MLA'S RESPONSE TO THE HOME OFFICE'S CONSULTATION: LEGISLATION TO COUNTER STATE THREATS (HOSTILE STATE ACTIVITY)

This response is submitted on behalf of the Media Lawyers Association ("the MLA")which is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of the MLA's members is set out in Annex 1.

A. Introduction

The MLA has focused this response to the consultation on the central issues that it considers specifically impact the rights and freedoms of the media and where, at this stage, it considers its response could greatly assist. The MLA would be happy to liaise with the Home Office in further meetings to expand on its concerns or to assist more generally on the impact on journalists and journalism.

The MLA acknowledges the need to consider the existing laws in response to the modern threat and modern legislative standards. However the MLA is concerned that a number of proposals in the Consultation Paper appear to be attempting to further limit the right of freedom of expression and adversely impact journalisms. In particular they would have a chilling effect, deterring sources and journalists.

The MLA provided a response to the Law Commission in 2017 in relation to the reform of the Official Secrets Act and was one of a number of organisations to raise concerns in particular relation to any proposed amendments to the 'damage' requirement.

B. Response to the consultation

3. Do you think there would be merit in considering a 'significant link' formula to bring into scope espionage against assets in the UK from overseas? How do you think this could work in practice?

Expanding the ambit to a "significant link' formula could widen the scope for prosecution and appears ambiguous.

5. Do you agree with the Law Commission's proposals with regards to introducing a subjective fault element, as part of offences in sections 1 to 4 of the existing Act, instead of a damage requirement?

The change proposed in the Consultation document (based on whether "the defendant knew, believed, or was reckless as to whether the disclosure would, was likely to, risked causing, or was capable of causing damage") potentially constitutes a significant expansion of the scope for criminal liability under the OSA. It would permit conviction if the defendant "was reckless as to whether the disclosure was capable of causing damage", even if no damage was in fact caused.

The "damage" criterion is an important element by which Article 10 ECHR are protected under the OSA 1989. See for example the discussion of Lord Bingham in R v Shayler [2003] 1 AC 247 at [33] as to the approach that a court would take in considering the issue of whether a disclosure falling within the scope of the OSA 1989 should be made:

"The court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead

to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually, a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 considerations."

The proposal to remove damage as a criterion places under threat of criminal sanction disclosure which does no more than "cause embarrassment or arouse criticism", even though such disclosure may be in the public interest (there being no public interest defence under the various Official Secrets Acts). That cannot be consistent with rights under Article 10, which requires any exception to the exercise of freedom of expression to be "narrowly interpreted" and its necessity to be "convincingly established": Sunday Times v United Kingdom (No 2) (1992) 14 EHRR 229 at [50(a)].

6. Do you agree that the requirement to prove damage should remain for offences under sections 5 and 6 of the existing Act? If so, why?

The points under 5 above apply even more strongly here, given the media's duty to impart information and ideas on matters of public interest. Moreover by Article 10 the public has a right to receive such information and ideas: Sunday Times at [50(b)].

It is also important, for the purposes of Article 10, to have regard to the chilling effect which any broadened offences would have on journalistic activities in the public interest. The existence of such wider offences is likely of itself to inhibit the investigation and preparation of journalistic stories in the public interest. The significance of the chilling effect of state action on the exercise of Article 10 rights is a factor repeatedly referred to in the leading authorities under the ECHR: see, for instance, Observer and the Guardian v United Kingdom (1992) 14 EHRR 153 at [60]. The Grand Chamber of the European Court of Human Rights ("**ECtHR**") has also stressed that "the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom": Satakunnan Markkinaporssi Oy v Finland (2018) 66 EHRR 8 at [191].

It would therefore be no answer to say that prosecutions of any broader offence may not be brought. That is a question of prosecutorial discretion which cannot be predicted in advance with any certainty. The fact of such offences on the statute-book is, for understandable reasons, itself liable to impede proper journalistic activity in the public interest.

There is also a chilling effect because of a deterrent to public interest whistleblowers who play a part in investigative journalism. Threat to sources undermines Article 10 rights and is contrary to the public interest in freedom of expression. The current sanctions are a sufficient deterrent.

7. Do you agree that maximum sentences for some offences under the Official Secrets Act 1989 should be increased?

In its judgment in Cumpănă and Mazăre v. Romania (2005) 41 EHRR 14 at [115], the Grand Chamber of the ECtHR noted that "the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence".

