusion 5

8.10 There are provisions contained in the Official Secrets Act 1911-1939 that are archaic and in need of reform. Do consultees agree?

Provisional conclusion 6

8.11 We consider that the references in the Official Secrets Acts 1911 and 1920 to sketches, plans, models, notes and secret official pass words and code words are anachronistic and in need of replacement with a sufficiently general term. Do consultees agree?

Provisional conclusion 7

8.12 The territorial ambit of the offences ought to be expanded so that the offences can be committed irrespective of whether the individual who is engaging in the prohibited conduct is a British Officer or subject, so long as there is a "sufficient link" with the United Kingdom. Do consultees agree?

Consultation question 5

8.13 Bearing in mind the difficulties inherent in proving the commission of espionage, do consultees have a view on whether the provisions contained in the Official Secrets Acts 1911 and 1920 intended to ease the prosecution's burden of proof are so difficult to reconcile with principle that they ought to be removed or do consultees take the view that they remain necessary?

Provisional conclusion 8

8.14 We provisionally conclude that the Official Secrets Acts 1911-1939 ought to be repealed and replaced with a single Espionage Act. Do consultees agree?

CHAPTER 3: THE OFFICIAL SECRETS ACT 1989

Provisional conclusion 9

8.15 We provisionally conclude that, as a matter of principle, it is undesirable for those who have disclosed information contrary to the Official Secrets Act 1989 to be able to avoid criminal liability due to the fact that proving the damage caused by the disclosure would risk causing further damage. Do consultees agree?

Provisional conclusion 10

8.16 We provisionally conclude that proof of the defendant's mental fault should be an explicit element of the offence contained in the Official Secrets Act 1989. Do consultees agree?

Consultation question 6

8.17 We welcome consultees' views on the suitability of shifting to non-result based offences to replace those offences in the Official Secrets Act 1989 that require proof or likelihood of damage.

Provisional conclusion 11

8.18 With respect to members of the security and intelligence agencies and notified persons, the offences should continue to be offences of strict liability. Do consultees agree?

Provisional conclusion 12

8.19 The process for making individuals subject to the Official Secrets Act 1989 is in need of reform to improve efficiency. Do consultees agree?

Consultation question 7

8.20 If consultees agree with provisional conclusion 12, do consultees have a view on whether these options would improve the efficiency of the process for making individuals subject to the Official Secrets Act 1989?

(1) Member of the security and intelligence services – As we have discussed, it is not entirely clear what is intended to be meant by the term "member". One option is to amend the term to clarify that employees, seconded and attached staff, in addition to those working under a contract of service, fall within the scope of the offence in section 1(1).

(2) Notified person – We have provisionally concluded that notification does serve a useful function and ought to be retained. We do believe, however, that there are two ways the process could be improved. First, new guidance could be issued clarifying when an individual ought to be subject to notification. Secondly, the length of time a notification is in force could be lengthened. It is possible, however, to envisage more fundamental reform that would further reduce the administrative burden. One option is to specify the types of post that ought to be subject to notification. Rather than focusing upon the individual, the focus would be on the post. A second option would be to replace the notification provisions and expand the scope of section 1(1) to anyone who has, or has had access to security and intelligence information by virtue of their office or employment or contract of services.

(3) Definition of Crown servant – We provisionally conclude that the process for expanding the definition of Crown servant ought to be streamlined and that it should be possible to make an officeholder a Crown servant for the purposes of the Official Secrets Act 1989 by way of primary legislation, in addition to the process set out in section 12 of the Act.

Provisional conclusion 13

8.21 We provisionally conclude that the maximum sentences currently available for the offences contained in the Official Secrets Act 1989 are not capable of reflecting the potential harm and culpability that may arise in a serious case. Do consultees agree?

Provisional conclusion 14

8.22 A disclosure made to a professional legal advisor who is a barrister, solicitor or legal executive with a current practising certificate for the purposes of receiving legal advice in respect of an offence contrary to the Official Secrets Act 1989 should be an exempt disclosure subject to compliance with any vetting and security requirements as might be specified. Do consultees agree?

Provisional conclusion 15

8.23 We provisionally conclude that a defence of prior publication should be available only if the defendant proves that the information in question was in fact already lawfully in the public domain and widely disseminated to the public. Do consultees agree?

