House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: National Security Bill

Fifth Report of Session 2022–23

Report, together with formal minutes relating to the report

Ordered by the House of Commons
to be printed 12 October 2022

Ordered by the House of Lords
to be printed 12 October 2022

HC 297
HL Paper 73
Published on 19 October 2022
by authority of the House of Commons and the House of Lords

Joint Committee on Human Rights

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Summary

The National Security Bill is a welcome attempt to modernise espionage offences, replacing those within the Official Secrets Acts 1911, 1920 and 1939. Whilst these provisions are overall a positive step forward and are broadly in line with recommendations of the Law Commission's recent review, there are risks within some of the provisions that offences are drawn too widely and could criminalise behaviour that does not constitute a threat to national security. Some would interfere unnecessarily and disproportionately with rights to freedom of expression and association, and the right to protest and may have a disproportionate impact on certain communities, particularly if new police powers are not exercised with restraint. The provisions on prevention and investigation measures, which were not included in the Law Commission's Review, also engage the right to a fair trial, the right to liberty and security and the right to a private and family life in a way which gives us some cause for concern. The Government is seeking to introduce restrictions on the grant of legal aid and on damages being awarded to those who have been involved in terrorism, but in doing so risks impeding access to basic rights and legal protections. We therefore suggest the Bill is amended in a number of respects and hope the Government will engage with our proposals during its passage through Parliament.

In relation to espionage offences, we find that:

- The move from offences relying on a link with enemy states to all foreign powers creates some risks that the legislation might disproportionately affect some communities and we suggest that consideration be given to excluding some states from this definition, as well as taking steps to reduce the risks of discrimination in the application of these provisions;

- The term "safety or interests of the United Kingdom" needs to be defined as the ambiguity and potentially subjective approach to the term may lead to uncertainty in law and variation in policing which may in turn risk having unequal impacts on different communities. There is also the risk of a chilling effect caused by the uncertainty that will impact on the right to freedom of expression, freedom of association, and the right to protest; and

- More thought must be given to how the legislation will affect whistle-blowers, protesters and journalists who are engaged in activities which are part of a healthy functioning democratic system.

The legislation also provides that courts may exclude the public from criminal trials for offences under this Bill when necessary in the interests of national security. Whilst this seems to be an improvement on the existing law, the Government should consider whether the new necessity test should require exclusion of the public to be "necessary for the administration of justice" as well as having regard to the risk to national security.

Of more concern are the clauses in the bill which would grant immunity from prosecution for certain offences of encouraging or assisting the commission of an offence overseas. Such immunity would be granted if the conduct was necessary for the proper exercise of any function of the intelligence agencies or the armed forces. Any provisions that grant

criminal immunity go to the heart of respect for the rule of law and the fundamentals of justice and fairness. We find that given there are existing immunities under the Serious Crime Act 2007 where a person has acted reasonably, further protections for conduct that is not reasonable are not necessary and we recommend the provisions be removed from this Bill.

Also of concern are the proposals in Part 2 of the Bill to introduce 'State Threats Prevention and Investigation Measures' (ST-PIMs or just PIMs). These are a set of restrictive measures that the Secretary of State could place on individuals that they reasonably believe are, or have been, involved in foreign power threat activity. Failing to comply with the measures imposed would be a criminal offence. The Bill would offer some protection for human rights, consistent with that currently provided in respect of Terror Prevention and Investigation Measures (TPIMs). We suggest, nevertheless, that there should be stricter limits on the time that a person can be subject to a curfew under a PIMS measure. Legal aid should always be made available when needed by those subject to such measures who wish to challenge them. Whilst we welcome the creation of a "reviewer" post, similar to the Independent Reviewer of Terrorism Legislation, we believe that its scope should be widened to match that role more closely allowing review of matters within the full ambit of the National Security Bill (and indeed other core national security legislation) not just the use of PIMS.

The provisions of Part 3 of the National Security Bill would make changes restricting both the award of damages (i.e. financial remedies in legal proceedings) in respect of those who have been involved in terrorist activity and the grant of legal aid to those with a terrorism-related conviction. The Explanatory Notes explain that this part of the Bill "prevents the exploitation of the UK's civil legal aid and civil damage systems by convicted terrorists. This will prevent public funds from being given to those who could use it to support terror". These proposed changes raise significant human rights concerns. In aiming to prevent damages being paid to those who have previously been convicted of terrorism related offences the legislation risks sweeping up low-level and historic offenders, denying them justice and ignoring the potential for rehabilitation. The Bill would also limit the ability of those who have been convicted of terrorism offences to gain access to legal aid which may be required to allow equal access to the law–for example in housing cases or cases of domestic violence. This risks both undermining the important principle of equality before the law and being counter-productive in terms of the rehabilitation and reintegration of former offenders. We propose the clauses restricting access to legal aid are removed from the Bill.

We acknowledge the recent tabling of clauses by the Government to introduce a foreign influence registration scheme ("FIRS") and note that particular consideration will need to be given to the extent to which any registration scheme will impact on democratic rights including freedom of association and free speech. We regret that the clauses were not included in the Bill as introduced so that they could have been subjected to more effective scrutiny by us and others alongside the other provisions in this Bill.

The Bill does not address issues relating to the unauthorised disclosure of information (leaks) despite this being a significant part of the Law Commission's recent review. The Law Commission set out clearly the ways in which the current law engages and potentially breaches the UK's human rights commitments under the European Convention on

Human Rights and suggests ways in which the law might be changed to overcome these issues. Whilst we appreciate this is a complex and controversial area of law in many ways, we hope this does not result in inaction and encourage the Government to consult on legislative provisions as soon as possible. Reform of the Official Secrets Act 1989 is needed to ensure adequate respect for free speech.

In several instances, the compatibility of national security and official secrets legislation relies on the ability of the court to read legislation as compatible with Convention rights so far as it is possible to do so, under section 3 of the Human Rights Act 1998. However, if the Bill of Rights is passed in the form in which it was introduced, the HRA will be repealed, and with it this requirement. This means that any incompatibilities will therefore become starker and more problematic. We call on the Government to explain how it will address any such incompatibilities in national security legislation.

1 Introduction

The National Security Bill

1. The National Security Bill was introduced into the House of Commons on 11 May 2022 and received Second Reading on 6 June. The Bill is divided into four parts:

a) Part 1 contains new offences in relation to espionage, sabotage and persons acting for foreign powers;

b) Part 2 contains new restrictive measures in relation to persons suspected of working on behalf of a foreign power,

c) Part 3 contains provisions restricting damages and legal aid in relation to persons who have been convicted of terrorism-related offences or otherwise involved in terrorism-related activity; and

d) Part 4 contains general provisions.[1]

2. The Bill would repeal and replace the Official Secrets Acts 1911, 1920 and 1939 ("OSA 1911–1939"), which relate to espionage offences. It does not amend the Official Secrets Act 1989 ("OSA 1989"), which relates to unauthorised disclosures (i.e. leaks). The Government intends to introduce amendments to the Bill during its passage through Parliament to provide for a Foreign Influence Registration Scheme.[2]

3. We issued a call for evidence on the Bill, to which we received five pieces of written evidence, and our attention was additionally drawn to other published briefings.[3] We are grateful to those who took the time to assist us in this work.

The current legislative framework and the Law Commission review

4. The majority of the existing legislation relating to espionage and unauthorised disclosure offences is governed by the OSA 1911–1939 (covering espionage offences) and the OSA 1989 (covering unauthorised disclosure of official information). The espionage offences contained in OSA 1911–1939 are very wide but rarely prosecuted, including espionage by trespass/proximity to a prohibited place;[4] and espionage by information gathering/communication.[5] The existing legislative framework is widely understood to be out of date, unworkable and ill-suited as a tool to combat modern espionage risks and practices—in particular in light of new technologies and the nature of modern espionage.[6]

5. The Law Commission was tasked, in July 2015, with conducting an independent review of the legal framework governing the unauthorised disclosure of government information. It published its Report on 1 September 2020.[7]

1 Clause numbering in this Report is based on the clauses of the Bill as introduced.
2 See statements made during the Second Reading debate. HC Deb, 6 June 2022, col 574 [Commons Chamber]
3 Human Rights (Joint Committee), "Call for Evidence"
4 Official Secrets Act 1911, Section 1(1)(a)
5 Official Secrets Act 1911, Section 1(1)(b) and 1(1)(c)
6 See, for example, statements made during the Second Reading debate, as well as the Law Commission's Protection of Official Data Report, HC 716, Law Com No. 395, 1 September 2020.
7 Law Commission, Protection of Official Data Report, HC 716, Law Com No. 395.

6. In relation to the espionage offences in OSA 1911–1939, the Law Commission recommended:

a) OSA 1911–1939 should be replaced by a modernised espionage statute.

b) The distinction between espionage by trespass and espionage by collection or communication of information should be retained, but with more modern terminology. Espionage offences should cover all electronic data and programmes.

c) References in espionage offences to "enemy" should be replaced with "foreign power", given the problems with using and defining "enemy".

d) References to "safety or interests of the state/UK" should be retained.

e) Criminal liability should only attach where a person has a purpose which they know or have reasonable grounds to believe is prejudicial to the safety or interests of the state.

f) The requirement that the conduct be capable of benefitting a foreign power should continue to be objectively determined.

g) The list of prohibited places should reflect the modern espionage threat; where appropriate and in the interests of the safety or interests of the state, the list should be able to be amended by Statutory Instruments subject to the affirmative procedure; and the Minister should inform the public of the effect of any designation order including by displaying notices at prohibited places.

h) The deeming and reverse burden elements of the espionage offences in sections 1(2) OSA 1911 and section 2(2) OSA 1920 should be repealed, as such deeming and reverse burden of proof provisions have no place in criminal law and are only rarely compatible with the right to a fair trial under Article 6 ECHR.[8]

i) Certain sections should be repealed as they are unnecessary, for example because they are now covered by general legal provisions.[9]

j) Espionage offences should be able to be prosecuted when they occur overseas provided the defendant has a "significant link" with the UK (not only British nationality).

7. The majority of the Law Commission's Report focussed on unauthorised disclosure offences in OSA 1989. Unauthorised disclosures proved more problematic and potentially controversial, not least given that these offences have the potential to affect journalists and whistleblowers more significantly. The Law Commission's findings are significant given the clear risks that the current legislative framework is incompatible with human rights,

8 The deeming and reverse burden elements of those offences would likely need to be "read down" using section 3 HRA in order to be compatible with Article 6 ECHR.

9 This applies to Official Secrets Act 1911, section 7 (offence of harbouring spies), Official Secrets Act 1920, section 2(1) (communication with a foreign agent as evidence of the commission of an espionage offence), Official Secrets Act 1920, section 6 (police powers to require an individual to provide information or to attend a specified place) and Official Secrets Act 1920, section 7 (offences of acts preparatory to the commission of an espionage offence).

including freedom of expression and the right to a fair trial, protected under Articles 10 and 6 ECHR respectively. We cover these points only briefly given that the NSB does not contain provisions on unauthorised disclosure.

8. In particular, the Law Commission considered that not every prosecution under OSA 1989 would be clearly compatible with freedom of expression, protected under Article 10 ECHR. In light of this, they recommend that a statutory public interest defence should be created for civilians (including journalists) to rely upon in court in respect of disclosures. In respect of public servants, they recommend the establishment of an independent commissioner to receive and investigate complaints of serious wrongdoing where disclosures would otherwise constitute a breach of OSA 1989—they also recommended a residual public interest defence for public servants which could be relied upon in court.

9. The Law Commission's report did not cover a number of the new offences in Part 1—or anything in Parts 2, 3 or 4 of the Bill.

2 Part 1: Offences of Espionage, Sabotage and Foreign Interference

Part 1 of the Bill

10. Part 1 of the National Security Bill (NSB) replaces the existing offences of espionage, and other measures contained in the Official Secrets Acts 1911, 1920 and 1939.[10] Part 1 of the Bill broadly follows the recommendations in the Law Commission's report, including recommendations to repeal those offences and replace them with more modern espionage offences.[11] From a human rights perspective, the removal of various of the reverse burdens in the offences currently found in OSA 1911–1939, as aligned with the Law Commission's recommendation, is particularly welcome.

11. The espionage offences in Part 1 relate to: espionage; trespass in a prohibited place; powers in respect of aircraft crash sites; sabotage; foreign interference; and preparatory conduct. We note that the Government has tabled a new clause during the Bill's Commons committee stage that would add a further offence of obtaining material benefits from a foreign intelligence service. We will consider this offence as the Bill progresses and may make further recommendations.

12. Part 1 also:

- makes a foreign power element an aggravating factor for the purposes of sentencing in other offences (clauses 16–19);
- contains provision for arrest without a warrant and detention for the purpose of investigating espionage-related offences (clauses 20–23 and Schedules 2–3); and,
- provides for immunity from prosecution for certain criminal offences for members of the intelligence agencies and the armed forces (clause 23) and for the possibility of excluding the public from criminal trials brought under Part 1 (clause 31). We consider clauses 23 and 31 in chapters 3 and 4 respectively.

Elements common to a number of offences

13. There are three common elements to many of the new offences in the Bill that we will address before considering the offences themselves:

- The concept of a "foreign power" element relevant to the majority of offences under this Part of the Bill;
- The term "prejudicial to the safety or interests of the United Kingdom" which is also a qualifying element for a number of the offences in Part 1; and
- "Foreign power threat activity" (clause 26) is relevant to the power of arrest without warrant under clause 21, as well as to Part 2 of the Bill relating to prevention and investigation measures.

10 Explanatory Notes, paragraph 16.
11 Law Commission, Protection of Official Data Report, HC 716, Law Com No. 395.

Foreign power element

14. The concept of "foreign power" is relevant to the majority of offences under this Part of the Bill (set out in clauses 24–25).[12] Previous espionage offences required conduct to be on behalf of an enemy. It is sensible to replace the term "enemy" (something that can be awkward to prove outside of a conflict situation) with another term to capture hostile State actors. However, the new definition now treats all States (and local administrations within States) effectively as potential enemies or hostile actors, without any distinction between friendly or hostile states.[13]

15. The definition of "foreign power" includes all foreign States, with no distinction between foreign States, Commonwealth States, European States or the Republic of Ireland.[14] The foreign power element covers a wide range of conduct in relation to the foreign power, and would also catch those who hold office, or are employed by a foreign power.

16. The Bill does not penalise States for hostile activity, but rather creates criminal offences to criminalise the actions of the individuals involved in such activity. The Bill criminalises conduct that would be lawful but for a link to a foreign country. This is of concern given the potentially disproportionate impact on dual nationals or those living in, or with close ties to another country. The requirement in many of the offences for there to be a purpose that is prejudicial to the safety or interests of the UK should help to ensure the offences are not applied too widely or in a manner that unfairly discriminates against certain communities. It will be important to ensure that the offences are only applied to genuine cases of espionage and do not capture, or have a chilling effect, on the ability of certain communities within the UK to exercise their rights, such as the right to protest or free speech.

17. In their evidence to us, the News Media Association raised concerns about journalists working for another government's state broadcaster, including that of a friendly state, who report on a leak of protected information which is subsequently held to be prejudicial to the UK's 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 was financed by such funds would satisfy the 'foreign power condition'. The journalist would commit an offence under the bill if they knew or ought to have known that the report would prejudice the UK's safety or interests and could face a maximum sentence of life imprisonment. It is arguable, for example, that the Cambridge Analytica story which revealed election interference with Brexit and the US election could have been caught in

12 Clause 1 (Obtaining or disclosing protected information); Clause 2 (Obtaining or disclosing trade secrets); Clause 12 (Sabotage); Clause 13 (Foreign Interference); Clause 14 (Foreign interference in elections); and Clause 15 (Preparatory Conduct).

13 Clause 25 defines "foreign power" as a foreign State, whether the head of State, the Government, a Governmental agency or authority, a local, federative or devolved authority within a foreign State, or a political party in the government of the foreign State.

14 The definition excludes the "political parties" in the government of Ireland that are also registered in Part 2 of the Political Parties, Elections and Referendums Act 2000—in recognition of the fact that some political parties are the same parties in the Republic of Ireland and Northern Ireland.

