Official Secrets Act 1989: Disclosure of Official Information

Summary

This year, on 11 May, marks thirty years since the Official Secrets Act 1989 received royal assent. It came into force on 1 March 1990 and, among other provisions, replaced section 2 of the Official Secrets Act 1911 that had made it an offence to disclose any official information without lawful authority.[1] The 1989 Act replaced the 'catch-all' section 2 and created offences associated with the unauthorised disclosure of information in the following categories:

- security and intelligence;
- defence;
- international relations;
- crime and special investigation powers;
- information resulting from authorised disclosures or entrusted in confidence; and
- information entrusted in confidence to or by other states or international organisations.[2]

In creating offences under these categories, the Act distinguishes between current and former employees of the security and intelligence services, and crown servants (eg ministers, civil servants, members of the police and armed forces) or government contractors.[3] For crown servants and government contractors, the Act stipulates that they can only be found guilty of an offence if the unauthorised disclosure is deemed "damaging".[4] Provisions relating to members of the security and intelligence services, on the other hand, stipulate that any unauthorised disclosure relating to security and intelligence is an offence.[5] The maximum penalty for individuals guilty of an offence under the Act is two years' imprisonment or a fine, or both. In 2015, the Law Commission was asked by the Cabinet Office to review the effectiveness of the laws that protect government information from unauthorised disclosure. Its provisional proposals, published in 2017, have been met with concern, principally on the grounds of 'public interest defence' protections for 'whistleblowers'.

Background

There had been successive efforts to review section 2 of the Official Secrets Act 1911, starting in 1971, when Lord Franks led a departmental committee "to review the operation of section 2 of the Official Secrets Act 1911 and to make recommendations".[6] The committee produced a report in 1972 that described section 2 as a "legislative mess" and concluded that the law "should be changed so that criminal sanctions are retained only to protect what is of real importance".[7] It recommended that section 2 needed to be replaced by a more narrowly drawn provision.[8] While the Franks committee's proposals were not enacted, over the following two decades, both the Labour and Conservative governments took steps to advance proposals for legislative reform of section 2.[9] In July 1978, the Labour Government published a white paper and, the following year, the new Conservative Government introduced the Protection of Official Information Bill in the House of Lords, based closely on Labour's white paper.[10] This bill was criticised and, although it received a second reading, such criticisms resulted in the Government withdrawing it.[11] There were also several private member's bills

introduced that attempted to repeal section 2 of the 1911 Act prior to the passage of the Official Secrets Bill. One such bill, introduced by Richard Shepherd (the then Conservative MP for Aldridge-Brownhills) in 1987, was debated in the House of Commons in January 1988 and defeated at second reading by 271 to 234, despite support from the Labour opposition.[12]

Fresh Government proposals to reform section 2 were laid out in a white paper published in June 1988, and on 30 November that year, the Government's Official Secrets Bill was introduced in the House of Commons.[13] In both Houses, amendments were put forward for a public interest defence to be added to the bill.[14] During committee stage in the House of Commons on 2 February 1989, for example, the insertion of the following clause was suggested:

> It shall be a defence for a person charged with an offence under this Act to prove that disclosure or retention of the information or article was in the public interest in that he had reasonable cause to believe that it indicated the existence of crime, fraud, abuse of authority, neglect in the performance of official duty or other misconduct.[15]

All amendments put forward for a public interest defence to be added to the bill were defeated.

Law Commission Review of the Official Secrets Acts

In 2015, the Cabinet Office requested that the Law Commission review the effectiveness of the laws that protect government information from unauthorised disclosure. On 2 February 2017, the commission published a consultation paper that suggested ways to improve the law around the protection of official information.[16] On the Official Secrets Act 1989, the Law Commission outlined that the Act caused several problems, with some being attributable to the "disparate nature of disclosure offences and the lack of rationality and coherence between them".[17] Other issues, the Law Commission argued, were "attributable to the manner in which the Official Secrets Act 1989 was drafted and the fact that it was drafted before the digital era".[18] The consultation went on to outline a range of provisional conclusions, including:

- That offences are remodelled so that they do not focus on the consequences of unauthorised disclosure, but upon whether the defendant knew or had reasonable cause to believe the disclosure was capable of causing damage.
- That the maximum sentences for the most serious offences contained in the Act, currently two years' imprisonment, do not reflect the harm and culpability that could arise in serious cases of disclosure.
- That the Act is reformed so that offences can be committed irrespective of whether the individual who disclosed the information was a British citizen.
- That, rather than piecemeal reform, the Official Secrets Act 1989 should be repealed and replaced with new legislation.[19]

The Law Commission also examined the arguments for introducing a statutory public interest defence and concluded that such steps would not be the "best solution".[20] It argued that such a defence would allow someone to disclose information with potentially damaging consequences and that it was not for the individual making the unauthorised disclosure to make decisions about national security and the public interest.[21] The commission provisionally concluded that the public interest is better served by providing a scheme that permits individuals to bring concerns about their work to the independent Investigatory Powers Commissioner, who would have statutory abilities to conduct an investigation and report.[22]

Responses from the consultation are being analysed and the commission has stated that it will report back on its final recommendations in 2019.

