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Public Concern at Works Submission to the Joint Committee Pre-legislative Scrutiny of the The Draft Communcations Bill 2012

INTRODUCTION

1. We are providing this response to the Joint Committee on the Draft Communications Data Bill as part of the call for written evidence. Our response focusses on issues where the draft bill may affect whistleblowing and the legal protection for whistleblowers, set out in the Public Interest Disclosure Act (PIDA). We begin by setting out a brief introduction to Public Concern at Work to provide context for our submission. We suggest 'function creep' within the proposed powers could mean the bill is used by investigating authorities to track communications between a whistleblower and third parties, such as regulators, MPs or journalists resulting in a chilling effect on the likelihood that regulatory or wider disclosures which are already protected by law will be raised. As we explain below, we believe there is a real risk that these powers set out in the bill will be abused, by those undertaking leak inquiries under the offence of misconduct in public office. We also raise concerns over the effect this may have on the legal protection for whistleblowers under PIDA. We recommend that investigations concerning misconduct in public office be excluded from the communication data that investigating authorities can obtain for the purposes of detecting crime or preventing disorder, or that there is an additional arms length oversight mechanism when such investigations are being undertaken or contemplated.¹ We also suggest that where the communication data of a whistleblower is accessed but no prosecution is pursued that the individual is informed that this access request was made and obtained.
2. We have limited this submission to our particular area of expertise – namely the protection of whistleblowers - but we would also endorse the concerns raised by other civil society organisations particularly Big Brother Watch, Open Rights Group, Liberty and Justice about the very broad powers contained within the draft bill. We agree that the nature and breadth of communications data being collected, stored and mined means that the distinction between communications data and communications content will necessarily become blurred so that there are real risks to individuals' privacy rights as a result of these provisions.²
3. As stated in evidence by Angela Patrick of Justice: "It is particularly important for parliamentarians to be aware of the need for effective controls and safeguards to ensure that surveillance is only used in those circumstances where it is strictly necessary and justifiable. Individuals in most cases, if surveillance is effective, will never know that it has happened and so will never have access to an effective challenge or a remedy."³ We would wholly endorse this statement and urge the committee to consider the question of appropriate checks and balances very carefully.

¹ Part 2, Subsection (6) (b) of the Draft Communications Bill

² <http://www.parliament.uk/documents/joint-committees/communications-data/uc170712ev4HC479iv.pdf>

³ Q222 Uncorrected Transcript of Oral Evidence, Joint Committee, Draft Communications Bill 17 July 2012

making **whistleblowing** work

4. We would also urge the committee to consider the implications for communications involving lawyer client privilege, the protection of journalists' sources and the confidentiality of communications between constituents and their MPs, as part of this consultation and suggest that either such communications should be excluded from the reach of this bill, or additional arms length safeguards are introduced where such communications are going to be monitored.

Background to Public Concern at Work

5. Public Concern at Work (PCaW) is an independent charity and legal advice centre. Launched in 1993, we have helped lead developments on whistleblowing as a good governance and risk management tool in the UK and abroad. We provide a confidential advice line for individuals with whistleblowing dilemmas; professional support to organisations, policy advice to Governments and international organisations and public education programme, that promote whistleblowing and good workplace cultures.
6. By way of brief background, PCaW was set up in response to a series of scandals and tragedies in the late 1980s and early 1990s which included the sinking of the Herald of Free Enterprise in 1987, the Piper Alpha oil rig explosion and the collapse of the BCCI amidst widespread fraud in 1990. The various official Inquiries after these disasters revealed that all too often staff had known of the danger but were too scared to speak up or, if they did, that they did so in the wrong way or to the wrong person, only to be ignored and/or dismissed.
7. Our work to address whistleblowing effectively as a matter of accountability and good governance means that we have unrivalled practical experience in the field - both in operating an advice line service for individuals and in providing professional support for organisations on whistleblowing.