> scope. Even the possibility that such conduct could be criminalised creates a high-risk environment for journalists and their sources, which can lead to the dropping of stories and the chilling of speech and accountability.[15]

18. **We understand that the term "enemy" within espionage offences has become unworkable and should be replaced. However, we have concerns that treating all those with links to other States as potentially hostile for the purposes of espionage laws might have the impact of stigmatising certain communities unnecessarily. There is the potential of a chilling effect on otherwise legal activity such as protest or journalistic activities. New espionage offences, with the potential for stigmatising certain communities are only proportionate if such offences, and their enforcement, focus on the sort of conduct and relations that are a risk.**

19. ***The Government should consider whether the definition of "foreign country or territory" in clause 25(4) should exclude Commonwealth States, European Economic Area member States, and/or the Republic of Ireland. The Government should justify any decision to include these groups of States within the definition of "foreign power" in clauses 24–25. The Government should provide further information about how these offences are expected to be policed, how it will reduce any risks of discrimination against diaspora communities in the UK, and how it will counteract any potential chilling effect on otherwise lawful activity.***

Foreign power threat activity

20. Foreign power threat activity is grounds for arresting a person without a warrant (clause 21) as well as the imposition of Prevention and Investigation Measures (PIMS) in Part 2 of the Bill.[16] "Foreign power threat activity" is defined in clause 26 as the:

a) commission, preparation or instigation of acts of threats to commit certain offences under Part 1;[17]

b) facilitating the commission, preparation or instigation of those acts;

c) supporting or assisting individuals known or believed by the individual to be involved in such conduct; and

d) acts or threats to carry out serious violence against another person, endangering the life of another, or creating a serious risk to the health or safety of the public, where the foreign power condition is met.

21. The majority of the actions potentially caught by "foreign power threat activity" are linked to people committing offences and therefore seem reasonable. However, clause 26(1)(c) covers providing support or assistance to a person—without there being any link

15 The News Media Association (NSB0003)

16 Prevention and investigation measures (PIMs), are restrictive measures that may be imposed under Part 2 of the Bill on a person suspected of working on behalf of a foreign power. They are discussed further in Chapter 5 below.

17 The offences are: obtaining or disclosing protected information (s1); obtaining or disclosing trade secrets (s2); assisting a foreign intelligence service (s3); entering a prohibited place for a purpose prejudicial to the UK (s4); sabotage (s12) and foreign interference (s13).

between that support or assistance and any espionage activity. Such support or assistance could, it seems, cover activities as mundane as babysitting, looking after a cat, fixing a leaky sink, or helping a person with their shopping.

22. **Providing support or assistance to a person should not be grounds for arrest, or a prevention and investigation measure, where there is no link to supporting or assisting them in espionage activities or otherwise in the commission of an offence. *Clause 26(1)(c) should be deleted from the Bill, or alternatively the support or assistance should be explicitly linked to espionage activity.***

Safety or interests of the United Kingdom

23. Another phrase that occurs often as a central element of offences in this Part of the Bill is "safety or interests of the United Kingdom". The phrase is not defined. However, in its ECHR Memorandum, the Home Office has set out that its intention in using this phrase is to copy the phrase "safety or interests of the State" in section 1 of the Official Secrets Act 1911, which has been interpreted in the case of Chandler.[18] Chandler concerned the prosecution of people taking part in Campaign for Nuclear Disarmament protests. It found that even if the long-term purpose of the protesters was not to harm the State, if their immediate purpose was prejudicial to the interests or safety of the State (preventing an aircraft from taking off) then the offence under section 1(1)(c) would be committed. Moreover, the Court in 1964 interpreted "safety or interests of the State" as meaning objects of state policy as determined by the Crown.

24. The Government's Explanatory Notes for the NSB set out that it considers the term to mean "the objects of state policy determined by the Crown on the advice of Ministers".[19] The examples contained in the Government's Explanatory Note suggest offences potentially committed by individuals employed by the UK State, such as a police officer, a person working for the UK intelligence agencies, or a person working as a contractor for the Ministry of Defence. However, the offences are not limited to such individuals and therefore could catch others who perhaps do not have such an obvious employment and trust relationship to the UK Government, and where the assessment of what is prejudicial to the safety or interests of the UK could be more difficult to ascertain.

25. Whilst one might consider "safety or interests of the United Kingdom" to be a reasonable qualifier for the offences in Part 1, especially if restricted to acts which could involve serious violence to people, a risk to life, or a serious risk to the health or safety of the public, the drafting and explanations imply that it is intended to go wider than this. It therefore could risk being construed (whether by the courts or by officials) as covering a very significant range of activity.

26. It is important that criminal offences created with the aim of protecting state interests nevertheless respect basic rights and freedoms. We have some concerns that the use of the term "safety and interests of the United Kingdom" might risk being construed so broadly—and from the sole perspective of Government interests—that the new offences using this term may not ensure respect for fundamental rights, such as the right to protest, freedom of association and freedom of expression, which are essential elements of a healthy democracy.

18 Chandler v DPP [1964] AC 763

19 Explanatory Notes, paragraph 53.

27. **The use of the "safety and interests of the United Kingdom" phrase without any indication of the severity of the potential prejudice to those interests, or as to how it may be interpreted creates legal uncertainty as to how these criminal offences might apply. It is contrary to rule of law principles to establish offences that lack legal certainty and sufficient clarity. Moreover, it is contrary to Articles 5 (the right to liberty and security) and 6 ECHR (the right to a fair trial) to prosecute and subsequently imprison people for offences that lack sufficient clarity.**

28. ***To ensure that there is the required level of legal certainty for the creation of a criminal offence, the Government should consider clarifying the phrase prejudicial to the "safety and interests of the United Kingdom" either to specify the types of conduct envisaged, or to include a threshold test as to the severity of the prejudice to the interests of the United Kingdom.***

29. The absence of any requirement that conduct be prejudicial to the "safety or interests of the United Kingdom" in some of the offences in Part 1 is also of concern. This is, for example, the case for clause 2 (obtaining or disclosing trade secrets); clause 3 (assisting a foreign intelligence service in the UK); or clause 5 (unauthorised entry to a prohibited place).

30. ***The Government should consider inserting a requirement in the new offences in clauses 2, 3 and 5, that conduct be "prejudicial to the safety or interests of the United Kingdom" (preferably once clarified to offer greater legal certainty). If it declines to do so, the Government should justify this decision and explain how it will ensure that these offences do not inadvertently criminalise benign activity.***

Espionage Offences

The offence of obtaining or disclosing protected information

31. Clause 1 provides that it is an offence, punishable by life imprisonment, to obtain, copy, record, retain, disclose or provide access to protected information. However, the offence is only committed where (i) the person's conduct is for a purpose that they know or ought to reasonably know is prejudicial to the safety or interests of the United Kingdom,[20] and (ii) the person knows or ought reasonably to know that the conduct is carried out for or on behalf of a foreign power.[21] In part, clause 1 replaces the existing offence in section 1(1)(c) of the Official Secrets Act 1911.[22]

32. As the offence relates to the sharing of information, freedom of expression (protected under Article 10 ECHR) is engaged, including the potential that it may catch journalism, political expression or whistleblowing activity. The Government considers that "any interference is justified under Article 10(2) in the interests of national security" because the offence only applies to information restricted for the purpose of protecting the safety or interests of the United Kingdom, and because the person must know or reasonably be expected to know that their conduct is prejudicial to the safety or interests of the United

20 Clause 1(1)(b). As discussed above, "safety or interests of the United Kingdom" is not defined, so is left to the Courts to interpret.

21 Clause 1(1)(c) as read with clause 24 and clause 25.

22 However, whereas OSA 1911 concerned information "directly or indirectly useful to an enemy" this is now extended to conduct with a link to a foreign State; and instead of a maximum penalty of 14 years for assisting an enemy, the maximum penalty is life imprisonment.

Kingdom.[23] Therefore, whilst the offence potentially catches a wide range of behaviour, not all of which would normally be considered to be espionage, the mental element of the offence that needs to be proved is considered by the Government to narrow the scope of the offence.

"Protected information"

33. Protected information is defined as any information, document or other article where, for the purposes of protecting the safety or interests of the United Kingdom, access is restricted in any way, or it is reasonable to expect that access to be restricted.[24] This could potentially catch a very wide range of information, not least given the uncertainty created as to how the words "safety or interests of the United Kingdom" might be applied in a given case.

34. More specifically, the requirement that the information be "restricted in any way" or that it might be "reasonable to expect" that information to be restricted in any way lacks clarity, lacks legal certainty and could potentially catch a wide range of material. It would also catch information that, in fact, was not protected (clause 1(2)(b)). Moreover, as the Government's Explanatory Notes set out, it would also cover "non-classified information" accessible in a building with restricted access such as a Government building.[25] It is not clear why the disclosure of information that has not been classified should be an offence; if the intention is that the information should be protected, then it should be classified to ensure clarity for all as to what information is sensitive and should not be disclosed and what information is not protected.

35. Given the severity of the offence, with a potential punishment of life imprisonment, it might be reasonable to expect it would attach to a clear type of information, such as information categorised as "Secret" or "Top Secret". It would seem unreasonable and potentially disproportionate, for example, for such a serious offence to catch information categorised as "protected"–or indeed official information that is not at all restricted. Clearer categorisation as to the type of information that would attract this offence would ensure better clarity as to the type of conduct to be criminalised and would ensure that the offence would not be erroneously applied to less significant types of information.

36. **The offence of obtaining or disclosing protected information in clause 1 does not make sufficiently clear what information is considered to be protected for the purpose of this offence. As such, it creates an unacceptable level of legal uncertainty, raising concerns about compliance with the right to liberty and security, the right to a fair trial, and the right to freedom of expression as protected by Articles 5, 6 and 10 ECHR. *To improve legal certainty and proportionality as to when this offence should apply, the Government should consider amending the offence to clarify that it only attaches to protected information that is (or that the defendant knows or reasonably ought to know should be) subject to a certain level of categorisation, such as "Secret" or "Top Secret". Details as to what is included within the definition of protected information could be contained in a non-exhaustive indicative list or specified in a Statutory Instrument to improve clarity and legal certainty.***

23 ECHR Memorandum, paragraph 9.
24 Clause 1(2).
25 Explanatory Notes, paragraph 54.

The offence of obtaining or disclosing trade secrets

37. Clause 2 provides that it is an offence, punishable by 14 years imprisonment, without authorisation to obtain, copy, record, retain, disclose or provide access to a trade secret. However, the offence is only committed where the person knows or ought reasonably to know that the conduct is carried out for or on behalf of a foreign power.[26]

38. As the offence relates to the sharing of information, freedom of expression (protected under Article 10 ECHR) is engaged, including the potential that it may catch journalism, political expression or whistleblowing activity. It would seem difficult to justify this as being "in the interests of national security" because there is no element in the offence that has a link to the interests of national security, or to the safety or interests of the United Kingdom, even if the economic interests of the State might have been part of the Government's thinking in proposing this drafting. The Government did not address compatibility of this offence with Article 10 ECHR in its human rights memorandum.

39. A trade secret is defined as something which is not generally known to people with expertise in the field, that has actual or potential industrial economic or commercial value, and which could reasonably be expected to be subject to measures to prevent it becoming generally known. There is therefore no requirement, in this offence, for there to be any detriment to the UK or to the public, as such it seems to be more akin to theft affecting a private actor. There is also no requirement in clause 2 for the trade secret to have been subject to measures to prevent it becoming generally known. The examples given in the Explanatory Notes (artificial intelligence, energy technology) suggest that industries with links to critical infrastructure and national security concerns are envisaged by the Government for this offence, rather than "mere" commercial secrets relating to industries which pose no risk to national security.[27] However, as currently drafted the offence risks catching all trade secrets, no matter their relevance (or lack of relevance) to national security.

40. Whilst the "foreign power" element is required for this offence, this could still lead to the offence applying to regular theft (for example if the theft of the trade secret was done in connivance with a corrupt member of a local government administration), rather than anything naturally envisaged under espionage activity.

41. **The theft of trade secrets that pose no risk to national security is more properly governed by the offence of theft (and other breach of confidence and intellectual property rules) than through new espionage offences. It is not appropriate to create espionage offences, with the potential to impact significantly on human rights, that relate solely to private commercial matters with no risk to national security.**

42. ***Clause 2 should be amended to require an adverse impact to the UK's national security in order for this specific espionage offence of obtaining a trade secret to be committed. An amendment to add in a requirement that the disclosure of the trade secret be "prejudicial to the safety or interests of the United Kingdom" would seem to address this concern. Alternatively, a reference to national security or critical infrastructure might be considered.***

26 Clause 1(1)(c) as read with clause 24 and clause 25.

27 Explanatory Notes, paragraph 66.

Whistleblowers and journalism

43. It is further unclear how the offences in clauses 1 and 2 may apply to whistleblowers and journalists. This can raise human rights considerations as free speech (including speech through whistleblowing) is protected by Article 10 ECHR and as such should only be interfered with to the extent necessary for a justified reason.

44. Whilst the foreign power element means that many whistleblowers would not be at risk of committing the offences, there may be cases where a person is a whistleblower, but has connections with a foreign local government or foreign State meaning that the offence may be committed. The requirement that a "purpose" of the conduct is "prejudicial to the safety or interests of the UK" in clause 1 would seem to create a higher threshold and would exclude many whistleblowers, however, given the possibility for different perceptions as to what is a prejudicial purpose, other whistleblowers would arguably risk being caught by this offence.

45. ***The Government should consider whether there should be a defence of whistleblowing for offences under clauses 1 and 2 of the Bill.***

The offence of assisting a foreign intelligence service

46. Clause 3 provides that it is an offence, punishable by 14 years imprisonment, to engage (1) in conduct of any kind intended to materially assist a foreign intelligence service[28] in carrying out UK-related activities;[29] or (2) in conduct of a kind that that person knows or reasonably ought to know is reasonably possible may materially assist a foreign intelligence service in carrying out UK-related activities. Clause 3 could apply even if such conduct has no discernible prejudice to the UK or the UK's interests. Moreover, clause 3 would criminalise conduct to assist in carrying out activities in the UK, even if those activities do not have any intelligence-related element.

47. "Foreign intelligence service" is defined as "any person whose functions include carrying out intelligence activities for or on behalf of a foreign power".[30] Foreign power includes all foreign States, including friendly States with whom the United Kingdom may have good intelligence relations.

48. The conduct envisaged is very wide and therefore could potentially include conduct that engages a number of human rights, most obviously freedom of expression, freedom of association and the right to protest (Articles 10 and 11 ECHR). The Government has not sought to justify any interference with human rights in respect of this new offence in its human rights memorandum. Whilst the justification of "national security" may be available for justifying any interference with these rights, it would seem difficult to credibly argue this justification for conduct which contained no prejudice to the safety or interests of the United Kingdom.

49. It is noteworthy that whilst conduct outside the UK is not caught unless it is "prejudicial to the safety or interests of the United Kingdom", such a qualifier does not

28 Such conduct includes providing, or providing access to, information, goods, services or financial benefits (whether directly or indirectly). [Clause 3(3)].

29 UK-related activities means activities taking place in the United Kingdom, or which are prejudicial to the safety or interests of the United Kingdom. [Clause 3(4)].

30 Clause 3(9).

apply to activities taking place in the United Kingdom. For example, the offence in clause 3 would seem to criminalise a French national in the UK who alerts the French intelligence authorities to a terrorist threat in the UK. It does not seem to be in anyone's interests for such activity to be criminalised. Clause 3(7) seems to envisage some exemptions, including where an agreement is in place, and it may be hoped that this would therefore exclude such situations. However, given the lack of clarity, there is a risk of disproportionality in relation to activities in the UK to the extent that they require no harm at all to UK interests (and indeed no intention to harm UK interests).

50. The offence in clause 3(1) could apply to conduct that is in fact of no material value at all to any foreign intelligence service. The offence in clause 3(2)(a) creates a relatively low bar of "conduct of a kind that it is reasonably possible may" materially assist a foreign intelligence service. An amendment to replace that with "conduct of a type that could materially assist" could make the offence tighter.

51. **There should be a requirement that for a clause 3 offence to be committed, the conduct must have the potential to harm UK interests. An amendment to this effect would ensure that any interference with human rights and liberties would be justified and not disproportionate.** ***The Bill should be amended to add "prejudicial to the safety or interests of the United Kingdom" to clause 3(4)(a).***

The offence of entering a prohibited place

The offences of entering a prohibited place and associated police powers

52. Clause 4 creates an offence, punishable by 14 years imprisonment, of accessing, entering, inspecting,[31] passing over or under, approaching or being in the vicinity of a "prohibited place" or causing an unmanned vehicle or device to so.[32] The offence is only committed, however, where the conduct is for a purpose that the person knows or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom. Given the different approaches possible to construing "safety or interests of the United Kingdom" there are risks that this may, for example, criminalise protesters who are "in the vicinity of" Government land.

