

Written evidence on behalf of Janus Friis

Introduction

1. Janus Friis is a philanthropist. He backs the call for a statutory public interest defence in the Official Secrets Acts (OSAs). He believes this will afford necessary legal protection to those who act in good conscience, without excusing those who seek to damage the country.
2. Mr Friis has put together and funded a team of legal and political experts from Matrix Chambers, Mishcon de Reya, and Powerscourt Group to oversee this work.
3. We welcome this opportunity to explain why the inclusion of such a defence in a forthcoming espionage bill will enhance human rights. Its exclusion would repeat the lack of fundamental protections in the existing OSAs.
4. We note the government is currently reflecting upon the Law Commission's *Protection of Official Data* report, which was laid before Parliament on 1 September 2020. Reform of the OSAs was included in the Queen's Speech after the 2019 general election. The Law Commission was asked by ministers to undertake a review.
5. The report's 33 recommendations included the introduction of a defence: "[W]e recommend that a statutory public interest defence should be created for civilians, including journalists, that they can rely upon in court. We consider that the defence should succeed only if the court finds that the disclosure was in fact in the public interest."
6. Our aim is to make sure government accepts this recommendation, includes a clearly defined defence in forthcoming legislation, and does not allow this to be weakened or excluded from the bill through political pressure and/or amendments.
7. The following is a summary of a detailed briefing paper outlining our position, including comparative analysis of 'Five Eyes' approaches. We will send this paper, *Introducing a Public Interest Disclosure Defence*, to members of the Joint Committee on Human Rights separately and, upon request, to the clerks.

Existing procedures - and their failings

8. The Law Commission report highlighted the need for a comprehensive overhaul of existing Official Secrets legislation, which dates back to the First World War and the Cold War. Society's expectations have moved on considerably since then, with freedom of information now widely accepted as a basic tenet of accountable democracy. Existing legislation has attracted considerable criticism; the Intelligence & Security Committee described it as "not fit for purpose".
9. If, as is anticipated, a new Espionage Act strengthens the protection of national security, the refined legislative framework must contain provisions that also strengthen accountability. A public interest defence is essential to maintaining the balance of rights on which democracy depends.
10. At present, disclosure of information protected by OSAs or disclosure by a person subject to OSAs is typically a criminal offence. A public interest defence would remove criminal liability for such a disclosure if it was objectively in the public interest.
11. The Law Commission's analysis found that the status quo under OSAs might already breach the UK's international law obligations, including Article 10 freedom of expression rights under the European Convention on Human Rights.
12. The Law Commission report confirmed a public interest defence would "increase the likelihood" that the UK would be compliant with Article 10 in all situations. It added: "This is

because it provides a backstop in the event that the mechanisms for investigation and redress are rendered ineffective.”

13. Current law does not provide for any public interest defence, even for those who make revelations about the kind of grave mistreatment that emerged in the Baha Mousa Inquiry. By criminalising disclosures in the public interest, it is difficult to see how our current law is consistent with obligations to prevent torture occurring anywhere in the world.

14. There are many examples in which a public interest defence should have been available. The Katharine Gun case is arguably the most famous. But there are others.

15. Clive Ponting, the distinguished civil servant who made disclosures concerning the government’s misstatements about the General Belgrano incident in the Falklands War, was acquitted by a jury that ignored the judge’s instructions. The jurors clearly felt he had acted in the public interest; another jury could have imprisoned him.

16. Occasionally, MPs have used parliamentary privilege as a form of public interest defence, making revelations that would otherwise have resulted in prosecution under the OSAs.

The Law Commission’s public interest defence

17. A public interest defence could require an individual to demonstrate a subjective or objective element - or both. The subjective judgement is whether a person *believed* the disclosure to be in the public interest; the objective assessment is whether the disclosure was *actually* in the public interest.

18. The Law Commission recommended disclosure should only take account of the objective element, rendering motivation irrelevant. We are broadly supportive of the approach adopted.

19. We also believe the Law Commission’s proposal for an independent statutory commissioner is a novel concept worthy of consideration. At present, public servants have no-one independent to whom they can make disclosures of serious wrongdoing.

20. An independent commissioner is not, however, a panacea; as the Law Commission acknowledges, a public interest defence is a vital accompaniment given the importance of the rights at stake. The manner of disclosure would also be taken into account when assessing whether the disclosure was in the public interest.

21. The Crown Prosecution Service (CPS) would then need to assess whether the disclosure satisfies the public interest test before deciding whether to bring a prosecution. If the CPS proceeds, the jury at trial would finally decide whether the disclosure satisfies the public interest defence. Where there are differences of opinion on the strength of a public interest defence, the case for a jury making the final decision could not be stronger.

22. Safeguards would thus be introduced, including statutory factors to be taken into account in assessing the claimed public interest, which can then be rigorously defended (or unpicked) in court. The defence would apply to those (including public servants) who make a disclosure or those (like journalists) who publish it; clearly it would be wrong, for example, to provide a defence only to the publisher but not the leaker if the disclosure was objectively in the public interest.

Our proposed defence

23. The Law Commission has not drafted a public interest defence. In its report, the Commission stated: “*We do not recommend the detail of any public interest defence (such as which factors define the “public interest”), because we regard this as a political matter for Government and, ultimately, Parliament to determine in any legislation.*”

24. We believe, however, that Parliament will need guidance when developing law and want to make sure a public interest is tightly defined in forthcoming legislation. This would ensure consistency of prosecution and defence.

25. Our proposed defence would apply to all offences arising under the current sections 1-6 of the OSA 1989 or any successor legislation replacing, replicating, or enlarging those offences. This is as follows:

In any proceedings for an offence under s.1-6 Official Secrets Act 1989 [or the corresponding provisions of the Espionage Act 2020] it shall be a defence for the accused to prove (i) that the disclosure in question was in the public interest and (ii) the manner of the disclosure was also in the public interest.

In assessing whether the disclosure was in the public interest the following (non-exhaustive matters) shall be taken into account:

- *the subject matter of the disclosure;*
- *the seriousness of the conduct exposed;*
- *the harm caused by the disclosure.*

In assessing whether the manner of the disclosure was in the public interest the following (non-exhaustive matters) shall be taken into account:

- *whether the disclosure is made in good faith;*
- *whether the extent of the disclosure is no more than reasonably necessary for the purposes of exposing the relevant conduct;*
- *whether the individual reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;*
- *whether the disclosure is made for purposes of personal gain;*
- *the availability of any other effective authorised procedure for making the disclosure and whether those procedures were exercised;*
- *whether, in all the circumstances of the case, it is reasonable for the disclosure to have been made in the relevant manner.*

Conclusion

26. Even if a new Espionage Act is not introduced, there is a strong rationale for amending the existing OSAs to include a public interest defence.

27. As the Law Commission has underscored, the absence of a defence in the current statutory framework raises significant questions about whether the balance is currently struck in a way that complies with the UK's legal obligations, in particular to protect freedom of expression and strengthen accountability in government.

28. Furthermore, the absence of any public interest defence puts the UK in the minority among Five Eyes: Australia, Canada, and New Zealand have all recognised the need for, and introduced, some form of public interest defence into their domestic law.

29. We would welcome the opportunity for further discussions with the committee.

16/12/2020