The Public Interest Disclosure Act

8. When enacted, PIDA was praised "for so skilfully achieving the essential but delicate balance...between the public interest and the interests of employers".⁴ The Act most readily protects concerns raised with an employer, but also gives protection to individuals who go outside their employer such as to a regulator, or MP/ journalist in certain circumstances when the concern has been covered up or not addressed. PIDA is ultimately about accountability and it follows that for this to work it must be possible for those responsible to be held to account for their conduct. This provides an incentive for organisations to deal openly and well with any potential wrongdoing when first raised by a worker. As stated below, we believe that one of the potential unintended consequences of this bill will be that legitimate whistleblowers working in public authorities will be discouraged from raising concerns openly or confidentially and will use anonymous leaking as an alternative if they believe that their communications are being or could be tracked.

Response to the Consultation

9. We note that the Committee has discussed 'function creep' with the bill appearing to cover more areas of investigation than originally indicated when proposed by the Home Secretary.⁵ We are concerned the new powers could be used to pursue leakers and whistleblowers via the offence of misconduct in public office.
10. Whistleblowing is now seen in the UK as a positive and necessary function of our democracy.

⁴ Hansard HL, 5 June 1998 Col. 614

⁵ Q183 Uncorrected Transcript of Oral Evidence, Joint Committee, Draft Communications Bill 12 July 2012

Disclosures under PIDA to any level of internal management within an organisation can be protected as can disclosures to a regulator, MP and to the media. There is often going to be a tension between wider disclosures (ie outside the regulatory framework to the media) and leaking confidential information about the political movements and policy discussions within Government. Leaks have long been described as damaging for effective government as they can erode the trust between a Minister and their civil servants.⁶ The line between whether someone is leaking information or whistleblowing in the public interest is not always a clear one for someone at the heart of this dilemma, and controversy has followed where the government has tried to pursue people they believe to have leaked information with criminal sanctions. Our concern is that powers proposed in this Bill may push whistleblowers into using anonymous online leaking platforms or other anonymous means of communication rather than the open and confidential options encouraged by best practice and protected under PIDA.

11. Leaking information can be a criminal offence if it breaches the official secrets act which outlaws disclosures of information related to national security, national defence or relations with a foreign power.⁷ How to deal with a situation where information leaked falls below this threshold has proven controversial, in recent years the police have unsuccessfully pursued individuals using the offence of misconduct in public office.
12. The Crown Prosecution Service (CPS) describes misconduct in public office as follows-
 - a public officer acting as such;
 - wilfully neglects to perform his duty and/or wilfully misconducts himself;
 - to such a degree as to amount to an abuse of the public's trust in the office holder;
 - without reasonable excuse or justification.⁸
13. There are two recent cases that demonstrate this tension and provide an insight into how 'function creep' towards the offence of misconduct in public office could occur. The first is the aborted investigation into Damian Green MP and Christopher Galley in 2008 and the second is the collapsed prosecution of journalist Sally Murrer in 2007. Both cases revolved around the investigation of misconduct in public office as the information disclosed did not fall within the scope of the official secrets act. Questions were asked in both cases as to whether it was in the public interest to pursue the cases. We have summarised the circumstances in each of these cases below and provided a more thorough case study of both cases at Annex A attached to this submission.
14. In Galley and Green's case, there had been press coverage about a number of problems within the Home Office and a leak investigation ensued resulting in a raid of Damian Green MP's Westminster Office and the arrest of a junior home office civil servant (Chris Galley) and Mr Green. In the end the CPS dropped the case against both men on the basis that the case had no reasonable prospect of success.
15. In the Murrer case a journalist and a police sergeant were prosecuted for the same offence over a number of stories that appeared in a local paper which included the arrest of the local football team's star striker. The case was thrown out when the trial judge ruled a taped conversation between Murrer and the sergeant was inadmissible as evidence due to legal protection for journalistic sources under European law. Both cases demonstrate a concern we share with oral evidence put before the committee that under the proposed system a disclosure of the confidential

⁶ P.g. 7 Leaks and Whistleblowing, 10th Report of the 2008-09 Session of The Public Administration Select Committee

⁷ Official Secrets Act 1989

⁸ Misconduct in Public Office- CPS- http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/#a04

information only requires a senior officer to approve its use.⁹ The proposed powers would make it possible for an MP or a journalist who has received information from a whistleblower to have their email and electronic correspondence tracked without having any knowledge that this is happening. The potential for abuse can be seen in the Home Affairs Select Committee report into the Green and Galley investigation where the committee criticised the Home Office and the Cabinet Office for exaggerating the actual and potential damage the leaks would do to national security when they approached the Police asking them to investigate.