53. Clause 5 creates an offence, punishable by six months imprisonment,[33] of accessing, entering, inspecting,[34] passing over or under a "prohibited place" or causing an unmanned vehicle or device to so, without authorisation, where the person knows or ought reasonably to know that their conduct is unauthorised.[35] There is no requirement in this offence for any prejudice to the safety or interests of the UK, it is therefore more akin to a specific type of criminal trespass.

54. Clause 6 empowers a police constable to order a person (or their vehicle) not to engage in the conduct (e.g. entering a prohibited place) covered by these offences, to leave

31 This includes taking photographs, videos or other recordings of the prohibited place [Clause 4(2)].

32 This includes both in person and electronic or remote access.

33 51 weeks in respect of offences committed in England upon the entry into force of s. 154 Criminal Justice Act 2003. [Clause 5(5)].

34 This includes taking photographs, videos or other recordings of the prohibited place [Clause 5(3)].

35 Conduct is unauthorised where the person is not entitled to determine whether they may engage in the conduct and does not have consent to engage in the conduct [Clause 5(2)]. This covers conduct in person, remotely or electronically.

the area immediately, or to leave an adjacent area immediately.[36] However, a constable may only exercise these powers where he "reasonably believes that exercising the power is necessary to protect the safety or interests of the United Kingdom". Given the potential for a subjective approach to interpreting what is "necessary to protect the safety or interests of the UK", there are risks that these powers could be used in ways going beyond what is necessary to protect the safety and interests of the UK and could be used to impact on ordinary rights and freedoms. Under clause 6, a person who fails to comply with an order commits an offence subject to three months' imprisonment. It is notable that the offence is committed even if there was, in fact, no risk to the safety or interest of the United Kingdom but only if a constable reasonably believed it to be the case.[37] There are obvious risks of this provision unduly impacting on the right to protest.

55. **The Government should consider how best to ensure that the offences in clauses 4 and 5 do not impact the right to protest, as protected under Articles 10 and 11 ECHR. *The Government and the police should produce clear guidance setting out how the powers under clause 6 will be exercised and the reviews that they will undertake to ensure these powers are only being used where it is proportionate to do so and will not be used to impact unduly on the right to protest. Clause 6 should be amended to ensure that an offence is only committed if the use of police powers was proportionate and necessary to protect the safety and interests of the UK.***

The meaning of "prohibited place"

56. Clause 7 defines "prohibited place" as meaning all Crown land used for defence purposes, or for the purposes of weapons development and storage, in the United Kingdom or in the Sovereign Base Areas in Cyprus;[38] and any vehicle in the UK or Sovereign Base Areas in Cyprus used for UK defence purposes or for the purposes of the defence of a foreign country or territory; and any vehicle outside of the UK used for UK defence purposes. Whilst the Government's Explanatory Notes refer to barracks, submarines, tanks, and military headquarters, the way the offence is drafted would seem to catch all Ministry of Defence land and thus potentially apply widely.[39]

57. Clause 8 empowers the Secretary of State to declare additional sites within the UK or the Sovereign Base Areas in Cyprus (or vehicles) as prohibited places, whether by reference to a particular site or a description of land/vehicles. However, the Secretary of State may only do so where, given the purpose for which the land/vehicle is used or the nature of any information or technology held there, they reasonably considers it necessary to do so to protect the safety or interests of the United Kingdom. This seems reasonable given the interests of places that hold information or technology, although it is worth noting that this power is only subject to a negative resolution statutory instrument.[40]

36 It also empowers a constable to arrange for the removal of a vehicle or device from a prohibited place or an area adjacent to a prohibited place.

37 In large part, the police orders would seem to relate to people who are likely already committing an offence under clause 5.

38 It also covers such land used for extracting metals, oil or minerals for us for UK defence purposes or for the purposes of the defence of a foreign country or territory.

39 See, for example, paragraphs 91 and 92 of the Explanatory Notes.

40 The Law Commission, in its Report, Protection of Official Data Report, HC 716, Law Com No. 395, para 3.86 recommended that an affirmative statutory instrument procedure be used.

58. These offences and powers contained in clauses 4–6 would therefore attach to significant areas of the British countryside, such as Ministry of Defence land covered by public footpaths frequented by tourists, hikers and dog walkers.

59. **Where land does not disclose any particular significant risk to the safety or interests of the United Kingdom, it would seem disproportionate to apply the restrictions, police powers and criminal offences in clauses 4–6.** ***Clause 7 should be amended so that it does not apply to all Ministry of Defence land and vehicles used for defence purposes (including those easily accessible to the public), irrespective of the real risk posed by that Ministry of Defence property, but instead only applies to those areas of Ministry of Defence land whose entry would pose a real risk to national security.***

60. It is not possible for the public to know that much of this land and many of these vehicles are Ministry of Defence property and are "prohibited places". As such, people could risk committing an offence without being aware that they were approaching a Ministry of Defence car or were walking along a section of the coast path that was Ministry of Defence property. It seems unreasonable and contrary to the principles of legal certainty and the rule of law to create an offence of being in a place, where a person cannot reasonably know that they are not allowed to be in that place—or indeed where that place is simultaneously prohibited and yet accessible to the public through being a footpath. Indeed, we note the Law Commission in its report recommended that the Minister be under a duty to place signs around "prohibited places" to ensure that people knew when they might be entering a prohibited place to which these offences would apply.[41]

61. **As it stands, there is a risk people will commit offences related to being in, or in the vicinity of, Ministry of Defence property without knowing they had done so.** ***There should be an obligation on the Minister to display notices on all entrances to "prohibited places" informing the public that this is a prohibited place, and that entry would be a criminal offence. The Bill should be amended to this effect.***

62. As the Government acknowledges, clauses 4–8, in affecting presence and conduct on land which could legitimately be used for a lawful protest, could "risk" preventing "otherwise lawful protests".[42] This will be particularly the case for those campaigning against military action, or against the use of certain weapons or techniques in military action.

63. An interference with the right to protest, protected under Articles 10 and 11 ECHR as well as under the common law, will only be justified where it is in accordance with law (which requires the law to be sufficiently clear) and is a proportionate and necessary interference. The Government has stated that it considers the interference to be justified in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime.[43] Given that these clauses arguably apply to a significant amount of Ministry of Defence land and vehicles, without more effort to restrict their application

41 The Law Commission, in its Report, recommended that notices be required to ensure that the public could reasonably know where a "prohibited place" was when they were entering it and therefore the potential consequences of any actions undertaken there – especially where such places can be readily accessed by the public.

42 ECHR Memorandum, paragraphs 11 and 12. See also concerns expressed in the Second Reading debate to ensure that these provisions do not catch legitimate protest, for example by Stewart Hosie MP, National Security Bill - Hansard - UK Parliament Col 612.

43 ECHR Memorandum, paragraph 11.

to specific areas of particular sensitivity or threat, it would seem to us unlikely that the proportionality test has been met–particularly if clause 7 continues to cover a significant amount of countryside accessible to the public.

64. ***In order for clauses 4–6 to represent a proportionate interference with human rights and freedoms, the Government must ensure that places are only prohibited if they are areas of particular defence or other national security sensitivity. The Government must also ensure that reasonable authorisation is granted for protests to take place in the vicinity of "prohibited places".***

65. Whilst prosecutions will require Crown Prosecution Service sign-off (and ultimately the Court's adjudication of a matter), the use of police powers does not have that level of scrutiny and therefore can create an unanticipated chilling effect on civil liberties if adequate safeguards are lacking. It will therefore be fundamental, in respect of these powers, that a clear police code is established to ensure that basic liberties are protected in the exercise of police powers under these provisions.

66. ***The police must produce a clear code setting out how they will use the powers in clause 6. An amendment to the Bill to require approval by a senior police officer before the exercise of these powers could additionally assist in ensuring that these powers are not used in a disproportionate or discriminatory manner.***

Powers in respect of a cordoned areas to secure defence aircraft

67. Clause 9 grants a constable the power to designate an area as a cordoned area if he considers it expedient to do so to secure an aircraft (or equipment/parts relating to an aircraft) used for military purposes. Whilst the Explanatory Notes explain that this is to do with a crash site of a military aircraft, clause 9 does not actually refer to a crash site.

68. Clause 9 contains certain procedural requirements relating to a designation, including that it be confirmed by a police officer of at least the rank of superintendent as soon as reasonably practicable; that decision-making be recorded; and that the cordoned area be demarcated using police tape. Clause 10 provides that a designation cannot have effect for longer than 14 days (extendable by up to 28 days in total).

69. Clause 11 empowers a police constable to order a person (or their vehicle) not to engage in the conduct (e.g. entering a cordoned area), to leave the area immediately, or to leave an adjacent area immediately. It also empowers a constable to arrange for the removal of a vehicle or device from a cordoned area or an area adjacent to a cordoned area.

70. **References to powers in respect of an area "adjacent" to a "cordoned area" seem to constrain activity going beyond the cordoned area and into other private or common land, which would seem to lack clarity and potentially create an unjustified interference with people's rights on private or public land. Similar concerns arise in respect of areas adjacent to "prohibited places" in clause 6.** ***The Government should delete the references to "adjacent area" in clause 11(1)(c) and 6(1)(c) unless it produces an adequate justification for the necessity and proportionality of applying these powers in relation to adjacent areas.***

71. Under clause 11(4), a person who fails to comply with an order commits an offence subject to three months imprisonment, for conduct which, but for the constable's order,

would not be a criminal offence. It is notable that the offence is committed even if there was, in fact, no risk to the safety or interest of the United Kingdom. However, there is a defence for a person to prove that they had a "reasonable excuse" for failing to comply.

72. There are obvious risks of these provisions unduly impacting on the right to protest and on journalism. Even if it could be argued that protest and journalism were a "reasonable excuse" in any eventual prosecution, there are risks that, without a clear exemption, this provision could be misapplied by police and could dissuade journalists and protesters from carrying out otherwise lawful activity.

73. ***Clause 9 would benefit from an amendment to make it clear that it is intended to refer to a military vehicle crash site, as set out in the Government's Explanatory Notes to the Bill. An amendment to require a code or guidance for the use of police powers in respect of these provisions could also help to ensure that these powers are exercised in a proportionate manner that does not inappropriately impact on journalism and protests.***

Sabotage

74. Clause 12 creates an offence of sabotage, punishable by life imprisonment, where a person intentionally or recklessly damages any asset.[44] The offence is only committed where (1) the person's conduct that led to the damage was for a purpose that they know or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom; and (2) the person knew, or ought reasonably to have known, that their conduct was carried out for, or on behalf of, a foreign power.

75. The Government acknowledges that the offence has the potential to engage the right to protest (Articles 10 and 11 ECHR). The Government considers that the foreign power element of the offence should mean that this would not be a disproportionate interference with those rights.[45] The offence also potentially engages the peaceful enjoyment of possessions (Article 1 or Protocol 1 ECHR).

76. The breadth of this offence is striking in applying to any asset, wherever located. Indeed, the Government envisages this offence being committed when a person may decide to dispose of/damage/alter their own property.[46] The Government justifies this wide coverage by highlighting the limits imposed by the requirement that the damage should be prejudicial to the safety or interests of the United Kingdom, and the foreign power element. The Government's Explanatory Notes give examples relating to critical infrastructure such as water supply, energy supply and nuclear energy plants. Whilst there is arguably a compelling case for the offence of sabotage to apply to critical infrastructure, it seems unreasonable to apply the offence to all assets/property of any kind, wherever located, and notwithstanding who owns them.

77. **A restriction of the offence of sabotage to relate to critical infrastructure or a potentially significant impact might help to clarify the threshold for this offence and to ensure that it is only applied where that would be proportionate to do so.**

44 Damage includes destruction, alteration, contamination, interference, loss of or reduction in access or availability, and loss of or reduction in function, utility or reliability, whether permanent or temporary, of any tangible or intangible property.

45 Paragraphs 14 and 15 of the ECHR Memorandum.

46 Paragraph 16 of the ECHR Memorandum.

Foreign interference

78. Clause 13 creates an offence of foreign interference punishable by 14 years imprisonment, where a person does something intending that it interferes with or manipulates public functions, political or legal processes, a person's enjoyment of their ECHR rights, or otherwise prejudices the safety or interests of the United Kingdom. The offence is only committed where (i) the conduct was done for or on behalf of a foreign power, and where (ii) that conduct constitutes an offence, involves coercion or involves misrepresentation.

79. A very wide range of conduct is potentially caught by this offence, including types of activity that could engage the right to protest, freedom of expression, freedom of assembly and association, political activity and conduct in the course of disputes or legal proceedings. Whilst the foreign power element restricts its ambit, there are risks that this new clause 13 offences could go wider than intended and catch conduct by campaigners, protesters or those in engaged in political movements.

80. Coercion includes conduct such as "placing undue spiritual pressure on a person", which could have the potential of impacting on freedom of religion and belief (Article 9 ECHR). Misrepresentation includes saying something false or misleading and thus could catch an example where a person does not accurately describe a situation. This could potentially cover a range of political speech or religious belief.

81. Clause 13 is intended to catch the activity of troll farms.[47] The Government considers that Article 10 ECHR does not protect the type of expression targeted by clause 13.[48] The Government also relies on Articles 16 (restrictions on political activities of aliens) and 17 (prohibition of abuse of rights) ECHR in seeking to justify this new offence.[49] Whilst it cannot be denied that troll farms have the potential to cause significant unhappiness and confusion, efforts to curtail speech risk backfiring and impeding on freedom of expression unless carefully targeted. The Government recognises the potential for this provision to lead to individuals pre-emptively self-censoring and the impact this could have on political speech or journalism, but considers the risk to be capable of justification and that it should not unduly inhibit public interest journalism.[50]

82. **It will be important to ensure that democratic political activity is not inadvertently criminalised by the foreign interference offence in clause 13.** ***The Government should consider amending clause 13 to explicitly provide that an offence is not committed if it is an exercise of free speech (giving due weight to the importance of political speech or religious speech) or the right to protest protected under Articles 10 and 11 ECHR.***

Preparatory conduct

83. Clause 15 provides that it is an offence, punishable by life imprisonment, to engage in conduct intending to prepare to commit offences under clauses 1 (obtaining or disclosing

47 See page 25 of the Explanatory Notes accompanying the Bill.

48 ECHR Memorandum, paragraphs 17–18.

49 Article 16 provides that "nothing in Articles 10, 11 and 14 shall be regarded as preventing [a State] from imposing restrictions on the political activity of aliens". Article 17 provides that "nothing in [the ECHR] may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for" in the ECHR.

50 ECHR Memorandum, paragraph 19.

protected information), 2 (obtaining or disclosing trade secrets), 4 (entering a prohibited place for a purpose prejudicial to the UK) or 12 (sabotage), or acts on behalf of a foreign power that involve serious violence, endangering life or creating a serious risk to the health or safety of the public. Such conduct is not covered by ordinary criminal attempts offences which require actions that are "more than merely preparatory".[51] This offence is therefore intended to reflect that action to intercept potential offences at an early stage can be necessary when dealing with espionage offences.

84. **The preparatory conduct offence in clause 15 could criminalise preparing to protest at certain key sites—and indeed could carry a maximum sentence of life for preparing to protest. It will be important to ensure that those exercising their right to protest are not inadvertently caught by this provision and, importantly, that it is not policed in a way to suggest that they would be so caught. *The Government should set out how they intend to ensure that clause 15 is not used to unduly interfere with the right to protest.***

Powers of search and arrest without warrant

Powers of search

85. Clause 20 and Schedule 2 confer powers of entry, search and seizure in relation to offences under Part 1 of the National Security Bill and acts or threats relating to foreign power threat activity. Of note, paragraph 10 of Schedule 2 contains powers for search and seizure of material based on a warrant issued by a police officer of at least the rank of superintendent.[52] The other search and seizure powers in Schedule 2 require judicial authorisation.

