

The Campaign for Freedom of Information

Lower Ground Floor
5-7 Highgate Road
London NW5 1JY
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk



Briefing for House of Lords Report stage

of the

National Security Bill

on 1 March 2023

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.

The Campaign's work is funded by the Andrew Wainwright Reform Trust, the Joseph Rowntree Charitable Trust, and the Joseph Rowntree Reform Trust.

Summary

- 1. The Campaign for Freedom of Information hopes peers will support Amendment 79 to create a public interest defence to charges under the National Security Bill. The amendment has been tabled by Lord Marks of Henley-on-Thames supported by Lord Garnier and Lord Pannick.**
- 2. The unduly broad drafting of the offences in clauses 1-3 of the bill, in particular, will expose civil society organisations and journalists to wholly unjustified risk of prosecution and lengthy prison sentences.**
- 3. The Law Commission's 2020 report on Protection of Official Data¹ recommended that there should be a public interest defence to the 1989 Official Secrets Act (reform of which has been omitted from the bill). However, the bill's new offences are drafted in even wider and less precise terms than those in the 1989 Act, increasing the chances that prosecutions may be brought against people who should not be subject to them and may have no defence to them. We believe a public interest defence is essential.**

Clause 1 - disclosure of protected information

- 4. Under clause 1(1)(a) it would be an offence for a person acting on behalf of a 'foreign power' to obtain, copy, record, retain or disclose protected information for a purpose they know, or ought reasonably to know, is prejudicial to the safety or interests of the UK. The maximum penalty on conviction is life imprisonment.**
- 5. Each of the key terms in this clause is either defined in unacceptably sweeping terms or not defined at all.**

The foreign power condition

- 6. The 'foreign power condition' would be satisfied by a person carrying out an activity which is funded by a friendly government (*clause 31(2)(c)*) as part of work to protect human rights, media freedom, the environment, asylum rights or other issues.**
- 7. Many NGOs operating in the UK have, or have recently had, such foreign government funding including Action Aid, Anti-Slavery International, Article 19, Client Earth, Global Witness, Index on Censorship, Media Defence, the Organised Crime and Corruption Reporting Project, Privacy International, Reprieve and**

¹ HC 716, September 2020

Transparency International UK.² Such bodies could commit offences under the bill although the identical conduct by an NGO without foreign government funding would not be an offence.

8. Journalists working for a friendly government's broadcasting authority are similarly at risk under clause 1. Journalists working for a UK broadcaster could not find themselves in that position.
9. During the Lords committee the minister, Lord Sharpe of Epsom, said:

'for a person to commit the Clause 1 offence, they must obtain or disclose information that is "protected" for a purpose that they know, or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom, and the activity must be conducted for, or on behalf of, or with the intention to benefit, a foreign power. The limits to the type of conduct that is capable of being caught under this offence, in particular the foreign power condition, ensure that there is a state link. Designing the offence in this way clearly focuses the offence on harmful state threats activity.'³

10. But clause 31(2)(c) makes clear that something is carried out 'for or on behalf of a foreign power' if it is 'carried out with financial or other assistance provided by a foreign power for that purpose'. Action taken by an NGO to strengthen individual rights or environmental protection in the course of a project funded by a friendly government would fall squarely within the clause 1 offence, if the clause's remaining tests were met

Protected information

11. 'Protected information' is information which a person knows is, or ought reasonably to expect to be, 'restricted in any way' to protect the UK's safety or interests (clause 1(2)).
12. **The term 'restricted' is not defined. It does not require that the information be classified. Nor does it require that a person should have obtained it unlawfully. Information would presumably be restricted if the government had previously refused to disclose it, for example, under the Freedom of Information Act, in response to a parliamentary question or in other correspondence. The restricted**

² 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.

³ House of Lords debates, 19.12.2022, col. 973

information may not even be inherently sensitive or of any interest to a hostile state. It may, for example, show that there is a fundamental error in a calculation used to justify a key government policy.

The safety or interests of the state

13. A 1962 decision of the House of Lords (*Chandler v DPP* [1964] 1 AC 763) established that it is for the government to determine what is in the interests of the state (see paragraph 62 of the bill's Explanatory Notes). In his judgment in the case Lord Pearce said:

'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."'

