The Campaign for Freedom of Information

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Briefing for Lords 2nd Reading

of the

The National Security Bill

on 6 December 2022

About the Campaign for Freedom of Information

The Campaign for Freedom of Information was set up in 1984 and played a key part in persuading the government of the day to introduce the Freedom of Information Act 2000 and securing improvements to it during its Parliamentary passage. Since the Act came into force in 2005 the Campaign has monitored and sought to improve its operation, provided assistance to requesters and trained both requesters and public authorities.

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Introduction

1. **We are concerned at the National Security Bill's implications for journalists and those working for civil society organisations involved in legitimate activities who receive some funding from foreign governments. Such individuals are at risk of committing offences under the bill for which the maximum sentence is life imprisonment. The identical act by someone not in receipt of foreign government funding would not be an offence at all. Other offences under the bill could be committed regardless of whether the person concerned receives any overseas government funding.**

2. The Explanatory Notes say that the bills' purpose is to:

> *'deter, detect, and disrupt those state actors who seek to harm the UK by covertly targeting the UK's national interests, sensitive information, trade secrets and democratic way of life'*[1]

3. They add that:

> *'Espionage is tackled by new offences in the Bill that are designed to capture modern methods of spying, and provide the ability to impose penalties reflecting the serious harm that can arise'*[2]

4. However, the bill criminalises matters that do not involve espionage, sabotage or other hostile actions by foreign states.

Obtaining or disclosing protected information

5. Under Clause 1(1) of the bill:

> *'A person commits an offence if—*
>
> *(a) the person—*
>
> *(i) obtains, copies, records or retains protected information, or*
>
> *(ii) discloses or provides access to protected information,*
>
> *(b) the person's conduct is for a purpose that they know, or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom, and*
>
> *(c) the foreign power condition is met in relation to the person's conduct (see section 29).'*

[1] Explanatory Notes, paragraph 3
[2] Explanatory Notes paragraph 16(a)

6. The maximum penalty on conviction is life imprisonment or a fine or both (Clause 1(4)).

7. However, each of the terms *'protected information', 'prejudicial to the safety or interests of the United Kingdom'* and *'foreign power condition'* are wider than they appear at first sight. Between them they are capable of applying to activities that should not be offences.

Protected information

8. Clause 1(2) provides that:

> *'In this section "protected information" means any information, document or other article where, for the purpose of protecting the safety or interests of United Kingdom—*
>
> *(a) access to the information, document or other article is restricted in any way, or*
>
> *(b) it is reasonable to expect that access to the information, document or other article would be restricted in any way.' (Clause 1(2))'*

9. The definition is not limited to information bearing a security classification. It applies to *unclassified* information which is '*restricted in any way'* to protect the UK's interests. **This would include unclassified information which it is the government's practice not to disclose. It would also apply to information to which access has been refused under the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIR) since that refusal to disclose would constitute a restriction on disclosure.**

10. The offence may be committed even if the information is not in fact restricted, but should have been. **Using information which has been accidentally disclosed under FOIA/EIR without redaction could be an offence under Clause 1(2)(b) if the person who receives it *should* have realised that the government *should* have redacted it.**

The safety or interests of the state

11. The offence is committed if information is used in a way that the person concerned knows, or should reasonably know, is prejudicial to the UK's '*safety or interests*' (Clause 1(1)(b)). The UK's safety and interests are defined by ministers. According to paragraph 62 of the Explanatory Notes on the bill:

> *'The term safety or interests of the UK is not defined but case-law has interpreted it as meaning, in summary, the objects of state policy determined by the Crown on the advice of Ministers (see the Court's view in Chandler v Director Public Prosecutions (1964) AC 763).'*

12. The question of which issues affect the UK's safety or interests are therefore determined by the government of the day. This issue was central to the decision of the House of Lords in the *Chandler* case referred to above. That involved an appeal against convictions under section 1 of the Official Secrets Act 1911 as a result of the planned six-hour occupation of a US Air Force base in England in 1961 in a protest against nuclear weapons. The House of Lords rejected the idea that it was for a jury to determine whether something was in the interests of the State. Lord Pearce's judgment in that case stated:

> *'the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognised organs of government and authority, the policies of the State as they are, not as they ought, in the opinion of a jury, to be. Anything which prejudices those policies is within the meaning of the Act "prejudicial to the interests of the State."'*

