Submission to National Security Bill Committee – NUJ Index on Censorship, RSF and openDemocracy

Executive Summary

The National Security Bill is a far-reaching piece of legislation designed to modernise protections to government and the public in light of potential new threats from hostile states while addressing threats posed by the internet. However, the proposed offences in the National Security Bill 2022 ("the Bill") are broad and ill-defined. Intended to cover acts of espionage damaging to UK national security interests by those acting on behalf of foreign States, the Bill may be sufficiently broad to criminalise reporters (and others) who receive any financial (or other) assistance from other countries.

As organisations that promote and protect free expression and the rights of journalists and media workers, the National Union of Journalists (NUJ), Index on Censorship, Reporters Without Borders, known internationally as Reporters sans frontièrs (RSF) and openDemocracy are extremely concerned about a number of the proposals outlined in the National Security Bill. The Bill risks a chilling impact on effective public interest journalism, including international collaborative investigations in the public interest.

Chilling Effect

Despite government reassurances that the new legislation will not affect the activities of genuine investigative reporters, the use of overbroad and vague language in the bill, as well as the absence of meaningful free expression protections means there is a risk that the measures will deter disclosure of wrongdoing by officials and chill public interest journalism.

Conflation of Journalists and Spies

There should be no situation in which journalists risk being classed as spies or traitors. This perception, reinforced by this Bill, risks legitimising threats made against journalists and media workers and undermining public support for a free media. A free press is one of the conditions of a pluralistic democracy and the UK government should not close down scrutiny of its activities.

Public Interest Defence

This new national security legislation must include a statutory public interest defence. At present there is no such safeguard in the bill, leaving the UK far below the standards established in other countries, including key intelligence partners. However, while a public interest defence is necessary, it will not be sufficient on its own to protect media freedoms if the offences of the bill remain the same.

Foreign Power Condition

The foreign power condition outlined in clause 24 of the Bill is fundamental to our concerns with the Bill. To prove that an offence has occurred, almost every clause in the Bill relies on the foreign power condition, including the clauses that contain particular challenges to free

expression and media freedom. There is serious concern that this condition is so broadly drawn in the Bill that journalists and free speech organisations could risk prosecution for espionage and foreign interference for their public interest activities. At present the scope of the Bill is so sweeping that any organisation receiving foreign funding (including foreign news services) could be caught up by the legislation. The definition of a foreign power condition should be narrowed to specifically exclude journalists and media organisations.

Severity of Sentences

The bill contains a maximum sentence of life imprisonment for espionage and 14 years imprisonment for foreign interference. These disproportionate sentences are far more severe than the two-year sentence in the Official Secrets Act 1989. There is no doubt that this escalation will have a chilling effect on journalists.

Reputation Management

Extending the definition of information covered by the Bill to "protected information" establishes an overly expansive and vague threshold that goes far beyond national security considerations. This could create the risk of potential abuses by the state seeking to obscure public scrutiny and democratic oversight. This Bill cannot be a tool for the Government of the day to protect its reputation from legitimate scrutiny, under the guise of national security.

We expand on key clauses of concern to the coalition in our full submission.[1] These are:

- Clause 1, leaks of protected information
- Clause 2, leaks of trade secrets
- Clause 3, assisting a foreign intelligence service
- Clauses 4 & 5, prohibited places
- Clause 24 & 25, foreign power condition

For further information for any of the arguments addressed in this briefing, please contact coalition members:

- **Bea Adi**, National Union of Journalists, campaigns@nuj.org.uk
- **Nik Williams**, Index of Censorship, nik@indexoncensorship.org
- **Azzurra Moores**, Reporters Without Borders, amoores@rsf.org
- **Stewart Kirkpatrick**, openDemocracy, stewart.kirkpatrick@opendemocracy.net

[1] The absence of comment on any proposed Clause for the purposes of this submission should not be taken as absence of concern on the part of the coalition or approval of the Clause in question.

Key Points:

- The Bill dissolves any distinction between journalist and spy. It criminalises journalists who use protected information to report on matters that are in the public interest – e.g. a journalist reporting a leak from the government that exposes wrongdoing.
- Extending the definition of information covered to "protected information" could allow the law to be used to protect the reputation of the UK Government and shield it from democratic scrutiny. This falls far short of any national security considerations.
- The scope of information protected by the Bill could chill public interest reporting on a wide range of topics across Government beyond national security issues. This means that few aspects of journalism are protected.
- The lack of geographic limits and the overly broad definition of the safety and interests of the United Kingdom can extend the reach of the bill across the globe.
- The foreign power condition means that journalists working for news organisations that are based outside the UK, or receive some of their funding from outside the UK, could face prosecution solely for their journalism.
- Establishing barriers to international media outlets and public service broadcasters will damage the UK media environment and limit the public's ability to access factual and trustworthy information and reporting.
- This Bill also directly affects the work of civil society organisations who receive foreign funding for their overseas work, including Index on Censorship.