Moreover, as set out above, any proposed criminal sanction must have regard to the possibility of a chilling effect on public interest journalistic investigations. Increasing the maximum sentences would be liable to impede such investigations. That cannot be justified in circumstances where no evidence has been advanced which identifies the need for increased maximum sentences.

8. Do you think there should be a distinction in sentencing between primary disclosure offences - committed by members of the security and intelligence agencies, Crown servants, government contractors and those notified - and onward disclosure offences - which can be committed by members of the public?

The jurisprudence under Article 10 clearly envisages a difference between the position of civil servants (and the like) and journalists. In Guja v Moldova (2011) 53 EHRR 16, for example, the Strasbourg Court referred to the "duty of loyalty, reserve and discretion" of employees, which was particularly strong "in the case of civil servants": [70]. By contrast, journalists are not subject to any such duties. They are bound by a distinct professional obligation to impart information and ideas on matters of public interest: Sunday Times at [50(b)].

Given the number and range of public interest issues which journalists investigate, there is a particular risk that the existence of higher sentences would inhibit their work generally, in ways which may go far beyond the core purposes of any legislation aimed at countering state threats. Any new legislation would, in respect of any sentences enacted, need to recognise these heightened risks faced by journalists, as well as the unique value and importance of the public interest journalism within a democratic society.

18. Do you have a view on whether a Public Interest Defence should be a necessary part of future legislation?

It is imperative that a public interest defence should form part of future legislation. Without such a defence the present Official Secrets Acts fail to accord adequate protection to journalistic investigations and do not constitute a proportionate interference with the right to freedom of expression which would meet the requirements of Article 10. We agree with the conclusions of the Law Commission that the holding in R v Shayler [2003] 1 AC 247 that the absence of a public interest defence did not render the OSA 1989 incompatible with Article 10 would not be decided in the same way today, given the principles subsequently developed in the case-law. In any event, that case did not concern the position of journalists, whose activities and role in a democratic society give rise to special considerations and special protection under Article 10.

Such defences already exist in other related areas in UK law: see for instance the public interest defences provided for by section 170 of the Data Protection Act 2018 (unlawfully obtaining personal data) and section 41(2)(k) of the Digital Economy Act 2017 (unauthorised disclosure of personal information), as well as the general protection to whistle-blower disclosures under the Public Interest Disclosure Act 1998. Similar defences are also enshrined in legislation relating to protected information in other jurisdictions: see for example section 15 of the Security of Information Act 2001 (Canada) and Division 122.5(6) of the Criminal Code (Australia).

There is no good reason why new legislation introduced by the UK could not incorporate a public interest defence as separately exists in domestic and foreign law.

22) Do you have any concerns about the continuation of this power [under section 9 of the Official Secrets Act 1911] ? If so, what kind of mitigating actions could be put in place to address these concerns?

In Sanoma Uitgevers BV v The Netherlands (2010) 30 BHRC 318 at [88]-[92] the Grand Chamber of the ECtHR set out the following principles in respect of the obtaining by a state authority of journalistic source material:

- the protection of journalistic sources must be attended with legal procedural safeguards commensurate with the importance of the article 10 principle at stake;
- first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body of any requirement that a journalist hand over material concerning a confidential source;
- the judge or other independent and impartial body must be in a position to carry out the exercise of weighing the potential risks and respective interests prior to disclosure. The decision to be taken should be governed by clear criteria;

- the exercise of an independent review that takes place only after the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality and cannot therefore constitute a legal procedural safeguard commensurate with the rights protected by article 10;
- however, in urgent cases, where it is impracticable for the authorities to provide elaborate reasons, an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether the public interest invoked by the investigating authorities outweighs the general public interest in source protection.

In R (Miranda) v Secretary of State for the Home Department [2016] 1 W.L.R. 1505 the Court of Appeal applied the principles in Sanoma in holding that the regime for seizure of journalistic material under Schedule 7 to the Terrorism Act 2000 was incompatible with Article 10 ECHR.

There are very real concerns that the regime under section 9 of the Official Secrets Act 1911 does not comply with these requirements, in particular the necessity of carrying out the exercise of weighing the potential risks and respective interests prior to disclosure. By contrast section 9 of and Schedule 1 to PACE 1984 provides that the Court must take specific account of factors going to the special status of journalistic source material. It would be wholly undesirable that a statutory regime first enacted over a hundred years ago, in a very different legal and technological context, should be the basis for state seizure of journalistic material in preference to a far more recent Act whose terms are based on a modern approach attuned to the value of public interest journalism in a democratic society.

Media Lawyers Association

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