86. The News Media Association have set out in evidence submitted to this committee, paragraph 10 is "a retrograde step which: (i) reduces protections for journalistic material in police searches; (ii) has the potential to stifle investigative journalism; (iii) puts sources at risk; and thereby (iv) impacts adversely upon Article 10 ECHR (freedom of expression) in relation to that journalistic material".[53]

87. ***The Government must justify the necessity of the police warrant powers in paragraphs 10 and 24 of Schedule 2 and should consider whether further safeguards might be appropriate. In particular, the Government should consider including greater protections for confidential journalistic material.***

Arrest without warrant

88. Clause 21 and Schedule 3 provide that a constable may arrest without a warrant anyone who the constable reasonably suspects is, or has been, involved in "foreign power threat activity".[54] These provisions are very similar to the provisions in Section 41 and Schedule 8 of the Terrorism Act 2000 (as amended) for arresting without a warrant anyone who a constable reasonably suspects is a terrorist.

51 Criminal Attempts Act 1981

52 Paragraph 24 of Schedule 2 in respect of Scotland.

53 The News Media Association (NSB0002).

54 Given the wide definition of this term in clause 26, discussed above, it is notable that this power of arrest would currently extend to conduct that may not, in of itself, be criminal.

Length of detention

89. A person arrested without a warrant under clause 21(3) may be detained for up to 48 hours. The continued detention of a person is subject to periodic review at least every 12 hours (paragraph 28, Schedule 3), and a person must be released if the review officer does not authorise continued detention (clause 21(5)). However, that review may be postponed in certain circumstances (paragraph 29, Schedule 3). Given the potential for lengthy detention without a warrant, the criteria for postponing a review of detention are quite wide and do not necessarily encourage a rigorous approach to reviewing continued detention (e.g. "no review officer is readily available" or "it is not practicable for any other reason to carry out the review").

90. **The reviews of detention without warrant should only be able to be postponed for well-defined and justified reasons.** ***Paragraphs 29(1)(b) and 29(1)(c) of Schedule 3 should be deleted from the Bill.***

91. A judicial warrant of further detention may also be sought to detain a person up to a total of seven days from initial arrest (paragraph 36), subject to a potential further extension up to a total of 14 days from initial arrest (paragraph 43). The detainee must be given an opportunity to make oral or written representations to the judicial authority about an application for further detention and is entitled to be legally represented at the hearing (paragraph 40). However, both the detainee and their legal representative may be excluded from parts of the hearing. Moreover, an application may be made to withhold certain information relied upon by the detaining/investigating authority (paragraph 41).

92. **The process for a judicial warrant contains some guarantees. However, we have some concerns given the potential for a person's access to their lawyer to be delayed, the potential for a detainee to be excluded from part of the hearing, and the potential for information relied upon to be withheld from the detainee and their legal representative. As a result, it is possible that a detained person may not be told sufficient information to enable them to be in a position to counter any claims made against them in a part of the hearing from which they are excluded. There are therefore risks that this process does not contain sufficient protections against arbitrary detention.** ***A requirement that a person should be able to know the case against them might improve the protections in paragraph 40 of Schedule 3.***

93. **We note in particular that the provisions to withhold information from the detainee and their legal representative extend, under paragraphs 41(3) and (4) of Schedule 3, to matters relating to recovering the proceeds of crime, rather than anything relating to national security.** ***The Government should justify the use of detention based on undisclosed/closed material where the concern relates solely to proceeds of crime. Failing a compelling explanation, paragraphs 41(3) and (4) of Schedule 3 should be deleted.***

Rights of a detainee

94. Paragraph 6 of Schedule 3 sets out the right of a detainee to have a named person informed of their detention. Paragraph 7 sets out the detainee's right to consult a solicitor.[55] However, under paragraph 8 (paragraph 16 in respect of Scotland), a police officer of at

55 Paragraph 15 sets out similar rights in respect of detainees in Scotland.

least the rank of superintendent may, if they have reasonable grounds to believe that there is a risk of alerting others, or of interference with gathering information or evidence, or a risk of physical injury to any person, direct that the detainee may not consult the solicitor who attends, but may consult a different solicitor of the detainee's choosing.

95. Similarly, paragraph 9 (paragraph 15 in respect of Scotland) provides that a police officer of at least the rank of superintendent, may if they have reasonable grounds to believe that there is a risk of alerting others, or of interference with gathering information or evidence or a risk of physical injury to any person, direct that the right to have a named person informed of their detention and the right to consult a solicitor be delayed (although the detainee must be able to exercise those rights before the end of the 48 hour period of detention). A similar power of delay exists where the officer has reasonable grounds for believing that a person has benefitted from criminal conduct and the recovery of property value would be hindered by allowing them access to a solicitor or by informing someone of their detention.

96. **Restrictions and delays on access to a lawyer and on letting a person's loved ones know where they are constitute serious impediments to accessing basic rights for a person detained without charge. Whilst such restrictions may be proportionate if necessary for imperative reasons of national security, such as to prevent immediate serious harm to another person, the case is less compelling where the objective is solely asset recovery. *Paragraphs 9(4) and (5) of Schedule 3 should be deleted from the Bill.***

3 The principle of open justice & the power to exclude public from proceedings

Clause 31 and the principle of open justice

97. Clause 31 provides that the public may be excluded from any part of proceedings (other than sentencing) for an offence under Part 1 of the National Security Bill (i.e. the espionage offences) if "necessary in the interests of national security". This would replace a somewhat similar provision in OSA 1920.

98. There is a general principle that the administration of justice should be public; this is in the interests of justice as publicity can be a vital means of guaranteeing justice and liberty.[56] The exclusion of the public and the media from trials therefore raises obvious questions around the fundamental principle of open justice.[57] Moreover, a lack of transparency in criminal prosecutions could raise issues of compliance with the right to a fair trial, protected under Article 6 ECHR.

99. Open justice is not an absolute principle and can be subject to exceptions, notably where that is in the interests of justice. For example:

a) Closed material proceedings for national security reasons are possible in certain civil and administrative proceedings (e.g. for immigration and TPIMS matters), but are considered exceptional.

b) The courts have a common law power to hear cases, including trials, in private. However, this is subject to a strict necessity test; meaning the public can only be excluded if justice cannot be done without their exclusion.[58] Such an approach was taken, for example, in the prosecution of Erol Incedal, although the approach taken there was viewed as less than ideal by some commentators.[59]

c) Section 8(4) OSA 1920 gives the court the power to exclude the public from trials when publication of any evidence would be "prejudicial to the national safety". By virtue of section 11(4) OSA 1989 this also applies to OSA 1989 offences.

56 Scott v Scott [1913] AC 417. In that judgment, Law Shaw of Dunfermline described open justice as "one of the surest guarantees of our liberties", whilst Viscount Haldane LC stated that a court must not exercise its power to exclude the public unless it was "strictly necessary", such that justice could not be done without exclusion of the public.

57 The Justice Select Committee are currently undertaking an inquiry into open justice.

58 See Scott v Scott [1913] AC 417. See also Attorney General v Leveller Magazine Ltd [1979] AC 440.

59 R v Incedal [2014] and Guardian News and Media Ltd v R & Erol Incedal [2016] EWCA Crim 11. Erol Incedal was accused of preparing a terror attack and possessing a bomb-making manual. His trial was held in secret due to national security concerns. For those critical of the approach taken in Incedal, see, for example, the evidence from Professor Lorna Woods, Dr Lawrence McNamara and Dr Judith Townend to the Law Commission, Law Commission Report, "Protection of Official Data", HC 716, Law Com No. 395, at paragraphs 7.53 and 7.54. See also the BBC's evidence at paragraph 7.55.

The Law Commission's report

100. The Law Commission considered the exclusion of the public under section 8(4) OSA 1920 in their consultation and ensuing report:

a) The Law Commission considered that there was some confusion as to whether a necessity test (that applies to the common law power of judges to hear trials in private) applied to section 8(4) OSA 1920. The Law Commission recommended that section 8(4) be reformulated to ensure that it was only used "if necessary" for the administration of justice, having regard to the risk to national safety.

b) Concerns were expressed about the term "prejudicial" to national safety in section 8(4) OSA 1920, as it was feared this could be used to justify excluding the public and the media in situations where national security/safety could nonetheless be protected and ensured.[60] The Law Commission suggested replacing "prejudicial to national safety" with "to ensure national safety".

c) There was some discussion as to whether the necessity test should attach to "national safety", "national security" or "the administration of justice". The case law references concerning the common law power to exclude members of the public focus on the overriding concern being the administration of justice—the reasoning being that open justice is necessary for the administration of justice, therefore any derogation from the principle of open justice must itself be justified by the interests of justice.[61] The Law Commission recommended that the necessity test should apply such that "the exclusion of members of the public must be necessary for the administration of justice having regard to the risk to national safety".[62]

The Government's approach to clause 31

101. Whilst the Government seems to have accepted the need for a necessity test in its clause 31, and the removal of the word "prejudicial", the Government has omitted the suggestion of referring to the administration of justice. The Government's approach is instead "necessary in the interests of national security".

102. The inclusion of a necessity test is welcome to ensure that any exclusions of the public will have to be properly justified in individual cases. Whilst "necessary" is helpful in limiting the exclusion of the public only to where "necessary", the words "interests of national security" are potentially wide. The exclusion of the public, under clause 31, therefore need not be necessary for the interests of justice—and indeed need not be necessary to ensure national security, only "in the interests of national security". An amendment might help to ensure this clause better complies with the right to a fair trial and the administration of justice.

60 See for example the BBC's evidence to the Law Commission, Law Commission Report, "Protection of Official Data", HC 716, Law Com No. 395, at paragraph 7.52.

61 See for example the evidence from Guardian News and Media to the Law Commission, Law Commission Report, "Protection of Official Data", HC 716, Law Com No. 395, at paragraph 7.56.

62 Law Commission Report, "Protection of Official Data", HC 716, Law Com No. 395. See in particular, paragraphs 7.43 - 7.65.

103. **The principle of open justice is fundamental to the proper administration of justice and the right to a fair trial. We welcome the replacement of section 8(4) OSA 1920 with clause 31, such that the public could only be excluded where this was "necessary in the interests of national security". *The Government should reconsider the need to include a reference to the interests of justice as part of this test. The test in clause 31 might thus be amended to read "necessary for the administration of justice, having regard to the risk to national security".***

4 Criminal Immunity: Offences under Part 2 of the Serious Crime Act 2007

104. Clause 23 amends Schedule 4 to the Serious Crime Act 2007 (extra-territorial application of Part 2) to provide that the extra-territorial application of certain offences of encouraging or assisting the commission of an offence overseas do not apply if the behaviour was necessary for the proper exercise of any function of the intelligence agencies or the armed forces. Granting immunity for crimes can raise concerns about respect for justice, human rights and the rule of law. It should therefore only be done cautiously where there is a compelling case for granting such immunity.

105. The Labour MP and member of the Intelligence and Security Committee (ISC), Maria Eagle, set out in the Second Reading debate the concern that the clause appears to be a "wholesale carve-out" for the intelligence services and armed forces from any liability for assisting or encouraging crime overseas in any activities undertaken abroad. She continued:

> It is in effect an extensive granting of impunity against liability for criminal wrongdoing abroad for those discharging national security functions. It is extraordinarily broad in scope, particularly given the defence in legislation for those discharging national security functions abroad, which protects from liability in certain circumstances.[63]

106. Section 50 of the Serious Crime Act 2007 already provides a defence of acting reasonably. This includes a defence of acting reasonably based on circumstances that the person believed to exist.[64] In considering whether action is reasonable, regard may be given to any authority under which a person was acting, and any purpose for which they were acting.[65] As member of the ISC and former Attorney General, Sir Jeremy Wright, highlighted during the second reading debate, it is not clear what clause 23 of the Bill would add to the defence already available.[66]

107. The Minister for Security, Damian Hinds, justified this clause by explaining that it is possible that intelligence can be shared in good faith and, in accordance with domestic and international law, could still be capable of contributing to an international partner engaging in activity that the UK would not support. He explained:

> Put simply, the Government believe it is not fair to expect the liability for that unforeseen eventuality to sit with an individual officer of our intelligence services or member of the armed forces who is acting with wholly legitimate intentions. Instead, the liability should sit with the UK intelligence community and the military at an institutional level, where they are subject to executive, judicial and parliamentary oversight.[67]

63 National Security Bill - Hansard - UK Parliament Col 600.

64 Section 50(2) Serious Crime Act 2007.

65 Section 50(3) Serious Crime Act 2007.

66 Sir Jeremy Wright, Col 603 National Security Bill - Hansard - UK Parliament, noting that a "defence of acting reasonably is already included in the 2007 Act, and I do not immediately see what the difference is between an argument of acting reasonably and an argument of acting in the proper exercise of someone's function, which is what clause 23 would add … we already have the backstop protection of section 7 of the Intelligence Services Act 1994."

67 Col 636–637. National Security Bill - Hansard - UK Parliament

108. We do not find that this makes the case for further impunity beyond the safeguards already provided by section 50 Serious Crime Act 2007. The Minister has not adequately explained why immunity from criminal prosecution should be granted for unreasonable actions by members of the intelligence communities and the armed forces.

109. The legal practice Birnberg Peirce explain in its evidence its view that the clause appeared to imperil "the need for unambiguous, unavoidable adherence to the rule of law, the need to eradicate any concept of exceptionalism and the need to have transparent enquiry".[68]

110. The NGO Reprieve, in its evidence to the Public Bill Committee list five concerns that clause 23 would:

a) Give Ministers and officials effective criminal immunity for assisting and encouraging crimes abroad like ordering an unlawful targeted killing or providing assistance to a torture interrogation.

b) Destroy the UK's moral authority in condemning crimes like Jamal Khashoggi's murder by Saudi Arabia, or international poisonings by the Russian Government.

c) Thwart accountability for Whitehall involvement in war-on-terror style abuses.

d) Undermine the UK's centuries' old legal prohibition on torture and related abuses.

e) Give Ministers and officials a special carve-out from British justice, placing them above ordinary members of the public.[69]

111. **Any provisions that seem to grant criminal immunity to officials go to the heart of respect for the rule of law, human rights and the fundamentals of justice and fairness. *Given the existing defence of acting reasonably in section 50 Serious Crime Act 2007 (including based on subjective information), we do not consider that the case has been made for clause 23. We recommend the deletion of clause 23.***

68 Birnberg Peirce (NSB0004).

69 Reprieve (NSB01), where Reprieve also set out detailed reasoning behind these 5 concerns

5 Part 2: Prevention and Investigation Measures (Clauses 32–56)

112. Part 2 of the National Security Bill would introduce 'State Threats Prevention and Investigation Measures' (ST-PIMs or just PIMs). These are a set of restrictive measures that the Secretary of State could place on individuals she reasonably believes are, or have been, involved in foreign power threat activity. Failing to comply with the measures imposed would be a criminal offence.

113. The provisions in Part 2 in large part mirror the legislative scheme of Terrorism Prevention and Investigation Measures or 'TPIMs', which can be imposed on those suspected of involvement in terrorist-related activity.[70] The intention behind these measures was that they would be applied to those terror suspects who were believed to pose a significant threat but could not be prosecuted. According to the Explanatory Notes that accompany the Bill, PIMs would similarly represent a "measure of last resort" applicable to those cases that, despite the wide range of new offences introduced by the Bill, "cannot be prosecuted or otherwise disrupted".[71]

114. In brief:

a) Clause 32 grants the Secretary of State the power to impose PIMs and Schedule 4 sets out the wide range of requirements and restrictions that can be included in a PIM. These include a requirement to reside at a specific residence; overnight curfews; exclusion from certain places or buildings; restrictions on travel, work, study, contact with others, use of phones, computers and access to financial services; daily reporting at a police station; and GPS monitoring.

b) Clause 33 sets out the conditions that must be satisfied before the power to impose a PIM can be exercised:

   i) Condition A - the Secretary of State must reasonably believe that the individual is or has been involved in "foreign power threat activity" (as defined in clause 26);

   ii) Condition B - some or all of the relevant activity (on the basis of which the test in condition A is satisfied) must be "new foreign power threat activity" (this has the effect that an individual who has been subject to a PIM for 5 years can only be subject to a further PIM in respect of foreign power threat activity that has taken place since the original PIM was imposed);

   iii) Condition C & D - the Secretary of State must reasonably consider it necessary for purposes connected with protecting the United Kingdom

70 Under the Terrorism Prevention and Investigation Measures Act 2011

71 Explanatory Notes, para 17. See also the Secretary of State at 2nd Reading: "There will be some cases where it will not be possible to bring a prosecution. As is the case with counter-terrorism law, where similar challenges arise, we need a way of protecting our country. New state threat prevention and investigation measures will allow the Home Secretary to impose targeted restrictions, such as where an individual works, lives or studies, to prevent the most serious forms of harm. This is a tool of last resort."

from a risk of acts or threats within clause 26 (i.e. "foreign power threat activity") to impose some measures on the individual AND to impose each individual measure included;[72]

iv) Condition E - the Secretary of State must obtain prior permission from the court or reasonably believe that the PIM is urgent and needs to be imposed without permission.[73]

c) Clause 35 sets out the approach to be taken by the court when considering whether to grant permission - essentially to grant unless the decision is obviously flawed.

d) Clause 38 provides that the court must review the Secretary of State's decision that the conditions required to impose a PIM were, and continue to be, satisfied (applying judicial review principles).

e) Clause 34 provides that a PIM lasts for one year but can be renewed for further one year periods up to a total duration of 5 years.