Analysis

Clause 1 – Obtaining or disclosing protected information

1. Clause 1 of the Bill criminalises journalists who handle, obtain, retain, disclose or provide access to *"protected information"* as part of their work, if they work for organisations that receive funding from outside of the United Kingdom. Clause 1 of the Bill makes it an offence to handle protected information when *"the person's conduct is for a purpose that they know, or ought reasonably to know, is prejudicial to the safety or interests of theUnited Kingdom".*

2. The offence attracts the most serious of penalties of a maximum sentence of life imprisonment. The coalition considers this penalty would result in an unjustified chilling effect on the work of any journalist who accepts any form of State assistance from outside the UK.

3. The coalition considers that the expansive definition of "protected information" will result in information that falls substantially short of any security classification being protected by the Bill. As outlined in the Bill's explanatory note, protected information includes information that is *"subject to any type of restriction of access for the purpose of protecting the safety and interests of the UK"* and that which *"includes, but is not limited to, classified material"*. This includes documents that public authorities may have refused access to under the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIR). This creates a worrying loophole in which the Government (or relevant departments) may use the Bill to shield themselves from scrutiny, rather than protecting legitimate national security concerns.

4. Clause 1 (2)(b) states that protected information includes any information, document or other article where *"it is reasonable to expect that access … would be restricted in any way."* This could mean that information that is not restricted or protected in any manner, but should have been, could fall within the parameters of the Bill. This places a disproportionate burden on the recipient of information, to determine whether it *should* have been protected. The coalition considers that this uncertainty would chill public interest reporting, dissuading journalists from engaging with public interest information for fear that the documents could fall within the parameters of the Bill.

5. There is no commonly understood definition of *a "purpose of protecting the safety or interests of the United Kingdom".* The Bill's explanatory note references the court's view on *Chandler v Director Public Prosecutions (1964) AC 763*, where Lord Pearce stated: *"the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognised organs of government and authority".* However, Lord Reid's judgement in the same case demonstrates the flexibility of this definition when he stated the safety or interests of the State *"does not mean the Government or the Executive…I do not subscribe to the view that the Government or a Minister must always or even as a general rule have the last word about [what is not prejudicial to the safety and interests of the State]".*

6. The explanatory note summarises safety or interests of the UK as *"the objects of state policy determined by the Crown on the advice of Ministers".* Without being defined in terms around national security, or foreign policy and going beyond the parameters of classified materials, this ensures the full remit of government policymaking, including energy, national infrastructure, health services, transport and law and order, organised crime, immigration controls, the raising of revenue, measures to deal with natural or other emergencies, pandemics and other issues could fall within the scope of this Bill. Going beyond national security, this means that few elements of journalism are beyond the Bill's scope.

7. The Foreign Power condition (Clause 24) raises significant concerns as it could criminalise the work of journalists from organisations that receive foreign funding, which includes respected international public broadcasters such as Raidió Teilifís Éireann (RTÉ Ireland), Australian Broadcasting Corporation (ABC) and National Public Radio (NPR). While these media outlets are based elsewhere, they operate in, and report from, the United Kingdom, playing a vital role in our media landscape. Under the provisions of this Bill, journalists who work in the United Kingdom for organisations such as these could risk prosecution.

8. This would create a two-tier reporting environment where UK-based media organisations would be free to report on protected information, while the broader international journalistic community's work could be criminalised for participating in the same behaviour. The same disparity would also be seen between public and private broadcasters, the latter group of which falling beyond the scope of this Bill. This could dissuade non-UK-based organisations, as well as international public broadcasters, from reporting on the UK, significantly manipulating the media environment and hampering the public's right to know. A number of recent journalistic investigations, including the Panama and Paradise Papers, which explored the use of offshore jurisdictions by wealthy individuals to avoid scrutiny or tax obligations, involved a consortium of journalists and media outlets, based in different

locations across the globe. This Bill could prevent any elements that involved UK interests being reported on by non-UK-based organisations.

9. Clause 1(3) confirms that an offence is committed *"whether the person's conduct takes place in the United Kingdom or elsewhere."* The Bill's explanatory note also reiterates that it covers *"people who use cyber means to access protected information remotely".* As UK interests are to be defined by the Government of the day (outlined in Paragraph 6), there are no parameters limiting these interests to UK territory or legal jurisdictions. While these interests could include international postings, such as through embassies and delegations to relevant treaty bodies, they could also include more diffuse interests such as trade relationships, issues around energy security, and international concerns such as international peace and security, the climate crisis and crisis prevention. As a result, the ill-defined geographic scope of this Bill could chill media freedom across the globe

Clause 2 – Obtaining or disclosing trade secrets

10. Clause 2 of the Bill relates to the handling and disclosing of trade secrets. Much like our concerns with Clause 1 of the Bill, we are concerned that Clause 2 will criminalise journalists who handle or disclose trade secrets if these journalists are working for organisations that receive foreign funding - see Paragraph 3.