13. **There is no indication of what else might be covered by *'the safety or interests of the state'* or what the limits of those terms might be. As well as the prevention of terrorism and espionage they could extend to policies on energy, national infrastructure, the protection of water, power, food, health services, transport and law and order, organised crime, immigration controls, election security, major strategic planning issues, the raising of revenue, measures to deal with natural or other emergencies, pandemics and other issues. The powers now being taken in the bill may be used in relation to a wide range of state interests over which ministers would have the final word.**

The 'foreign power condition'

14. **The offences under Clause 1 and some other of the bill's provisions will only occur if the '*foreign power condition*' is met. This is defined in Clause 29. It does not refer to the actions of a *hostile* government, it includes any *friendly* government including an ally of the UK.** This is a major extension of the scope of the offences in section 1 of the 1911 Official Secrets Act, which the bill will replace. Section 1 of the 1911 Act refers to the obtaining or communication of information: '*which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy*'.[3]

[3] Official Secrets Act 1911, sections (1)(b) and (c)

15. The term *'enemy'* is replaced in the bill by '*foreign power'*, which in turn is defined as including any *'foreign government'* or agency or part of one. (Clause 30(1)(b) and (c)) The foreign power condition will be met if a person knows (or ought to know) that their conduct is carried out *'for or on behalf'* of a foreign government. This includes conduct carried out with the *financial assistance* of a foreign government (Clause 29(2)(c)).

16. The financial assistance need not be for the purpose of promoting espionage, terrorism, or other hostile activities. If a UK organisation receives financial assistance from a friendly government for work aimed at, for example, countering climate change that work would, under the bill, be done '*for or on behalf of a foreign power'* and the foreign power condition would be satisfied.

Civil society organisations

17. **A civil society organisation engaged in legitimate activities which has some funding for work on environmental, human rights, press freedom, asylum, aid or other issues from a friendly government could commit an offence under the bill. The prosecution would only need to show that it had made use of leaked information which they knew or should have known was restricted to avoid prejudicing the UK's safety or interests and that its use did prejudice the UK's safety or interests.**

18. The decision on what constituted the UK's safety or interests would be the government's and could not be challenged in court. **If the government decided that the UK's energy situation required an immediate expansion of fracking or the building of coal fired or nuclear power plants, the use of leaked information which undermined that policy could be a criminal offence under the bill**, **involving a maximum penalty of life imprisonment**. The prosecution would only have to show that the information prejudiced the attainment of the government's policy in the UK's interests and that the person who used the information received funding from a foreign government. On conviction, that person could face life imprisonment (Clause 1(4)).

19. **The same would be true if an organisation with overseas government funding to address the problems of asylum seekers used leaked information in a way which obstructed the government's asylum policies.** The government could assert that these were necessary in the UK's interests. If the use of the leaked information 'prejudiced' those interests, the person concerned should have anticipated that and was in receipt of foreign government funding that person would face possible life imprisonment.

20. In both examples, an offence would be committed if the use of the leaked information was in connection with the work funded by the foreign government (Clause 29(2)(c)). There would be no need to show that the funder intended the funded organisation to use leaked information in this way.

21. The threat of prosecution and conviction in these circumstances would be oppressive and disproportionate.

22. **Civil society organisations based in, or with a presence in the UK, which receive or have recently received some funding from foreign governments for their international work include: Action Aid, Anti-Slavery International, ARTICLE19, Client Earth, Global Witness, Index on Censorship, Media Defence, Organised Crime and Corruption Reporting Project, Privacy International, Reprieve and Transparency International UK.**[4]

23. **Significantly, a UK civil society organisation which had no foreign government funding would commit no offence under the bill and could not face this penalty, despite committing the identical act.** It would probably commit no offence under the 1989 Official Secrets Act either. The 1989 Act penalises the leaking or use of leaked information in four main areas: the work of the security and intelligence services, defence, international relations and law enforcement. But a disclosure which prejudices the government's energy or asylum policies would not be an offence under the 1989 Act. Even where an offence under the that Act is committed, the maximum penalty that can be imposed is two years imprisonment[5] - not the life imprisonment that the bill provides.