115. Conditions A, B, C and D focus on "foreign power threat activity" as defined in clause 26. As noted above in respect of clause 21, this is defined broadly, so as to include some behaviour that may not currently even justify arrest. It must also be highly questionable, therefore, whether a reasonable belief that such behaviour has taken place, and that measures are needed to prevent it happening in future, could justify the imposition of potentially long-lasting, highly restrictive measures on an individual.

116. Whilst the measures that would be introduced by the Bill are called "Prevention and Investigation Measures", the "investigation" element appears extremely limited. Clause 39 would require the Secretary of State to consult with the appropriate chief officer of police regarding whether a prosecution is possible before imposing a PIM, and for the police to "keep under review" the investigation of the individual's conduct, with a view to their prosecution, for the duration of the PIM. The Bill would place no obligation on the Secretary of State to take or refrain from any particular action after consulting with the police. Neither does it specify any duty on the police to take action beyond keeping investigation under review.

117. **Given the intention that these measures should be used in "cases that cannot be prosecuted or otherwise disrupted", a requirement that the Secretary of State confirms with the police that prosecution is not realistic or feasible before a PIM is imposed would appear to be consistent with the policy justification.** ***We recommend that the Bill is amended to include such a provision.***

Article 6 ECHR–right to a fair trial–and access to justice

118. The requirement for courts to review any PIM imposed ensures that individuals receive the protection of judicial oversight. As with TPIMs, however, given the confidential nature of much of the evidence involved challenging a PIMs measure will often involve

72 Under clause 40, the Secretary of State must keep under review whether these tests of necessity continue to be met for the duration of the PIM.

73 Where permission is not obtained in advance due to urgency the Secretary of State must immediately refer the case to the court after the imposition of measures on the individual. The court must begin consideration of the case within seven days of the subject being notified of the PIM (see Clause 36 and Schedule 5).

the use of closed proceedings (for which the Bill provides).[74] These are proceedings in which material will be considered by the court without the individual affected by the PIM, and his or her legal team, being permitted to take part. The individual's interests will be presented by independent special advocates, who are permitted to go behind the curtain of secrecy. Those advocates are not, however, permitted to disclose any of the material to the individual, or even to meet the individual and take instructions once they have seen that material (subject to very narrow exceptions). In such proceedings, therefore, it will be difficult for an individual to know or understand the case against them, let alone to challenge it meaningfully. As the courts have frequently recognised, "a closed material procedure involves derogations from two fundamental procedural principles: natural justice and open justice".[75] It also obviously raises substantial concerns regarding compliance with the right to a fair trial, guaranteed by Article 6 ECHR (as well as procedural guarantees within Article 5 and Article 8 ECHR).

119. In the context of proceedings concerning control orders and subsequently TPIMs, the courts have protected the right to a fair trial, using the power available to them under section 3 HRA, by reading down the relevant legislation in a manner that is compatible with the Convention. The National Security Bill reflects this read down in Schedule 7 by stating that the provisions concerning how PIMs proceedings are conducted do not require the courts to do anything that would be incompatible with Article 6 ECHR. The schedule also specifies that if the court does not grant permission for material to be withheld from the PIM subject, the court can prevent the Government relying on it. Schedule 7 appears to do enough to prevent closed proceedings violating Article 6 and other procedural guarantees under the ECHR.[76]

120. Access to justice, itself protected by Article 6 ECHR, is also hindered, however, by difficulties in obtaining legal aid faced by individuals subject to these measures. This has been raised in respect of TPIMs in successive reports by the Independent Reviewer of Terrorism Legislation, who has concluded that the failure to ensure that legal aid is available to all individuals on whom a TPIM is imposed "undermines the statutory regime as a whole".[77] The Bill would repeat for PIMs the approach to legal aid taken with TPIMs. This risks exposing PIM subjects to the same issues with accessing justice that have been highlighted by the Independent Reviewer of Terrorism Legislation. Engaging with any PIM proceedings without legal representation would be extremely challenging for any individual, but particularly difficult for individuals who may be ostracised from society as a result of the measures imposed or the stigma attached to them and for individuals who suffer from mental health issues. More pragmatically, it can be easier (and less time-consuming) for the authorities to deal with a solicitor rather than an individual, in managing any review. As such, ensuring legal aid is available for all matters relating to PIMs (subject only to means) makes sense for practical as well as for principled reasons.

74 The Bill allows the Secretary of State to apply to the court (without the knowledge of the individual affected) for permission not to disclose certain material. The court must grant permission if it considers that the disclosure would be contrary to the public interest (but must also consider requiring the Secretary of State to provide the individual affected with a 'gist' of the contents of the material).

75 Secretary of State for the Home Department v TL [2022] EWHC 825 (Admin) at para 9

76 The European Court of Human Rights has considered and accepted the use of closed material procedures, albeit with reservations, on a number of occasions. See, for example, A v United Kingdom (2009) 49 E.H.R.R. 29 and In IR and GT v United Kingdom (14876/12 and 63339/12) 28 January 2014

77 See paragraph 8.30 of the Independent Review of Terrorism Legislation's Report, The Terrorism Acts in 2020. See also paragraphs 8.62–8.70 of his earlier Report, The Terrorism Acts in 2019.

121. **The use of closed proceedings in the review of Prevention and Investigation Measures (PIMs) raises concerns in respect of Article 6 ECHR, the right to a fair trial. However, the Bill provides for material to be disclosed, or not relied upon, if keeping it from the subject of the PIM would result in impermissible unfairness. This should be enough to ensure compliance with Article 6, as long as adequate legal aid is made available to the subjects of PIMs. *To ensure that legal aid is available to a subject of a PIM in any legal proceedings concerning the Prevention and Investigation Measures, an Order should be made under section 11(6) Legal Aid, Sentencing and Punishment of Offenders Act 2012, exempting PIMs proceedings from the criteria in that section.***

Other Convention rights

122. There are well-known concerns regarding the significant impact that TPIMs can have on an individual's liberty, family life and well-being, engaging a wide range of human rights. PIMs would be likely to have much the same impact and raise the same concerns.

Article 8–right to respect for private and family life

123. Most obviously, many of the measures that could be imposed under a PIM will involve significant interference with the right to respect for private and family life guaranteed by Article 8 ECHR. As the Government's ECHR Memorandum acknowledges, measures providing for restrictions on movement, communications and association and measures requiring monitoring and reporting will all engage Article 8. Control orders and TPIMs have shown that where the subject is required to live under extremely strict conditions, and particularly if they are required to reside somewhere away from where their family are currently located, this can result in social isolation and even families being separated.[78] Plainly, such a separation will impact on the Article 8 rights not only of the subject but also his or her family members. Their Article 8 rights can also be seriously infringed as a result of the alternative to familial separation—being forced to live in a household subject to onerous restrictions and monitoring by the state.

124. Under the HRA the courts will be obliged to take into account the Article 8 rights of those affected by PIMs and to assess whether measures go further than is necessary and proportionate in the interests of national security, public safety, the prevention of crime or the protection of the rights and freedoms of others. Measures found to violate Article 8 will not be upheld. The courts will, however, show significant deference to the national security assessments presented on behalf of the Secretary of State. Furthermore, the court's ability to hold public authorities to their obligations under Article 8 ECHR may be weakened if the Bill of Rights Bill, as introduced, becomes law.[79]

125. **Restrictions and obligations imposed under Prevention and Investigation Measures (PIMs) are likely to engage the right to private and family life under Article 8 ECHR. Article 8 issues will need to be raised in court proceedings where PIMs are reviewed. Given the likelihood of material being considered in closed proceedings,**

78 The Bill would allow for residence requirements at locations up to 200 miles from where the individual is currently living (anything further would require the individual's consent).

79 For example, the Bill of Rights Bill would repeal the obligation on public authorities, including the courts, to read legislation compatibly with Convention rights. Furthermore, clause 7 of the Bill of Rights Bill would alter the approach taken by the courts to deciding whether a public authority has acted in a way which is incompatible with a Convention right, requiring them to give greater weight to the principle that striking a balance between Convention rights and policy aims is a matter for Parliament.

hampering the ability of the individual subject to the PIM to challenge it, it is vitally important that national security assessments are carefully and accurately produced and that closed advocates are given the time and resource needed to represent the individual's interests effectively.

Article 5–right to liberty and security

126. Specific concerns regarding the right to liberty, guaranteed by Article 5 ECHR, arise from the imposition of curfew measures. It has been established over many years of litigation, arising from control orders and TPIMs, that requiring a person to remain in their home for more than 16 hours per day is likely to amount to a deprivation of liberty under Article 5. Furthermore, curfews that last 16 hours or less could still engage Article 5 when they are coupled with other restrictive measures, particularly those causing social isolation.[80]

127. The ECHR memorandum that accompanies the Bill recognises the potential for Article 5 to be violated by a PIM, but states that there are protections in place to prevent this happening—specifically the obligation on the Secretary of State to act compatibly with Convention rights, including Article 5. This obligation, imposed by section 6 of the Human Rights Act 1998, also applies to the courts. This means that the judicial review process built into the Bill should serve as a protection against unjustified deprivations of liberty. Such protection depends, however, on the Human Rights Act 1998, which, under the Bill of Rights as introduced will be repealed and replaced. While the Bill of Rights Bill as introduced would retain an obligation on public authorities to act compatibly with Convention rights, it nevertheless threatens to weaken the court's ability to hold public authorities to that obligation.[81]

128. **A more effective protection against interference with Article 5 rights would be to include within the National Security Bill a strict limit on the number of hours for which a subject of Prevention and Investigation Measures could be required to remain in their residence: for example, 14 hours per day. *The Government should consider amending the Bill to include such a limit.***

The role of the independent Reviewer

129. Clause 49 establishes an independent reviewer in relation to PIMs under Part 2.[82] Whilst this is a welcome additional safeguard, it is unclear why their role should be restricted to Part 2. As set out above, there are also significant concerns about how powers under Part 1 will be exercised. The role of the Independent Reviewer of Terrorism Legislation, a very similar position, extends well beyond TPIMs, covering a wide range of terrorism legislation. As with terrorism legislation an independent reviewer covering all of the National Security Bill would serve a key role in ensuring adequate oversight of

80 See Secretary of State for the Home Department v AP [2010] UKSC 24

81 For example, the Bill of Rights Bill would repeal the obligation on public authorities, including the courts, to read legislation compatibly with Convention rights. Furthermore, clause 3 of the Bill of Rights Bill would alter the approach taken by the courts to interpreting Convention rights, potentially leading to a protection gap between domestic and Strasbourg case law.

82 The Chair of the Joint Committee on National Security Strategy, Rt Hon Dame Margaret Beckett MP, called for such a Reviewer in her letter of 2 December to the Security Minister, Damian Hinds.

the use of the powers the Bill contains. Indeed, the independent reviewer's role could be extended to cover other core national security legislation, such as the Official Secrets Act 1989.

130. **We welcome the inclusion of an independent reviewer of the Prevention and Investigation Measures regime under Clause 49 of the Bill. However, this role should be extended to cover other parts of the Bill and other core national security legislation in the same way that the Independent Reviewer of Terrorism Legislation has a remit wider than just the Terrorism Prevention and Investigation Measures regime.** ***We recommend that the Independent Reviewer's role be extended to cover Parts 1 and 2 of the National Security Bill. The Government should review whether the Independent Reviewer could also cover other core national security legislation.***

6 Part 3: Persons Connected with Terrorism: Damages and Legal Aid

131. The provisions of Part 3 of the National Security Bill would make changes restricting both the award of damages (i.e. financial remedies in legal proceedings) in respect of those who have been involved in terrorist activity and the grant of legal aid to those with a terrorism-related conviction. The Explanatory Notes explain that this part of the Bill "prevents the exploitation of the UK's civil legal aid and civil damage systems by convicted terrorists. This will prevent public funds from being given to those who could use it to support terror".[83] These proposed changes raise significant human rights concerns.

Duty on a court to consider reducing damages in national security proceedings

132. Clauses 57–59 would require a judge to consider reducing damages in "national security proceedings". These are defined in Clause 57 as all proceedings relating to national security brought against the Crown (i.e. in civil and administrative cases against the state), excluding proceedings brought under section 7(1)(a) HRA.[84] Clause 58 specifies that in such cases brought against the Crown, the Court, in deciding any remedy, must consider to what extent the claimant has committed any wrongdoing involving terrorism-related activity and the extent to which the harm suffered was linked to that wrongdoing. The court must also take into account whether, and the extent to which, the Crown's culpable conduct sought to reduce a risk of harm and any limitation on the Crown's ability to prevent the conduct taking place. The court must then decide, in light of such considerations, whether to reduce damages as a result. The Explanatory Notes expressly acknowledge that a reduction could extend to withholding damages altogether. While the provision does not dictate that courts must reduce damages if satisfied that the relevant factors apply, the clear intention behind the legislation is that they should do so.

133. It is important to recognise, in this regard, that reductions in damages can only ever apply where the court has already found in favour of the claimant—i.e. found that the Crown has acted unlawfully and that the claimant was a victim of that unlawful conduct. Thus, by introducing clauses 57–59 the Government is effectively legislating to reduce its own liability in damages when a court finds it has acted unlawfully.

134. While the clauses could affect damages awards made in favour of individuals with a conviction for a "terrorism offence", this is defined broadly and would include some more minor offending, as well as offences one might not consider to amount to terrorist activity. For example, a "terrorism offence" would include an offence of failing to disclose a suspicion, gained in the course of business or employment, that another person is fundraising or money laundering for terrorist purposes.[85] It would also include a breach of a TPIM, such as a failure to return home within the hours of a curfew or withdrawing

83 Explanatory Notes, para 8

84 Clause 57 goes on to explain that proceedings will relate to national security whenever any party makes submissions or presents evidence relating to national security (including the activities of the intelligence services and the investigation of terrorism).

85 Under section 19, Terrorism Act 2000 (which is an offence listed in Schedule A1 to the Sentencing Code)

more cash than the TPIM condition permits.[86] Significantly, the courts are also invited to take into account "involvement in terrorism-related activity", which can be non-criminal in nature and includes conduct which gives encouragement to the commission or preparation of acts of terrorism.

135. The NGO, Reprieve, set out the potential effect of these clauses in its written evidence to the Public Bill Committee:

> Clauses 57–60 would limit the rights of victims of torture or other crimes to seek redress for any UK role in their treatment on the basis of so-called 'national security factors', which could be used to reduce or refuse the awarding of damages in civil claims. The effect of the clauses would be to enable Ministers to excuse complicity in abuse and evade paying damages, for example by claiming that in getting mixed up in torture the UK was seeking to "prevent or limit" some other risk of harm. This would in turn limit victims' ability to seek legal redress for the harms suffered.[87]

Impact on human rights claims

136. Damages in human rights claims have in some respects been protected against this potential reduction under the Bill. It is important to note, in this regard, however, that the Bill of Rights Bill as introduced proposes similar changes in human rights claims - inviting the courts to take into account the past conduct of a human rights claimant, and anything done by a public authority to avoid acting incompatibly with a Convention right, before awarding damages. In any event, while the exclusion of section 7(1)(a) HRA from the effect of clause 58 of the Bill might be intended to exempt human rights cases, the reality is that many human rights issues will emerge in cases that fall under section 7(1)(b) HRA (i.e. proceedings brought on other grounds in which a human rights matter arises). This is because it is common to have a human rights issue arising in the context of other proceedings (e.g. an action in tort or under another claim). Merely excluding purely human rights proceedings therefore does not adequately allow for fair damages to be obtained in human rights cases.