Consultation question 8

8.24 We would welcome consultees' views on whether the categories of information encompassed by the Official Secrets Act 1989 ought to be more narrowly drawn and, if so, how.

Consultation question 9

8.25 Should sensitive information relating to the economy so far as it relates to national security be brought within the scope of the legislation or is such a formulation too narrow?

Provisional Conclusion 16

8.26 The territorial ambit of the offences contained in the Official Secrets Act 1989 should be reformed to enhance the protection afforded to sensitive information by approaching the offence in similar terms to section 11(2) of the European Communities Act 1972 so that the offence would apply irrespective of whether the unauthorised disclosure takes place within the United Kingdom and irrespective of whether the Crown servant, government contractor or notified person who disclosed the information was a British citizen. Do consultees agree?

Provisional conclusion 17

8.27 The Official Secrets Act 1989 ought to be repealed and replaced with new legislation. Do consultees agree?

CHAPTER 4: WIDER UNAUTHORISED DISCLOSURE OFFENCES

Consultation question 10

8.28 Do consultees agree that a full review of personal information disclosure offence is needed?

Consultation question 11

8.29 Do consultees have a view on whether the offence in section 55 of the Data Protection Act 1998 ought to be reviewed to assess the extent to which it provides adequate protection for personal information?

Consultation question 12

8.30 Do consultees have a view on whether national security disclosure offences should form part of a future full review of miscellaneous unauthorised disclosure offences?

CHAPTER 5: PROCEDURAL MATTERS RELATING TO INVESTIGATION AND TRIAL

Provisional conclusion 18

8.31 We provisionally conclude that improvements could be made to the Protocol. Do consultees agree?

Consultation question 13

8.32 Do consultees have a view on whether defining the term “serious offence” and ensuring earlier legal involvement would make the Protocol more effective?

Consultation question 14

8.33 Do consultees have views on how the Protocol could be improved?

Provisional conclusion 19

8.34 The power conferred on the court by section 8(4) of the Official Secrets Act 1920 ought to be made subject to a necessity test whereby members of the public can only be excluded if necessary to ensure national safety (the term used in the 1920 Act) is not prejudiced. Do consultees agree?

Provisional conclusion 20

8.35 The guidance on authorised jury checks ought to be amended to state that if an authorised jury check has been undertaken, then this must be brought to the attention of the defence representatives. Do consultees agree?

Provisional conclusion 21

8.36 A separate review ought to be undertaken to evaluate the extent to which the current mechanisms that are relied upon strike the correct balance between the right to a fair trial and the need to safeguard sensitive material in criminal proceedings. Do consultees agree?

CHAPTER 6: FREEDOM OF EXPRESSION

Provisional conclusion 22

8.37 Compliance with Article 10 of the European Convention on Human Rights does not mandate a statutory public interest defence. Do consultees agree?

CHAPTER 7: PUBLIC INTEREST DEFENCE

Provisional conclusion 23

8.38 The problems associated with the introduction of a statutory public interest defence outweigh the benefits. Do consultees agree?

Provisional conclusion 24

8.39 The legal safeguards that currently exist are sufficient to protect journalistic activity without the need for a statutory public interest defence. Do consultees agree?

Consultation question 15

8.40 We welcome views from consultees on the effectiveness of the Civil Service Commission as a mechanism for receiving unauthorised disclosures.

Provisional conclusion 25

8.41 A member of the security and intelligence agencies ought to be able to bring a concern that relates to their employment to the attention of the Investigatory Powers Commissioner, who would be able to investigate the matter and report their findings to the Prime Minister. Do consultees agree?

Provisional conclusion 26

8.42 The Canadian model brings no additional benefits beyond those that would follow from there being a statutory commissioner who could receive and investigate complaints from those working in the security and intelligence agencies. Do consultees agree?

Provisional conclusion 27

8.43 It should be enshrined in legislation that current Crown servants and current members of the security and intelligence agencies are able to seek authority to make a disclosure. Do consultees agree?

Provisional conclusion 28

8.44 There should be a non-exhaustive list of the factors to be considered when deciding whether to grant lawful authority to make a disclosure. Do consultees agree?