16. A cautionary tale can also be seen in the US where two cases have been brought against the US government centering on a secret presidential order signed by President Bush in October 2001, which was then exposed in 2005 via whistleblowers and media reports.¹⁰ The order allowed the US law enforcement agencies to secretly store email and telephone data via the telecommunications companies under the guise of national security in the wake of 9/11. Security services were allowed access to this data without prior approval from an outside court, this situation continues today. When this was uncovered and questions were asked as to whether the presidential orders were constitutional, a class action suit was brought against the telecommunication companies by the Electronic Frontier Foundation and the US Government in response, passed laws exonerating the relevant companies from liability. This in turn led to a further class action suit this time against the US Government and the politicians responsible for creating the current system, namely former President George W. Bush, then Vice President Dick Cheney and the administration's Attorney General. Though the case is still to be decided, the decision by the US Government to create a system of electronic surveillance without any warrant or judicial oversight has caused considerable controversy and a lengthy legal battle. The Committee should look at this situation as an example of the unintended consequences of such an initiative and ask the government to ensure that proper safeguards are in place so that similar legal actions in the UK are not necessary.
17. We recommend that more thought is given to what criminal offences are included under provisions that allow communications data to be obtained in the pursuit of detecting crime or preventing disorder. We suggest that the bill either excludes misconduct in public office from Part 2 section 6(b), or that additional arms length oversight is required outside of the investigating authority where such a charge is being contemplated. We also recommend that a warrant or judicial oversight system is brought in to monitor the use of the new powers to ensure requests are necessary and used in an appropriate and proportionate way.¹¹
18. We are also concerned about the use of the proposed powers as 'fishing expedition' against an individual who is known to have raised concerns with a body external to the organisation within which they work, under the pretence that the individual might commit a criminal offence but in reality it is an attempt to intimidate the individual.
19. We draw the Committee's attention to the treatment of HMRC whistleblower Osita Mba who raised concerns about the inappropriate tax deal that had been struck between the tax authorities and large corporations.¹² Mr Mba raised his concerns with the Public Accounts Committee, the Treasury Select Committee and with the National Audit Office, each of these avenues of disclosure

⁹ Q117 Joint Committee on the Draft Communications Bill, Uncorrected Transcript of Written Evidence, The Draft Communications Bill 11 July 2012

¹⁰ http://www.nytimes.com/2012/08/23/opinion/the-national-security-agencys-domestic-spying-program.html?_r=1&ref=opinion

¹¹ Part 2, Subsection (6) (b) of the Draft Communications Bill

¹² See Annex A for the full case study.

is protected under PIDA. The Guardian reported in June that a complaint had been issued in relation Mr Mba and that his wife's personal details had been passed by HMRC managers to the Department's criminal investigation department.¹³ Mr Mba has not been charged with any criminal offence, in fact his concerns led to critical reports on the governance arrangements at the HMRC and praise from the chair of the Public Accounts Select Committee and its members.

20. Our concern is that without adequate safeguards there is a very real risk that the powers provided by this piece of legislation will be misused by those charged with undertaking a leak investigation which will only serve to intimidate people like Mr Mba, which in turn will mean that it is very much less likely that government whistleblowers (like Mr Mba) will ever come forward. Alternatively the likelihood is that such whistleblowers will anonymously leak the information for fear of communication data tracking. Leading to a weakening of public trust and confidence, making it harder for wrongdoing to be addressed and more difficult to protect an individual or even to thank them.
21. We are also concerned that this has the potential to undermine the legal protection for whistleblowers. PIDA requires the claimant to demonstrate that there is a link between the protected disclosure (the whistleblowing) and the detriment suffered (the victimisation or dismissal suffered) but under the proposed powers there is no way an individual would be aware they were subject to such an investigation. This request could well be a key part of any PIDA case this individual may want to take forward as it could demonstrate a line of causation from the concerns raised to any detriment or victimisation suffered as a result.
22. Our recommendation would be that where a request for communication data is granted in relation to an investigation into a whistleblower, but no prosecution has been brought forward, the requesting authority notifies the target of this request.
23. We trust that this short response is helpful to the committee. We would be pleased to provide any further assistance deemed necessary by the Committee or to expand upon our submission if this would be of help.