14. The government says the bill is intended to protect the UK against hostile activity by foreign states. However, its provisions also apply to those challenging government policy by open and legitimate means. The policies that may be protected in the interests of the state could include those on energy, public health, transport, infrastructure, policing, asylum, tax or other matters.
15. **The open use of information by a campaigning body with overseas government funding which knows or ought reasonably know that what it is doing is prejudicial to such a policy would, incredibly, be an offence punishable by life imprisonment. An environmental group, funded by a foreign government for climate change work could commit an offence by using 'restricted' information to successfully oppose an expansion of coal fired power or fracking to deal with the energy crisis.**
16. A government amendment to clause 1(1)(b) provides that in determining whether someone '*ought reasonably to know*' that their conduct is prejudicial to the safety or interests of the state, regard would be had '*to other matters known to them*'. The Home Office states that that this amendment will '*put beyond doubt that it would need to be proved what an individual knew – and eliminating the possibility an individual acting unwittingly could be captured*'.⁴
17. We doubt that this is the case. In any prosecution, the fact that the accused has been *told* that disclosure would prejudice the interests of the state will be presented as

⁴ Home Office, '[Amendments laid to strengthen National Security Bill](#)', 23 February 2023

evidence that they ought reasonably to *know* this. However, many people will be sceptical of government explanations for non-disclosure. As the Supreme Court put it '*Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection*'.⁵ It is not unusual for government to claim that disclosing particular information under the Freedom of Information Act would be harmful, only for the Information Commissioner or tribunal to later reject that claim.

18. It is far from clear how journalists, NGOs and others are to know which of the government's policies are considered necessary in the interests of the state and which disclosures challenging those policies could constitute an offence. Without the opportunity to argue that their actions were justified in the public interest these provisions will be disproportionate and oppressive.

Clause 2 - trade secrets

19. It would be an offence under clause 2 for a person with foreign government funding to obtain, record or disclose a trade secret without the owner's permission. The maximum penalty on conviction would be 14 years imprisonment (*clause 2(8)*).
20. **It could be offence for an NGO or journalist with foreign government funding to reveal that a UK company is breaking a trade or arms embargo or that its products are made by child labour overseas. Details of a business's customers or manufacturing arrangements would typically be trade secrets within the definition in clause 2(2).**
21. Such disclosures are not currently a criminal offence but could be a breach of confidence under civil law. However, the law of confidentiality incorporates a public interest defence, in part to prevent wrongdoing being concealed. The Law Commission recommended, as long ago as 1981, that a new statutory action for breach of confidence [incorporating a public interest defence](#) should be introduced. Lord Marks's Amendment 79 would provide such a defence.

Clause 3 - Assisting foreign intelligence services

22. A person who does anything that may materially assist a foreign intelligence service knowing, or having reasonable grounds to know, that this is likely would commit an offence under clause 3 and face up to 14 years imprisonment (*clause 3(9)*). (This account assumes that government amendments to clause 3 will be accepted.) The

⁵ Lord Mance in *Kennedy v Charity Commission*, [2014] UKSC 20, at paragraph 1.

offence would apply to people who do not *intend* to provide such assistance as well as to those who have no overseas government funding.

23. **A person who reveals that the UK's security and intelligence services have failed to address another government's interference in UK elections could commit this offence, as revealing shortcomings of the UK's intelligence services could be held to materially assist foreign intelligence services. The person's actual purpose in revealing the information would be irrelevant. A journalist who, for example, obtained information from a *foreign* intelligence service, confirming that it had interfered in UK elections, could also commit an offence under clause 3.**

The Law Commission and a public interest defence

24. In its 2020 report, the Law Commission was concerned to ensure that '*confidentiality is not being used within Government as a cloak to mask serious wrongdoing*'.⁸ As part of its proposals it recommended that a public interest defence to charges under the 1989 Act should be established. These arguments are equally applicable to the offences in the National Security Bill.
25. **In light of the offences that can be committed by persons with no involvement in terrorism, espionage or the deliberate undermining of the economy, we believe a public interest defence of the kind contained in Amendment 79 is essential.**