137. Clause 58(4) similarly intends to protect human rights claims, by excluding damages awarded under section 8 HRA from the effect of any reduction, but is likely to be less effective than it might first appear. The Government's recent communications (including in the consultation on a potential Bill of Rights) have emphasised the desirability of cases concerning human rights issues being brought on grounds other than under the HRA. This is already often the case, as Reprieve explained in its evidence to the Public Bill Committee:

> While some claims for redress are brought under the HRA, most survivors of torture seek redress through ordinary civil claims relating to harms under

86 Under section 23, Terrorism Prevention and Investigation Measures Act 2011 (listed under Schedule A1 to the Sentencing Code)

87 Reprieve (NSB01), where they set out further detail for their concerns in relation to clauses 57–60.

> the UK's civil law. Clauses 57–60 would potentially enable Government to evade paying any and all damages for UK complicity in torture brought under UK tort law.[88]

138. **It is important that remedies for human rights violations are not reduced by the courts, simply because they have been identified through claims brought otherwise than under the HRA.** ***The Bill should be amended to ensure that all damages awarded for what amount to human rights violations are exempted from the restrictions on damages in clauses 57–59.***

Equality before the law

139. By introducing the reduction of damages based on involvement in terrorism or terrorism-related activity, clauses 57–59 appear to accept the principle that certain individuals are less deserving of the protection of justice because of their past conduct. This is hard to reconcile with the principles of equality before the law and the universality of human rights.

140. Furthermore, clause 58(2) goes further than appears to be the intention, as in principle it allows the court to reduce damages even where the claimant is not found to have had any involvement in terrorism. This is because the requirement that the claimant has committed wrongdoing involving terrorism does not expressly need to be satisfied in order for a reduction in damages to be applied. This appears inconsistent with the Government's intention, stated in the Explanatory Notes, to deal with claimants who are involved in relevant wrongdoing of a terrorist nature.[89]

Other practical implications

141. In its evidence to us, the law firm Birnberg Peirce noted that reducing the damages likely to be obtained by individuals who have committed terrorist offences could prevent those individuals obtaining legal aid for their claims:

> The effect of clauses 57–50 is to reduce damages in these claims, potentially to zero. In these circumstances, the LAA will be unable to fund these claims because the Claimants' legal costs are likely to exceed any award of damages. Therefore, the Claimants will fail the cost benefit and proportionately tests. Even if the Claimants were in a position to fund litigation privately or enter into a conditional fee agreement with their solicitors, they would be unlikely to recover their full legal costs if successful at the detailed assessment stage.[90]

142. As a result, important claims might never be brought. To take an example provided by Birnberg Peirce, the availability of such damages enabled litigation to be brought by Guantanamo detainees and Libyan nationals who had been subjected to rendition and torture. This litigation "uncovered a pattern of unlawful behaviour by the Security Services" and thus "served an important constitutional and political purpose".[91]

88 Reprieve (NSB01). Most obviously, a claim for torture might be brought as a claim in tort for assault and/or false imprisonment and/or misfeasance in public office, rather than as a claim under the HRA for breach of Article 3 ECHR.

89 Explanatory Notes, Para 20

90 Birnberg Peirce (NSB0005).

91 Birnberg Peirce (NSB0005).

143. The Law Society's evidence to us highlights the difficulties of there being no minimum threshold of involvement for invoking clause 58, as well as a risk of creating a conflict of interest. As they set out: "in practice, these clauses mean that if a person sues the state for harm caused in a case that has, at any stage or any time, involved evidence related to the intelligence services or is related to national security, their damages could be reduced. There is no minimum threshold of involvement for invoking this provision. This could create a perverse scenario in which the state itself is able to make submissions about national security of limited significance to the case that would then bring the clause into effect".[92]

144. The Law Society suggests that damages should not be reduced unless "an evidence threshold [has been] met, demonstrating that any damages will be used for terrorism … ". We agree. We also agree with their proposal that even in these circumstances, where the Government has acted unlawfully "it should still face consequences for its actions, with the funds instead going to a charitable or voluntary cause, potentially one supporting the victims of terrorism".[93]

145. **Damages should not be reduced based simply on factors identifying the claimant as unworthy of compensation or excusing the Government for actions that have been found to be unlawful.** ***Before any reduction in damages should be made in the widely defined "national security proceedings", the defendant should be required to satisfy the court that the damages are likely to be used for terrorist purposes. Furthermore, to avoid the defendant being able to avoid legal consequences for its unlawful conduct, the Government should explore whether any amount by which damages are reduced could be paid to an appropriate charitable cause, such as a charity supporting the victims of terrorism.***

Seizure and forfeiture of damages

146. Clause 61 and Schedule 10 provide that damages found to be at "real risk" of being used for the purposes of terrorism may be seized (for a period of two years, renewable once) and after that may be forfeited. This would apply to damages awarded in any legal claim–not just those with a connection to terrorism or terrorism-related activity. Plainly preventing the funding of terrorism is a crucial aim in the protection of national security and public safety, but the seizure and particularly forfeiture of damages awarded by a Court is an extreme measure and requires careful justification, particularly since it has the potential to undermine effective enforcement of human rights and to interfere with the ECHR rights to an effective remedy under Article 13 ECHR and to respect for property under Article 1 Protocol 1 ECHR.

147. The Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, has concluded that "the forfeiture measure goes further than necessary to deal with terrorist risk".[94] The proposal would add to the existing freezing and forfeiture regime in Part 1 of and Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which already allows for the forfeiture of any monies intended to be used for the purposes of terrorism. If the concern behind the proposal in clause 61 is that the current regime does not allow for immediate applications to prevent damages awards being "spirited away" as

92 The Law Society of England and Wales (NSB0002).
93 The Law Society of England and Wales, (NSB0002).
94 The Independent Reviewer of Terrorism: Note on Terrorism Clauses in the National Security Bill, 23 May 2022

soon as they are awarded, we agree with Jonathan Hall QC that extending the existing forfeiture regime so that applications can be made within other proceedings would appear to be sufficient. It is not clear why a new process, with a significantly lower threshold, requiring only a "real risk" of funds being used for terrorism rather than that the funds are "intended to be used" for terrorism, is necessary. As Jonathan Hall QC points out "[g]iven that there is no greater operational risk from court-awarded damages than other monies such as lottery wins, it must be asked why a further regime is required".[95] This is particularly questionable when the Bill also seeks to introduce the requirement proposed in clauses 57–59 for a court to consider reducing damages.

148. One possibility is that the proposal would operate as a disincentive against claims being brought in the first place. Whether or not this is the intention behind the measure, such an effect is likely, and again gives rise to concerns about reducing the accountability of the state for unlawful action, including action violating human rights.

149. Given how low the threshold is for justifying seizure and ultimately forfeiture and given how much deference is understandably shown to the State in the assessment of terrorist risk, it is likely to be extremely difficult for any claimant to resist an application made against them under clause 61.[96]

150. A further concern raised by both the Law Society and the Independent Reviewer of Terrorism Legislation is that forfeited damages are paid to the Government's Consolidated Fund. This could give the impression of a conflict of interest since the Government itself would appear to be benefiting financially from taking action under clause 61 against individuals.

151. **The need for a new regime to allow for damages awarded in legal proceedings to be seized and ultimately forfeited on the basis of a real risk that they will be used for terrorist purposes has not been made out. To prevent damages awards being spirited away for terrorist purposes, the existing freezing and forfeiture regime could be extended so that applications can be made to the court dealing with the damages award.**

Limiting access to civil legal aid

152. Clauses 62–63 would place limits on an individual convicted of a terrorism-related offence from being able to access civil legal aid for a period of 30 years (15 years in respect of a person whose offences relate to when they were a child).[97] We agree with the Law Society which stated in its evidence to us that, "[i]t is fundamental to the rule of law that our justice system rests on the clear principle that every judgment relies on the merits of the case brought before the court. We should not automatically be excluding people from legal advice and support because of unrelated convictions. To do so will diminish access to justice in our country and could affect the objectivity of our legal system".[98]

95 Ibid

96 As Jonathan Hall QC puts it: "Assessment of terrorist risk is not only imprecise, but it is quintessentially a matter for the authorities in the light of considerations of national security and public safety, on which a Court will accord the authorities appropriate respect for reasons of institutional competence and democratic accountability." The Independent Reviewer of Terrorism: Note on Terrorism Clauses in the National Security Bill, 23 May 2022

97 The bar on civil legal aid would not apply to children under the age of 18 when applying for legal aid.

98 The Law Society of England and Wales (NSB0002).

153. The cohort that would be affected by clauses 62–63 is likely to be significantly wider than those convicted of serious terrorist offences. "Terrorism offence" is defined broadly, catching some more minor and historic offending, as well as what might not be considered to be terrorist activity at all.[99] It would include an offence of failing to disclose a suspicion, gained in the course of business or employment, that another person is fundraising or money laundering for terrorist purposes.[100] Furthermore, since it covers any conviction, it could also affect individuals given less severe sentences such as a referral order.[101] As the Law Society note, it could also bar from accessing civil legal aid individuals convicted of an offence that has since been abolished.[102]

Access to justice

154. A lack of availability of legal aid can impede the right of access to justice and the effective enforcement of basic human rights. The Law Society highlighted in its evidence to us that automatically excluding people from legal advice and support because of unrelated convictions "diminishes access to justice… and could affect the objectivity of our legal system". They give the example of a person fleeing from domestic abuse who is prevented from accessing an injunction against their abuser, and protection for their human rights, because of a twenty-year old conviction for a terrorist offence.[103]

155. Evidence from the Association of Prison Lawyers highlighted particular concerns of the impact of these measures on access to justice for prisoners:

> Ensuring that all individuals have the ability to obtain legal advice and assistance is fundamental in a fair and just society. The availability of legal aid is vital to ensuring access to justice for all. Equal access to justice for everyone, including people in prison no matter what their offence, is essential to maintain the rule of law, and the true test of a democratic society.[104]

156. As member of the ISC and former Attorney General, Sir Jeremy Wright, set out during the Second Reading debate:

> […] I do not think we have ever before contemplated determining someone's eligibility for civil legal aid based on previous criminal behaviour. Prisoners serving sentences, let alone those whose sentences have been served, do not lose all their rights in our society. It is the criminal justice system that exists

99 For example, a person placed on a TPIM, who may well have no convictions at all, could lose their right to access legal aid as a result of a conviction for a minor breach of the measures imposed on them - such as straying into an area they are prohibited from entering, returning home a few minutes after their curfew or withdrawing more cash from the bank than the limit that has been applied to them. As Birnberg Peirce note, NSB0005 "Individuals subject to TPIMs or TEOs must comply with obligations such as reporting to a police station, attendance at rehabilitation programmes or mentoring, relocation, curfew, and can be prohibited from possessing phones or internet-enabled devices. Both measures intentionally have a low standard of proof… We have seen individuals convicted because they failed to declare an electronic device, because they walked down the wrong street, and because they failed to telephone the police station at the specified time. None of these actions are in themselves reflective of terrorist activity or intent, but convictions which flow from them would attract, under the National Security Bill, an extreme exclusion from the right to civil legal aid…"

100 Section 19, Terrorism Act 2000

101 A community sentence available in respect of offenders aged 10–17 - see this Gov.uk Fact Sheet

102 The Law Society of England and Wales (NSB0002), para 13

103 The Law Society of England and Wales (NSB0002), paras 11–12

104 Association of Prison Lawyers (NSB0004), who set out detailed reasons of principle for opposing clause 62.

> to reflect our collective disapproval of and sanction for criminal behaviour. The civil justice system is not set up to do so—certainly not in perpetuity thereafter.[105]

Other human rights at risk

157. The Association of Prison Lawyers and Birnberg Peirce both set out their view that the proposals in clauses 62–63 were inconsistent with a number of ECHR rights, including the right to a fair trial under Article 6, the prohibition on discrimination under Article 14 and the right to an effective remedy under Article 13. Birnberg Peirce also raised compliance with Article 7 ECHR, which guarantees against retrospective criminal penalties: "[t]his measure applies to any individual who was sentenced to a terrorist offence after 2001 and therefore has retrospective effect on the individual who at the time of the offence would not have any knowledge or foresight of the measure".[106]

158. In respect of discrimination, clause 62 would expressly result in terrorist offenders being treated less favourably than other offenders. Such a difference in treatment could potentially be justified in the public interest.[107] However, as highlighted to us by the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, this proposal is not intended to reduce the risk of terrorism. Neither is it intended to obtain a significant saving for the legal aid fund. The Government's own ECHR memorandum acknowledges that the aim of the measure is "symbolic", to reflect "the significance of the bonds with the State and society that are broken by the commission of terrorist offences".[108] It is extremely troubling that such a fundamental measure is being proposed for essentially symbolic reasons, and it is hard to see how a potentially significant difference in treatment can be justified on this basis. Furthermore, as Jonathan Hall QC notes, "[e]ven symbolic restrictions may have practical consequences. No released terrorist offender is going to reoffend merely because their access to civil legal aid is restricted. But legal advice and assistance is relevant to securing help on housing, debt and mental health. A homeless terrorist offender, or one whose mental health needs are unaddressed, will present a higher risk to the public. There is a risk of unintended consequences".[109]

Practical implications

159. Clauses 62–63 do indeed have some unfortunate practical implications. Those effectively punished by this provision will include historic offenders who may be ostracised for up to 30 years after an offence, with consequent impacts on successful rehabilitation and resettlement.[110] This seems likely to be highly counter-productive. As Jonathan Hall QC points out: "[f]rom the public's point of view, reintegration is the best counter-terrorist outcome. A terrorist offender who goes back into society and lives quietly presents a rosier prospect than one who needs perpetual monitoring".[111]

105 National Security Bill - Hansard - UK Parliament Col 603
106 Birnberg Peirce (NSB0005).
107 Under Article 14 ECHR, differences in treatment may be justified if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see Molla Sali v. Greece [GC], 2018, § 135)
108 ECHR Memorandum, para 94
109 The Independent Reviewer of Terrorism: Note on Terrorism Clauses in the National Security Bill, 23 May 2022
110 See, for example, Birnberg Peirce (NSB0005).
111 Independent Reviewer of Terrorism Legislation, "Note on Terrorism Clauses in the National Security Bill", 23 May 2022

160. A further practical issue highlighted by the Law Society is that "[t]his measure will likely create large volumes of bureaucracy for the Legal Aid Agency, as it will have to confirm whether every applicant for civil legal aid has a previous conviction for terrorism. This may significantly increase the costs to the public purse, while it is unclear how this measure would contribute to public security and safety".[112]

Exceptional case funding

161. Clauses 62–63 do contemplate a lesser form of legal aid, Exceptional Case Funding (ECF), being available for human rights claims brought by persons with convictions for terrorist offences. The Law Society describe ECF as "a very bureaucratic process" which "puts in place a significant obstacle to access to justice given the extra work and uncertainty [its use] will create". It explains that: "[e]ven if a person is detained under the Mental Health Act or seeking an urgent injunction from a violent partner, they will have to apply for ECF. There is no emergency process for ECF applications. Solicitors are unable to grant exceptional funding themselves, and all applications for ECF must be sent to the Legal Aid Agency. The Legal Aid Agency's target time for responding to an initial application is 25 working days. The target time for responding to an urgent application is ten working days". It adds that "[i]f ECF was refused by the LAA, there would not be automatic access to legal aid to challenge the refusal through judicial review". The Law Society concludes that it "does not believe that relying on access to Exceptional Case Funding (ECF) is sufficient to ensure adequate access to justice".[113]

162. The Association of Prisoner Lawyers are also highly critical of ECF, setting out examples as to why ECF funding would be insufficient to fill the gap created by clause 62:

> The reliance on 'ECF' funding is not sufficient to ensure access to justice. As set out above, many of the Judicial Review cases bought on behalf of Terrorist Act prisoners are based on challenges on public law principles or principles of common law fairness and would not be covered by 'ECF' funding[…] Whilst segregation engages Article 8 ECHR and therefore decisions in relation to it may be covered by 'ECF', often those challenges are taken (and succeed) on common law fairness principles such as Bourgass and Hussain v Secretary of State for Justice [2015] UKSC 54 which was a Judicial Review of prolonged segregation/solitary confinement for 6 months[…] Even if cases are potentially covered by 'ECF' because they engage Human Rights issues, the threshold for demonstrating why it is necessary to receive legal representation is a high one and this funding is, by definition, awarded exceptionally[…]The current on-line system of applying for 'ECF' is not available to prisoners and so we are unsure how prisoners are meant to exercise this right.[114]

163. The Joint Committee on Human Rights has previously criticised the ECF system for failing to guarantee that legal funding will be available whenever Article 6 requires it.[115] More recently, significant problems with ECF were noted in a report from the Justice

112 The Law society of England and Wales (NSB0002).
113 The Law Society of England and Wales (NSB0002).
114 Association of Prison Lawyers (NSB0004)
115 Joint Committee on Human Rights, First report of Session 2014–15, *Legal aid: children and the residence test,* HC 234, HL Paper 14

Select Committee, which called for reform of the system.[116] The Government responded to this report by stating that they were making changes, including simplifying the guidance for Exceptional Case Funding.[117] Without more significant reform, we are concerned that ECF is not an adequate safeguard to ensure compliance with basic standards and basic rights.