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¹³ Audit Office Attacks Tax Deals for Corporations, Rajeev Syal and Shiv Malik, The Guardian, Thursday 14 June 2012

Annex A

Whistleblowing and Leaking Case Studies

Damian Green MP Case Study

From 2007-2008 Home Office ministers became concerned about a number of leaks within the department, some of which had been received by Damian Green, then a Shadow Conservative Minister. The leaks included information about:

- The November 2007 revelation that the Home Secretary knew the Security Industry Authority had granted licences to 5,000 illegal workers, but decided not to publicise it.
- The February 2008 news that an illegal immigrant had been employed as a cleaner in the House of Commons.
- A whips' list of potential Labour rebels in the vote on plans to increase the pre-charge terror detention limit to 42 days.
- A letter from the Home Secretary warning that a recession could lead to a rise in crime.

The Home Office became concerned that continuing leaks could lead to further leaks of *“a series of other material across Government, which did have a national security classification”*.¹⁴ Internal leak inquiries by both the Home Office and the Cabinet Office had been unable to find the culprit or stop the leaks. On 8 September 2008 a decision was made by the Permanent Secretary at the Home Office to write to the Police requesting an investigation. In the Department’s letter to the police the Home Office stated *“we are in no doubt that there has been considerable damage to national security already as a result of some of these leaks and we are concerned that the potential for future damage is significant”*.¹⁵

As part of the investigation a junior Home Office official (Christopher Galley) connected to the private office of the Home Secretary was arrested on 19 November 2008 for passing on information to Damian Green MP. Mr Green was then arrested on 27 November 2008 for *“conspiring to commit misconduct in a public office”* and *“aiding and abetting, counselling or procuring misconduct in a public office”*.¹⁶ Controversially as part of this investigation the House Authorities allowed Police to search Damien Green’s office without a warrant.

On 16 April 2009 the Criminal Prosecution Service (CPS) dropped the case saying there was no realistic prospect of securing a conviction against either Christopher Galley or Damian Green MP. Interestingly the CPS lawyer also added that- *“My conclusion should not be misunderstood. The unauthorised leaking of restricted and/or confidential information is not beyond the reach of the criminal law. The fact that the overall evidence of damage or potential damage in this case is not such that the offence of misconduct in public office is made out should not be taken to mean that*

¹⁴ Pg. 6 House of Commons Home Affairs Committee *Policing Process of Home Office Leaks Inquiry Fourth Report of Session 2008-09*

¹⁵ Pg. 6 House of Commons Home Affairs Committee *Policing Process of Home Office Leaks Inquiry Fourth Report of Session 2008-09*

¹⁶ BBC Article ‘Q&A: Damian Green affair’ http://news.bbc.co.uk/1/hi/uk_politics/7754099.stm

the absence of sufficient damage actual or potential will always lead to a decision not to prosecute."¹⁷

The Home Affairs Select Committee also went on to criticise the Home Office and the Cabinet Office for over-estimating the actual and potential damage to national security when requesting a police investigation.¹⁸

The Milton Keynes Journalist Case

In 2007, Sally Murrer was a part-time journalist working for the *'Milton Keynes Citizen'*. She wrote a story about the star striker of the town's football team being arrested at a private party. She was then accused of aiding and abetting misconduct in public office as it was alleged she broke the story by obtaining Police information illegally from Mark Kearney (a police sergeant). A third man who was a private detective was also charged with similar offences.

Further charges were brought forward around other articles as evidence that Murrer had obtained the disclosures illegally. They included a phone conversation where Kearney reminded Murrer she had written an earlier piece about a suspected murder suspect being convicted for selling cannabis. The final piece of evidence the Police had was a taped phone conversation between the pair about an Islamist being released early from prison even though he had boasted about building a bomb, however this story was never published.

Nick Cohen in his piece for the Guardian sets the scene for the arrest-

"The security services planned the arrest of the journalist with painstaking care. They bugged her contacts and assembled an elite squad to take her down. On 8 May 2007, eight detectives swarmed into her home and seized her address book, mobile, laptops and bank statements. In a simultaneous raid, a second team searched her newspaper office - going through everything from filing cabinets to boxes of Cup-a-Soup by the office kettle.