Journalists working for non-UK state broadcasters

24. **A journalist working for another government's state broadcaster - including that of a friendly state - who reports on a leak of protected information which is held to be prejudicial to the UK's interests, would also commit an offence under the bill if they knew or ought to have known that the broadcast would prejudice the UK's safety or interests.** The fact that the journalist was paid for from the funds of a foreign government department or agency and that the broadcasting organisation itself

[4] Amongst the funders of these organisations are the Danish International Development Agency, Department for Foreign Affairs (Canada), Department of Foreign Affairs and Trade (Ireland), Department of Foreign Affairs and Trade (Australia), Federal Foreign Office (Germany), Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (Germany), Irish Aid (Ireland), Italian Agency Development Co-operation, Ministère des Affaires étrangères et du Développement international (France), Ministry of Foreign Affairs (Denmark), Ministry of Foreign Affairs (Finland), Ministry of Foreign Affairs (Netherlands), Ministry of Foreign Affairs and Trade (New Zealand), Norwegian Agency for Development Cooperation, Slovak Agency for International Development Cooperation, Swedish International Development Cooperation Agency, U.S. Agency for International Development, US Department of State Bureau of Democracy, Human Rights, and Labor, US Department of State Office to Monitor and Combat Trafficking in Persons.

[5] Official Secrets Act 1989, section 10(1)(a)

was financed by such funds would satisfy the foreign power condition. They would also face a maximum sentence of life imprisonment.

25. A journalist working for a UK news organisation responsible for an identical report based on the same leak could not commit this offence because the foreign power condition would not apply.

Trade secrets

26. Clause 1 of the bill is not the only provision which could create such disproportionate offences. The same is true of Clause 2 (obtaining or disclosing trade secrets). It could be offence to reveal that a UK company is breaking a trade or arms embargo by a disclosure which might allow a UK or overseas competitor of that company to win some of its business. The offence could be committed by an organisation or individual with overseas government funding (Clause 2(1)(d)) in the course of what would normally be regarded as entirely legitimate activity.

Assisting foreign intelligence services

27. The margin note to Clause 3 *('Assisting a foreign intelligence service')* might suggest that it focuses on espionage, but the offence catches people with no such intention or connection and to people **with no overseas government funding.**

28. A person who reveals that the UK's security and intelligence services have failed to address overseas government interference in the conduct of UK elections could commit this offence, as revealing shortcomings of the UK's intelligence services might be considered likely to assist foreign intelligence services. The maximum penalty on conviction would be 14 years imprisonment (Clause 3(9)).

29. Significantly, this offence could be committed without actually disclosing any protected information. The offence can be triggered by *'conduct of any kind'* (Clause 3(1)(a)). **Producing an analysis based solely on information which has been lawfully published could be an offence if it is *'reasonably possible'* that doing *so 'may materially assist a foreign intelligence service in carrying out UK-related activities'* (Clause 3(2)(a)) and the person ought to have known this (Clause 3(2)(b)). The person's *actual* purpose would be entirely irrelevant.**

A public interest defence

30. The above examples illustrate why a public interest defence to charges under the bill is necessary.

31. The government had initially intended that the National Security Bill should also repeal the 1989 Official Secrets Act (which deals with the unauthorised disclosure of information) and replace it with new provisions making it easier to secure conviction and substantially increasing the penalties on conviction.[6] However, it dropped these proposals, apparently because the Law Commission had recommended that there should be a public interest defence to charges under the 1989 Act[7] – which it appears the government was not prepared to accept.

32. The Law Commission was concerned to ensure that *'confidentiality is not being used within Government as a cloak to mask serious wrongdoing'*.[8] To achieve this, it proposed the establishment of an independent Statutory Commissioner to investigate allegations of wrongdoing or criminality made by civil servants or members of the public where disclosure of such concerns would be an offence under the 1989 Act.

33. Without such an independent means of investigation, it considered that the prohibition on disclosures covered by the 1989 Act would represent a disproportionate restriction on the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. Because the proposed Statutory Commissioner might not be able to investigate certain urgent concerns speedily enough it also proposed that a public interest defence to charges under the 1989 Act should be created. These arguments are equally applicable to the offences in the current bill.

34. **In light of the offences that can be committed under the National Security Bill by persons with no involvement in terrorism or espionage we believe a public interest defence both to charges under the bill and those under the 1989 Act is essential.**

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Campaign for Freedom of Information
5.12.22

[6] Home Office, 'Legislation to Counter State Threats (Hostile State Activity), Government Consultation' May 2021
[7] Law Commission, 'Protection of Official Data Report', HC 716, 1st September 2020
[8] Law Commission, paragraph 10.25