164. **In the absence of significant reform to the system of Exceptional Case Funding, it is likely that the provisions of the Bill removing legal aid for terrorist offenders will impede access to justice and the enforcement of basic human rights. There is also potential for them to be counterproductive in respect of reducing terrorist offending. These provisions have been proposed for symbolic reasons, and as such, the Government has not provided sufficient justification for the impact they will have. *Clauses 62 and 63 should be removed from the Bill in the interests of access to justice and the effective enforcement of human rights.***

116 Justice Committee, Third report of Session 2021–22, The Future of Legal Aid, HC 70

117 Justice Committee, Fourth Special Report of Session 2021–22, The Future of Legal Aid: Government Response to the Committee's Third Report, HC 843

7 Other Matters Arising

Foreign Influence Registration Scheme

165. The Government has recently, during its Committee stage in the Commons, tabled a suite of new clauses to be added to the Bill that would introduce a foreign influence registration scheme. This scheme would require the registration of foreign influence arrangements and political influence activities and would introduce a number of criminal offences for failing to register or acting without registration. We recognise the need to prevent illegitimate foreign interference in our democratic processes. We have not yet, however, seen the Government's analysis of the human rights implications of the proposals. Nor do we expect to see this until the Bill is introduced in the House of Lords, which is disappointing. Particular consideration will need to be given to the extent to which the proposed scheme will impact on the activities, and Article 10 and 11 rights, of legitimate campaigning groups. We note reports that registration requirements for NGOs in receipt of funding from foreign sources have been used in Russia and in Hungary to stifle voices critical of Government.[118] We will scrutinise the proposals and may make further recommendations at a later date.

166. **It is important that Parliament is given sufficient time to consider any foreign influence registration scheme; it is unfortunate that these clauses were not in the Bill as introduced. Any foreign influence registration scheme must contain adequate protections to ensure that it does not interfere unduly with democratic rights, including freedom of association and free speech.**

Compatibility of OSA 1989 with Article 10 ECHR & the absence of a public interest defence.

167. The OSA 1989 contains offences relating to the disclosure of protected information. The Law Commission raised concerns that OSA 1989 may not be compatible with human rights. OSA 1989 is also largely unenforceable. As Sir Jeremy Wright set out during the Second Reading debate, in order to take action under OSA one needs to show evidence of damage caused by the disclosure, and yet "that evidence of that damage is often impossible to present without causing more damage. That makes it counterproductive to prosecute such cases at all".[119]

168. The Law Commission had concerns about the compatibility of OSA 1989 with Article 6 ECHR in cases where a person would be prevented from seeking legal advice where that would risk further disclosure of protected information. The Law Commission recommended that disclosure should be permitted for the purpose of seeking legal advice subject to the lawyer being a qualified lawyer subject to professional obligations and to having the requisite security clearance and assurances in respect of their systems and premises.

118 For example "Russia extends 'foreign agents' law to critics of military and security", The Guardian, 1 October 2021 and "Hungary's scrapping of NGO law insufficient to protect civil society", Human Rights Watch, 23 April 2021

119 National Security Bill - Hansard - UK Parliament, Col 602.

169. In relation to freedom of expression, protected under Article 10 ECHR, the Law Commission considered that not every prosecution under OSA 1989 would be clearly compatible with Article 10 ECHR. The Law Commission suggested a number of measures to rectify the current position, including:

a) the creation of a statutory public interest defence for civilians (including journalists) to rely upon in court in respect of disclosures.

b) an independent commissioner to receive and investigate complaints, from public servants, of serious wrongdoing where disclosures would otherwise constitute a breach of OSA 1989.

c) a residual public interest defence for public servants, which can be relied upon in court.

170. Moreover, at present, it can be up to individual juries to try to make sense of the law, rather than the balance being struck by Parliament through legislation. As Sir Robert Buckland, the former Lord Chancellor and currently Secretary of State for Wales, set out during the Second Reading debate:

> Currently, we have no mechanism that allows us as legislators or, indeed, us as a country to strike a reasonable balance between the importance of secrecy and the importance of accountability, while ensuring that those such as Julian Assange who dump data in a way that has no regard for the safety of operatives and other affected people are still subject to criminal sanction.[120]

171. The News Media Association made a clear case for a public interest defence:

> In light of the offences that can be committed under the Bill by persons with no involvement in terrorism or espionage we consider that the introduction of a simple and broad public interest defence to these charges and any under the 1989 Act is an essential safeguard. Such a defence enhances public accountability; it enables matters of public interest to be scrutinised and debated and allows malpractice to be exposed and addressed. The defence must be available to all. Neither whistle-blower nor journalist should be at risk of prosecution for revealing wrongdoing or other matters of public interest.[121]

172. **We are concerned that the Official Secrets Act 1989 may be incompatible with Convention rights, including the freedom of expression and the right to a fair trial. We consider that the Government should take action to address these concerns as soon as possible. There seems to be a certain level of consensus that a whistleblowing or public interest defence is needed—and that such a defence should not catch data dumps but should be available for genuine cases of whistleblowing. The Government should set out its timetable for addressing these concerns given the potential of this legislation to negatively impact on free speech.**

120 National Security Bill - Hansard - UK Parliament Col 608
121 The News Media Association (NSB0003)

Compatibility of OSA 1989 with Convention rights and section 3 HRA

173. The Law Commission identified a number of ways in which the Official Secret Acts were incompatible (or potentially incompatible) with ECHR rights—in particular Articles 6 and 10 ECHR protecting the right to a fair trial and freedom of expression respectively.

174. Some of these incompatibilities have been remedied by the use of section 3 HRA which requires legislation to be read compatibly with Convention rights so far as it is possible to do so. However, if the Bill of Rights as introduced is passed, the HRA will be repealed, and with it this requirement in section 3 HRA. This means that any incompatibilities will therefore become starker and more problematic if the Government's proposed Bill of Rights is enacted. For example, section 3 HRA has been used to read OSA 1989 compatibly with Convention rights, relating to:

a) Disclosing information during employment proceedings, where the disclosure would breach section 105 Utilities Act.[122]

b) In relation to the defence to section 3 OSA 1989 that a person did not know or had no reasonable cause to believe that the information related to defence or that its disclosure would be damaging, the Law Commission noted that section 3 HRA and Article 6 of the European ECHR were used to read down the burden in section 2(3) OSA 1989 to being merely an evidential burden.[123]

175. Clause 40 of the Bill of Rights Bill envisages a mechanism whereby section 3 HRA interpretations can be retained. However, it is unclear how the Government intends to use this power.

176. **The Government should clarify whether, if the Bill of Rights is passed as introduced, it intends to preserve the interpretations made using section 3 Human Rights Act. If it does not intend to preserve these interpretations, it should explain how it intends to remedy the incompatibilities in Official Secrets Act 1989.**

122 See the cases relating to Pytel v OFGEM. Employment Tribunal Case No. 2206458/2016, and [2018] UKEAT 004_17_1012.

123 R v Keogh [2007] WLR 1500 at [29].

Conclusions and recommendations

Part 1: Offences of Espionage, Sabotage and Foreign Interference

1. We understand that the term "enemy" within espionage offences has become unworkable and should be replaced. However, we have concerns that treating all those with links to other States as potentially hostile for the purposes of espionage laws might have the impact of stigmatising certain communities unnecessarily. There is the potential of a chilling effect on otherwise legal activity such as protest or journalistic activities. New espionage offences, with the potential for stigmatising certain communities are only proportionate if such offences, and their enforcement, focus on the sort of conduct and relations that are a risk. (Paragraph 18)

2. *The Government should consider whether the definition of "foreign country or territory" in clause 25(4) should exclude Commonwealth States, European Economic Area member States, and/or the Republic of Ireland. The Government should justify any decision to include these groups of States within the definition of "foreign power" in clauses 24–25. The Government should provide further information about how these offences are expected to be policed, how it will reduce any risks of discrimination against diaspora communities in the UK, and how it will counteract any potential chilling effect on otherwise lawful activity.* (Paragraph 19)

3. Providing support or assistance to a person should not be grounds for arrest, or a prevention and investigation measure, where there is no link to supporting or assisting them in espionage activities or otherwise in the commission of an offence. *Clause 26(1)(c) should be deleted from the Bill, or alternatively the support or assistance should be explicitly linked to espionage activity.* (Paragraph 22)

4. The use of the "safety and interests of the United Kingdom" phrase without any indication of the severity of the potential prejudice to those interests, or as to how it may be interpreted creates legal uncertainty as to how these criminal offences might apply. It is contrary to rule of law principles to establish offences that lack legal certainty and sufficient clarity. Moreover, it is contrary to Articles 5 (the right to liberty and security) and 6 ECHR (the right to a fair trial) to prosecute and subsequently imprison people for offences that lack sufficient clarity. (Paragraph 27)

5. *To ensure that there is the required level of legal certainty for the creation of a criminal offence, the Government should consider clarifying the phrase prejudicial to the "safety and interests of the United Kingdom" either to specify the types of conduct envisaged, or to include a threshold test as to the severity of the prejudice to the interests of the United Kingdom.* (Paragraph 28)

6. *The Government should consider inserting a requirement in the new offences in clauses 2, 3 and 5, that conduct be "prejudicial to the safety or interests of the United Kingdom" (preferably once clarified to offer greater legal certainty). If it declines to do so, the Government should justify this decision and explain how it will ensure that these offences do not inadvertently criminalise benign activity.* (Paragraph 30)

7. The offence of obtaining or disclosing protected information in clause 1 does not make sufficiently clear what information is considered to be protected for the

purpose of this offence. As such, it creates an unacceptable level of legal uncertainty, raising concerns about compliance with the right to liberty and security, the right to a fair trial, and the right to freedom of expression as protected by Articles 5, 6 and 10 ECHR. *To improve legal certainty and proportionality as to when this offence should apply, the Government should consider amending the offence to clarify that it only attaches to protected information that is (or that the defendant knows or reasonably ought to know should be) subject to a certain level of categorisation, such as "Secret" or "Top Secret". Details as to what is included within the definition of protected information could be contained in a non-exhaustive indicative list or specified in a Statutory Instrument to improve clarity and legal certainty.* (Paragraph 36)

8. The theft of trade secrets that pose no risk to national security is more properly governed by the offence of theft (and other breach of confidence and intellectual property rules) than through new espionage offences. It is not appropriate to create espionage offences, with the potential to impact significantly on human rights, that relate solely to private commercial matters with no risk to national security. (Paragraph 41)

9. Clause 2 should be amended to require an adverse impact to the UK's national security in order for this specific espionage offence of obtaining a trade secret to be committed. An amendment to add in a requirement that the disclosure of the trade secret be "prejudicial to the safety or interests of the United Kingdom" would seem to address this concern. Alternatively, a reference to national security or critical infrastructure might be considered. (Paragraph 43)

10. *The Government should consider whether there should be a defence of whistleblowing for offences under clauses 1 and 2 of the Bill.* (Paragraph 45)

11. There should be a requirement that for a clause 3 offence to be committed, the conduct must have the potential to harm UK interests. An amendment to this effect would ensure that any interference with human rights and liberties would be justified and not disproportionate. *The Bill should be amended to add "prejudicial to the safety or interests of the United Kingdom" to clause 3(4)(a).* (Paragraph 51)

12. The Government should consider how best to ensure that the offences in clauses 4 and 5 do not impact the right to protest, as protected under Articles 10 and 11 ECHR. *The Government and the police should produce clear guidance setting out how the powers under clause 6 will be exercised and the reviews that they will undertake to ensure these powers are only being used where it is proportionate to do so and will not be used to impact unduly on the right to protest. Clause 6 should be amended to ensure that an offence is only committed if the use of police powers was proportionate and necessary to protect the safety and interests of the UK.* (Paragraph 55)

13. Where land does not disclose any particular significant risk to the safety or interests of the United Kingdom, it would seem disproportionate to apply the restrictions, police powers and criminal offences in clauses 4–6. *Clause 7 should be amended so that it does not apply to all Ministry of Defence land and vehicles used for defence purposes (including those easily accessible to the public), irrespective of the real risk*

posed by that Ministry of Defence property, but instead only applies to those areas of Ministry of Defence land whose entry would pose a real risk to national security. (Paragraph 59)

14. As it stands, there is a risk people will commit offences related to being in, or in the vicinity of, Ministry of Defence property without knowing they had done so. *There should be an obligation on the Minister to display notices on all entrances to "prohibited places" informing the public that this is a prohibited place, and that entry would be a criminal offence. The Bill should be amended to this effect.* (Paragraph 61)

15. *In order for clauses 4–6 to represent a proportionate interference with human rights and freedoms, the Government must ensure that places are only prohibited if they are areas of particular defence or other national security sensitivity. The Government must also ensure that reasonable authorisation is granted for protests to take place in the vicinity of "prohibited places".* (Paragraph 64)

16. *The police must produce a clear code setting out how they will use the powers in clause 6. An amendment to the Bill to require approval by a senior police officer before the exercise of these powers could additionally assist in ensuring that these powers are not used in a disproportionate or discriminatory manner.* (Paragraph 66)

17. References to powers in respect of an area "adjacent" to a "cordoned area" seem to constrain activity going beyond the cordoned area and into other private or common land, which would seem to lack clarity and potentially create an unjustified interference with people's rights on private or public land. Similar concerns arise in respect of areas adjacent to "prohibited places" in clause 6. *The Government should delete the references to "adjacent area" in clause 11(1)(c) and 6(1)(c) unless it produces an adequate justification for the necessity and proportionality of applying these powers in relation to adjacent areas.* (Paragraph 70)

18. *Clause 9 would benefit from an amendment to make it clear that it is intended to refer to a military vehicle crash site, as set out in the Government's Explanatory Notes to the Bill. An amendment to require a code or guidance for the use of police powers in respect of these provisions could also help to ensure that these powers are exercised in a proportionate manner that does not inappropriately impact on journalism and protests.* (Paragraph 73)

19. A restriction of the offence of sabotage to relate to critical infrastructure or a potentially significant impact might help to clarify the threshold for this offence and to ensure that it is only applied where that would be proportionate to do so. (Paragraph 77)

20. It will be important to ensure that democratic political activity is not inadvertently criminalised by the foreign interference offence in clause 13. *The Government should consider amending clause 13 to explicitly provide that an offence is not committed if it is an exercise of free speech (giving due weight to the importance of political speech or religious speech) or the right to protest protected under Articles 10 and 11 ECHR.* (Paragraph 82)

21. The preparatory conduct offence in clause 15 could criminalise preparing to protest at certain key sites—and indeed could carry a maximum sentence of life for

preparing to protest. It will be important to ensure that those exercising their right to protest are not inadvertently caught by this provision and, importantly, that it is not policed in a way to suggest that they would be so caught. *The Government should set out how they intend to ensure that clause 15 is not used to unduly interfere with the right to protest*. (Paragraph 84)

22. *The Government must justify the necessity of the police warrant powers in paragraphs 10 and 24 of Schedule 2 and should consider whether further safeguards might be appropriate. In particular, the Government should consider including greater protections for confidential journalistic material*. (Paragraph 87)

23. The reviews of detention without warrant should only be able to be postponed for well-defined and justified reasons. *Paragraphs 29(1)(b) and 29(1)(c) of Schedule 3 should be deleted from the Bill*. (Paragraph 90)