Once in custody, detectives kept her isolated from her two teenage daughters and autistic son for 24 hours. Then they began the grilling.

'You could go to prison,' they told her.

They let her go, but soon hauled her back in. Before her second interrogation, they left her shivering in a cell. Before her third, a woman officer put on rubber gloves and strip-searched her. After that, 'I just lost my ability to think coherently,' Sally Murrer said. 'My brain went to cotton wool.'"¹⁹

In November 2008 the case collapsed when the trial judge threw the case out after ruling the taped phone conversation was inadmissible due to European laws that protected the rights of journalists and their sources. Even with this ruling the Police issued a statement saying they acted

¹⁷ Decision on prosecution - Mr Christopher Galley and Mr Damian Green MP 16/04/09 Crown Prosecution Service

¹⁸ Pg. 8 House of Commons Home Affairs Committee *Policing Process of Home Office Leaks Inquiry Fourth Report of Session 2008-09*

¹⁹ 'Meet Sally. Her case should scare us all' Nick Cohen The Guardian 21/09/2008

properly going on to say *"the leaking of sensitive information is a serious matter which can jeopardise police investigations, put officers and members of the public at risk and lead to criminal and misconduct charges,"* and *"The public has a right to expect that officers and police staff who have access to sensitive information can be trusted to handle the material appropriately."*²⁰

The HMRC 'Sweet Heart Deals'

On 14 December 2011 the Public Accounts Select Committee (PASC) published a report that heavily criticised the HMRC for creating special deals over outstanding tax bills for large corporations and then seeking to hide these arrangements from scrutiny.²¹ Part of the evidence that the Committee drew on came from a HMRC tax lawyer Osita Mba who also raised his concerns with a second Select Committee and the National Audit Office (who following the PAS report carried out their own critical review).²²

The report specially raised the concern that Mba may be victimised for coming forward with these issues and asked the department not to pursue him. Following the fall-out from the PASC report that Committee's Chair Margaret Hodge was quoted as saying *"Given the department's failures in these cases, the whistleblowers were absolutely right to be concerned"*.²³

Again in January Hodge said *"I think the evidence given by the whistleblower (Mba) has been hugely important in uncovering vital issues and we would want to ensure that he was properly treated and that his rights under the whistleblowing legislation are properly protected."*²⁴

In early part of June this year the Guardian reported that the Information Commissioner's Office (ICO) has launched an inquiry into the way HMRC investigators obtained the personal information of Mba and his wife (Claudia Mba). The ICO received documents that show in October 2011 HMRC managers sent personal information, including Claudia Mba's address and four phones numbers to the Department's Criminal Investigations Unit. The article reports that insiders within HMRC still blame Mba's whistleblowing disclosure for the retirement of the permanent secretary for tax David Harnett.

Claudia Mba is quoted in the article as saying that she believes HMRC were trying to intimidate her husband and that though he was still employed by the Department he had not returned to work since giving evidence to the Select Committee.

Concern over this recent development has also been expressed by members of PASC. Committee member Stephen Barclay MP stated- *"This is a concerning development. We have taken a very close interest in a whistleblower who we regard as having provided information of public interest to parliament. Clearly we will need to see the details but there is a sense of mistakes being compounded with further mistakes."*²⁵

²⁰ 'Thames Valley police leak case against Sally Murrer thrown out' Leigh Holmwood The Guardian 28/11/2008

²¹ House of Commons Committee of Public Accounts, HM Revenue & Customs 2010-11 Accounts: Tax disputes Sixty-first Report of Session 2010-12

²² Audit Office Attacks Tax Deals for Corporations, Rajeev Syal and Shiv Malik, The Guardian, Thursday 14 June 2012

²³ *ibid*

²⁴ Tax Disputes: MPs Defend HMRC Whistleblower, Andrew Goodall, Tax Journal, 05 January 2012

²⁵ Information Commissioner Investigates HMRC over Whistleblowing Inquiry, Rajeev Syal, The Guardian, Thursday 7 June 2012

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