Reaction to the Law Commission's Proposals

There has been limited parliamentary discussion of the Law Commission's proposals aside from an early day motion that was tabled by Helen Goodman (Labour MP for Bishop Auckland) on 1 March 2017.[23] The motion, signed by 30 MPs, expressed concerns with the Law Commission's recommendations and said:

> [this House] notes the ability of whistleblowers to make disclosures in the public interest is vital for democracy, press freedom and the well-being of the public; is shocked by the proposal to extend the maximum criminal sentence for unlawful disclosures from two years to 14 years, and to make unlawful the mere acquisition and possession of confidential material.[24]

Baroness Chakrabarti, the Shadow Attorney General, in an article written for the *Guardian*, criticised the Law Commission's proposals. She noted that the provisional recommendations could lead to "draconian jail sentences" that place leaking and whistleblowing in the same category as spying on foreign powers.[25] She went on to write:

> More alarmingly still, the commission says there should be no statutory public interest defence for anyone accused of the offences. Threatened by such grave consequences and offered little-to-no legal protection, it is surely more than we can ask of any journalist or genuine whistleblower to come forward in order to protect the public interest.[26]

The National Union of Journalists (NUJ) also expressed concern and urged the commission to reconsider its recommendations and offer additional safeguards for journalists and journalism.[27] In particular, the NUJ highlighted that it did not want journalists and media workers to face the threat of prosecution for "upholding our long-standing ethical principles of reporting in the public interest".[28]

Further Information

- House of Commons Library, *The Official Secrets Acts and Official Secrecy*, 2 May 2017

[1] Official Secrets Act 1989; and Official Secrets Act 1911.
[2] Official Secrets Act 1989.
[3] ibid; and House of Commons Library, *The Official Secrets Acts and Official Secrecy*, 2 May 2017, p 9.
[4] ibid.
[5] Official Secrets Act 1989.
[6] Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, September 1972, Cm 5104, p 1.
[7] ibid, p 37.
[8] Law Commission, *Protection of Official Data: A Consultation Paper*, 2 February 2017, p 51.
[9] Rosamund Thomas, *Espionage and Secrecy: The Official Secret Acts 1911–1989 of the United Kingdom*, 1991, p 210.
[10] ibid; and Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, January 1978, Cm 7285.
[11] Law Commission, *Protection of Official Data: A Consultation Paper*, 2 February 2017, p 53; and HL *Hansard*, 5 November 1979, cols 608–80.
[12] HC *Hansard*, 15 January 1988, col 637.
[13] Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, June 1988, Cm 408.
[14] Rosamund Thomas, *Espionage and Secrecy: The Official Secret Acts 1911–1989 of the United Kingdom*, 1991, p 211.
[15] HC *Hansard*, 2 February 1989, col 440.
[16] Law Commission, 'Protection of Official Data', accessed 14 March 2019.
[17] Law Commission, *Protection of Official Data: Summary*, February 2017, p 8.
[18] ibid.
[19] Law Commission, *Protection of Official Data: A Consultation Paper Overview*, February 2017.
[20] ibid.
[21] ibid.
[22] ibid.
[23] House of Commons Early Day Motion, 'Protection of Whistleblowers Marking Public Interest Disclosures', 1 March 2017, EDM 1002.
[24] ibid.
[25] Shami Chakrabarti, 'Whistleblowers Keep Us Safe. We Can't Allow Them to be Silenced', *Guardian*, 13 February 2017.
[26] ibid.
[27] National Union of Journalists, *NUJ Response to the Law Commission Consultation on Reforming Official Secrets Legislation and the Protection of Official Data*, June 2017, p 1.
[28] ibid, p 2. For journalistic comment on the Law Commission's recommendations, see: *Times* (£), 'Official Nonsense', 13 February 2017; and *Guardian*, 'The Guardian view on Official Secrets: New Proposals Threaten Democracy', 12 February 2017.