24. The process for a judicial warrant contains some guarantees. However, we have some concerns given the potential for a person's access to their lawyer to be delayed, the potential for a detainee to be excluded from part of the hearing, and the potential for information relied upon to be withheld from the detainee and their legal representative. As a result, it is possible that a detained person may not be told sufficient information to enable them to be in a position to counter any claims made against them in a part of the hearing from which they are excluded. There are therefore risks that this process does not contain sufficient protections against arbitrary detention. *A requirement that a person should be able to know the case against them might improve the protections in paragraph 40 of Schedule 3*. (Paragraph 92)

25. We note in particular that the provisions to withhold information from the detainee and their legal representative extend, under paragraphs 41(3) and (4) of Schedule 3, to matters relating to recovering the proceeds of crime, rather than anything relating to national security. *The Government should justify the use of detention based on undisclosed/closed material where the concern relates solely to proceeds of crime. Failing a compelling explanation, paragraphs 41(3) and (4) of Schedule 3 should be deleted*. (Paragraph 93)

26. Restrictions and delays on access to a lawyer and on letting a person's loved ones know where they are constitute serious impediments to accessing basic rights for a person detained without charge. Whilst such restrictions may be proportionate if necessary for imperative reasons of national security, such as to prevent immediate serious harm to another person, the case is less compelling where the objective is solely asset recovery. *Paragraphs 9(4) and (5) of Schedule 3 should be deleted from the Bill*. (Paragraph 96)

The principle of open justice & the power to exclude public from proceedings

27. The principle of open justice is fundamental to the proper administration of justice and the right to a fair trial. We welcome the replacement of section 8(4) OSA 1920 with clause 31, such that the public could only be excluded where this was "necessary in the interests of national security". *The Government should reconsider the need to*

include a reference to the interests of justice as part of this test. The test in clause 31 might thus be amended to read "necessary for the administration of justice, having regard to the risk to national security". (Paragraph 103)

Criminal Immunity: Offences under Part 2 of the Serious Crime Act 2007

28. Any provisions that seem to grant criminal immunity to officials go to the heart of respect for the rule of law, human rights and the fundamentals of justice and fairness. *Given the existing defence of acting reasonably in section 50 Serious Crime Act 2007 (including based on subjective information), we do not consider that the case has been made for clause 23. We recommend the deletion of clause 23.* (Paragraph 111)

Part 2: Prevention and Investigation Measures (Clauses 32–56)

29. Given the intention that these measures should be used in "cases that cannot be prosecuted or otherwise disrupted", a requirement that the Secretary of State confirms with the police that prosecution is not realistic or feasible before a PIM is imposed would appear to be consistent with the policy justification. *We recommend that the Bill is amended to include such a provision.* (Paragraph 117)

30. The use of closed proceedings in the review of Prevention and Investigation Measures (PIMs) raises concerns in respect of Article 6 ECHR, the right to a fair trial. However, the Bill provides for material to be disclosed, or not relied upon, if keeping it from the subject of the PIM would result in impermissible unfairness. This should be enough to ensure compliance with Article 6, as long as adequate legal aid is made available to the subjects of PIMs. *To ensure that legal aid is available to a subject of a PIM in any legal proceedings concerning the Prevention and Investigation Measures, an Order should be made under section 11(6) Legal Aid, Sentencing and Punishment of Offenders Act 2012, exempting PIMs proceedings from the criteria in that section.* (Paragraph 121)

31. Restrictions and obligations imposed under Prevention and Investigation Measures (PIMs) are likely to engage the right to private and family life under Article 8 ECHR. Article 8 issues will need to be raised in court proceedings where PIMs are reviewed. Given the likelihood of material being considered in closed proceedings, hampering the ability of the individual subject to the PIM to challenge it, it is vitally important that national security assessments are carefully and accurately produced and that closed advocates are given the time and resource needed to represent the individual's interests effectively. (Paragraph 125)

32. A more effective protection against interference with Article 5 rights would be to include within the National Security Bill a strict limit on the number of hours for which a subject of Prevention and Investigation Measures could be required to remain in their residence: for example, 14 hours per day. *The Government should consider amending the Bill to include such a limit.* (Paragraph 128)

33. We welcome the inclusion of an independent reviewer of the Prevention and Investigation Measures regime under Clause 49 of the Bill. However, this role should be extended to cover other parts of the Bill and other core national security

legislation in the same way that the Independent Reviewer of Terrorism Legislation has a remit wider than just the Terrorism Prevention and Investigation Measures regime. *We recommend that the Independent Reviewer's role be extended to cover Parts 1 and 2 of the National Security Bill. The Government should review whether the Independent Reviewer could also cover other core national security legislation.* (Paragraph 130)

Part 3: Persons Connected with Terrorism: Damages and Legal Aid

34. It is important that remedies for human rights violations are not reduced by the courts, simply because they have been identified through claims brought otherwise than under the HRA. *The Bill should be amended to ensure that all damages awarded for what amount to human rights violations are exempted from the restrictions on damages in clauses 57–59.* (Paragraph 138)

35. Damages should not be reduced based simply on factors identifying the claimant as unworthy of compensation or excusing the Government for actions that have been found to be unlawful. *Before any reduction in damages should be made in the widely defined "national security proceedings", the defendant should be required to satisfy the court that the damages are likely to be used for terrorist purposes. Furthermore, to avoid the defendant being able to avoid legal consequences for its unlawful conduct, the Government should explore whether any amount by which damages are reduced could be paid to an appropriate charitable cause, such as a charity supporting the victims of terrorism.* (Paragraph 145)

36. The need for a new regime to allow for damages awarded in legal proceedings to be seized and ultimately forfeited on the basis of a real risk that they will be used for terrorist purposes has not been made out. To prevent damages awards being spirited away for terrorist purposes, the existing freezing and forfeiture regime could be extended so that applications can be made to the court dealing with the damages award. (Paragraph 151)

37. In the absence of significant reform to the system of Exceptional Case Funding, it is likely that the provisions of the Bill removing legal aid for terrorist offenders will impede access to justice and the enforcement of basic human rights. There is also potential for them to be counterproductive in respect of reducing terrorist offending. These provisions have been proposed for symbolic reasons, and as such, the Government has not provided sufficient justification for the impact they will have. *Clauses 62 and 63 should be removed from the Bill in the interests of access to justice and the effective enforcement of human rights.* (Paragraph 164)

Other Matters Arising

38. It is important that Parliament is given sufficient time to consider any foreign influence registration scheme; it is unfortunate that these clauses were not in the Bill as introduced. Any foreign influence registration scheme must contain adequate protections to ensure that it does not interfere unduly with democratic rights, including freedom of association and free speech. (Paragraph 166)

39. We are concerned that the Official Secrets Act 1989 may be incompatible with Convention rights, including the freedom of expression and the right to a fair trial. We consider that the Government should take action to address these concerns as soon as possible. There seems to be a certain level of consensus that a whistleblowing or public interest defence is needed—and that such a defence should not catch data dumps but should be available for genuine cases of whistleblowing. The Government should set out its timetable for addressing these concerns given the potential of this legislation to negatively impact on free speech. (Paragraph 172)

40. The Government should clarify whether, if the Bill of Rights is passed as introduced, it intends to preserve the interpretations made using section 3 Human Rights Act. If it does not intend to preserve these interpretations, it should explain how it intends to remedy the incompatibilities in Official Secrets Act 1989. (Paragraph 176)

Annex: Proposed amendments to the National Security Bill

Obtaining or disclosing protected information

Amendment 1

Clause 1, page 1, line 15, insert "with a Government Security Classification of Secret or Top Secret" after "article"

Explanation: This amendment would confine the offence of obtaining or disclosing protected information to information that has been classified as secret or top secret (rather than to all information access to which is restricted in any way).

Obtaining or disclosing trade secrets

Amendment 2

Clause 2, page 2, line 16, leave out "and" and insert new paragraph 1(d):

"(d) the person's conduct is [significantly] prejudicial to the safety or interests of the United Kingdom, and"

Explanation: This amendment would narrow the scope of the offence of obtaining or disclosing trade secrets so that it applies only to trade secrets that would prejudice the safety or interests of the UK.

Assisting a foreign intelligence service

Amendment 3

Clause 3, page 3, line 30, insert "which are prejudicial to the safety or interests of the United Kingdom" after "United Kingdom".

Explanation: This amendment would narrow the scope of the offence of assisting a foreign intelligence service in respect of activities within the UK so that it applies only to assistance that would prejudice the safety or interests of the UK (rather than to assistance of any kind).

Unauthorised entry etc to a prohibited place

Amendment 4

Clause 5, page 5, line 16, insert at end new paragraph 1(b):

"(b) the conduct is prejudicial to the safety or interests of the United Kingdom,"

Explanation: This amendment would confine the offence of unauthorised entry etc to a prohibited place so that it applies only to entry etc that is prejudicial to the safety or interests of the UK.

Police powers in relation to prohibited places

Amendment 5

Clause 6, page 6, line 8, leave out sub-paragraph (c)

Explanation: This amendment would remove the power of the police to order a person to leave an area "adjacent to" a prohibited place.

Amendment 6

Clause 6, page 6, line 19 insert "- (a)" before "unless" and insert ", and (b) without prior authorisation by an officer of at least the rank of Inspector, unless obtaining that authorisation is not reasonably practicable." after "United Kingdom".

Explanation: This amendment would impose a requirement that a police officer obtains authorisation from a more senior officer before exercising powers under clause 6.

Amendment 7

Clause 6, page 6, line 23, at end insert "which was necessary to protect the safety or interests of the United Kingdom and proportionate to that aim."

Explanation: This amendment would narrow the offence of failing to comply with an order made by a police constable in relation to a prohibited place so that it applies only to an order that was necessary and proportionate to protecting the safety or interests of the UK.

Meaning of prohibited place

Amendment 8

Clause 7, page 6, line 28, insert "a location entry to which could pose a risk to the safety or interests of the United Kingdom, comprised of" after "means"

Explanation: This amendment would narrow the definition of prohibited place so that it applies only to locations relevant to the safety and interests of the United Kingdom (rather than any Ministry of Defence land).

Public notice of prohibited places

Amendment 9

Page 7, line 40, insert new clause 7A as follows:

"7A Requirement to inform public of prohibited places

(1) The Secretary of State must by regulations make provision so as to ensure that the public are given sufficient notice:

(a) that a location is a prohibited place within the meaning of section 7;

(b) of the circumstances in which an offence may be committed under sections 4 to 6 in respect of that prohibited place."

Explanation: This amendment would place an obligation on the Secretary of State to make regulations providing for the public to be given notice of prohibited places and the conduct which would amount to a criminal offence in relation to them.

Police powers in relation to cordoned areas

Amendment 10

Clause 11, page 9, line 29, leave out sub-paragraph (c)

Explanation: This amendment would remove the power of the police to order a person to leave an area 'adjacent to' a cordoned area.

Detention under clause 21

Amendment 11

Schedule 3, paragraph 9, page 74, line 22, leave out sub-paragraphs (4) and (5)

Explanation: This amendment would prevent it being permissible to delay informing a named person of an individual's detention under clause 21, or that individual consulting a solicitor, for the purposes of asset recovery.

Amendment 12

Schedule 3, paragraph 29, page 91, line 3, leave out sub-paragraphs (b) and (c)

Explanation: This amendment would prevent it being permissible to postpone reviews of detention without warrant on the basis that the review officer is unavailable or, for any other reason, the review is not practicable.

Offences under Part 2 of the Serious Crime Act 2007

Amendment 13

Page 18, line 16, leave out clause 23

Explanation: This amendment would remove immunity in respect of crimes committed outside UK territory for the intelligence agencies and armed forces (but would not remove the existing defence of acting reasonably).

Foreign power threat activity

Amendment 14

Clause 26, page 20, line 19, leave out paragraph 1(c)

Explanation: This amendment would narrow the definition of foreign power threat activity to remove giving support and assistance (including support and assistance unrelated to espionage activity) to a person known or believed to be involved in offences under the Bill (but would retain conduct which facilitates or is intended to facilitate such offending).

Prevention and Investigation Measures

Amendment 15

Clause 39, page 28, line 3, leave out "The Secretary of State must consult the chief officer of the appropriate police force about the matter mentioned in subsection (2) before" and insert "The chief officer of the appropriate police force must confirm to the Secretary of State that the condition in subsection (2) is satisfied before"

Explanation: This amendment, together with amendments 16 to 18, would require the Secretary of State to receive confirmation from the police that prosecution is not realistic before imposing a PIM, rather than requiring only a consultation on the subject.

Amendment 16

Clause 39, page 28, line 6, leave out "(1) or"

Amendment 17

Clause 39, page 28, line 10, leave out "The matter is whether there is" and insert "The condition is that there is not"

Amendment 18

Clause 39, page 28, line 34, leave out "responding to consultation" and insert "providing confirmation"

Independent Review

Amendment 19

Clause 49, page 35, line 34, leave out "this Part" and insert "Part 1 and Part 2"

Explanation: This amendment would extend the review function of the Independent Reviewer to cover Part 1 of the Bill in addition to Part 2.

Duty to consider reduction in damages

Amendment 20

Clause 58, page 41, line 25, at end insert new sub-paragraph (c):

"(c) the court is satisfied that any damages awarded to the claimant in those proceedings are likely to be used for the purposes of terrorism,"

Explanation: This amendment would remove the duty on the court to consider reducing damages in clause 58, unless the court considered the damages were likely to be used for the purposes of terrorism.

Amendment 21

Clause 58, page 42, line 9, at end insert "or which it would award under section 8 of that Act had the claim been brought under it."

Explanation: This amendment would prevent the reduction of damages in claims that could have been brought as a human rights claim under the HRA 1998 but were in fact brought on other grounds.

Legal aid for individuals convicted of terrorism offences

Amendment 22

Page 44, line 6, leave out clause 62

Explanation: This amendment, together with amendment 23, would remove the proposed limits on access to legal aid for persons with a conviction for a terrorism offence and the consequential power to make information requests related to those limits.

Amendment 23

Page 46, line 6, leave out clause 63

Formal minutes

Wednesday 12 October 2022

Hybrid Meeting

Members present:

Joanna Cherry KC MP, in the Chair

Baroness Chisholm of Owlpen

Lord Dubs

Lord Henley

Baroness Ludford

David Simmonds MP

Lord Singh of Wimbledon

Draft Report (*Legislative Scrutiny: National Security Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 176 read and agreed to.

Summary agreed to.

Annex agreed to.

Resolved, That the Report be the Fifth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjourment

[Adjourned till 19 October 2022 at 2.45pm.

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

NSB numbers are generated by the evidence processing system and so may not be complete.

1 Association of Prison Lawyers (NSB0004)

2 Birnberg Peirce Solicitors (NSB0005)

3 Matrix Chambers, Mishcon de Reya, and Powerscourt Group (NSB0006)

4 The Law Society of England and Wales (NSB0002)

5 The News Media Association (NSB0003)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2022–23

Number	Title	Reference
1st	Legislative Scrutiny: Public Order Bill	HC 351 HL 16
2nd	Proposal for a draft State Immunity Act 1978 (Remedial) Order	HC 280 HL 42
3rd	The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976	HC 270 HL 43
4th	Protecting human rights in care settings	HC 216 HL 51
1st Special Report	Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22	HC 608
2nd Special Report	Proposal for a draft State Immunity Act 1978 (Remedial) Order 2022: State Immunity & The Right of Access to a Court	HC 280

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90
8th	Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners	HC 594 HL 91

Number	Title	Reference
9th	Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement	HC 885 HL 112
10th	Legislative Scrutiny: Judicial Review and Courts Bill	HC 884 HL 120
11th	Legislative Scrutiny: Nationality and Borders Bill (Part 5)— Modern slavery	HC 964 HL 135
12th	Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum, Home Office DecisionMaking, Age Assessments, and Deprivation of Citizenship Orders	HC 1007 HL 143
13th	Human Rights Act Reform	HC 1033 HL 191
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911
8th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People: Government Response to the Committee's Sixth Report	HC 983
9th Special Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing: Government Response to the Committee's Third Report of Session 2019–21	HC 1198
10th Special Report	Legislative Scrutiny: Nationality and Borders Bill: Government Responses to the Committee's Seventh, Ninth, Eleventh and Twelfth Reports	HC 1208

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120

Number	Title	Reference
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911