11. Much like Clause 1, Clause 2 could have a direct impact on public interest reporting. If any collaborator in a cross border investigation were to satisfy the broadly drawn requirements of the 'foreign power condition' any of the organisations participating in the investigation would risk criminalisation if any element of the story might prejudice the interests of the UK.

12. Clause 2 (2)(c) enables a trade secret to be defined as such if any information, document or article *"could reasonably be expected to be subject to measures to prevent it becoming generally known by, or available to, such persons (whether or not it is actually subject to such measures)".* This raises similar concerns to Clause 1 (2)(b) and could extend restrictions on public interest reporting beyond clearly defined trade secrets to anything that could be expected to be restricted. This again breeds uncertainty and can chill public interest reporting on private enterprises.

13. The Foreign Power condition (Clause 24) also applies to this clause, and we remain concerned that this puts at risk journalists working for organisations that receive funding from foreign governments, such as non-UK-based media outlets, public service broadcasters, and civil society organisations.

14. Another parallel to Clause 1 is the severity of the maximum sentence that can be given to those found guilty of an offence under the provisions of Clause 2 of the Bill. The maximum custodial sentence is 14 years imprisonment, and if the Bill remains in its current form, with a very broad definition of what constitutes a trade secret, and a Foreign Power condition with a broad and unclear definition, this will have a significant chilling effect on public interest journalism. This would establish restrictions for non-UK-based organisations that UK-based organisations (funded by UK or private donors) are not restrained by.

Clause 3 – Assisting a foreign intelligence service

15. Clause 3 of the Bill relates to the offence of engaging in conduct that can *"materially assist a foreign intelligence service in carrying out UK-related activities."* Our particular concerns focus on the provisions set out in Sub-Clauses 3 (2) and (3).

16. Clause 3 (2) provides two conditions that must be met for an individual to have committed the offence of assisting a foreign intelligence service. We believe that these conditions are too broad and vaguely defined. Under these terms, an offence can be regarded to have been committed if an individual engages in conduct that could reasonably assist a foreign intelligence service even if the individual did not intend for their conduct to have this effect.

17. Clause 3 (3) provides a list of conduct that can be regarded as materially assisting a foreign intelligence service. Once again, we believe that the terms set out in this section are overly broad and cover a wide range of conduct that, while important within a democratic society, could be regarded as reasonably possible it may materially assist a foreign intelligence service. This clause is so wide that publishing any information – for example reporting on the activities of Government ministers – could arguably be sufficient basis for the offence. The publication of information, entirely properly put in the public domain, could be reasonably possible to assist a foreign intelligence service.

18. Providing, or providing access to information that may materially assist a foreign intelligence service, as defined in Clause 3(3) could easily capture journalistic, academic, artistic and civil society expression. The actors behind that expression cannot limit or control how their work can be used by other actors, including foreign intelligence services. To this end, journalists, academics, artists and civil society organisations should not be held criminally liable for how their work may be used by others as outlined in the Bill.

19. The Foreign Power condition (Clause 24) once again applies to this clause of the Bill, and so establishes significant risks for individuals working for organisations that are based outside of the United Kingdom.

20. We are concerned that the provisions laid out in this clause could criminalise journalists, academics, artists and civil society organisations whose work could be regarded as having the effect of materially assisting a foreign intelligence service, even when no intention to assist a foreign intelligence service exists.

Clauses 4 and 5 – unauthorised entry to a prohibited place

21. Clause 5 outlines conditions under which unauthorised entry to a prohibited place would be a criminal offence. We are concerned about the extension of entry to include photography, and the potential implications for journalists and photographers capturing material relevant to their public interest reporting.

22. Clause 5 (3) defines *"inspecting a prohibited place includes taking, or procuring the taking of, photographs, videos or other recordings of the prohibited place."* Those convicted of an offence including photographers face six months imprisonment and/or an unlimited fine.

This is likely to act as a deterrence to journalists who must consider whether their actions would be criminal under the broad terms outlined.

23. Capturing images of vehicles or locations that would directly expose wrongdoing should not be criminalised, particularly when those images are in the public interest. At present, the broad scope of this clause means its application could reach beyond circumstances when national security is directly threatened. This poses a significant risk to how information is gathered to support public interest journalism, and to the journalists who may be criminalised for doing so.

Clause 24 – The Foreign Power condition

24. To prove an offence has occurred, all the clauses discussed in this submission rely on the Foreign Power condition (Clause 24). Clause 24 provides the 'foreign power condition' which seeks to limit the Bill to 'espionage' conducted on behalf of a foreign power. Clause 24(1) provides that the condition is satisfied only if the conduct in question 'is carried out for or on behalf of a foreign power' and the person 'knows or ought reasonably to know' that to be the case.

25. Our concern with the Foreign Power condition relates to the breadth of its definition. Clause 24 (2) lays out the criteria by which an individual can be regarded to have been working on behalf of a foreign power. These criteria are incredibly broad. Clause 24 (2)(c) speaks of the Foreign Power condition being met if there is a financial connection between the individual and a foreign power. Clause 24 (3) states that this connection can be an indirect connection, as well as a direct connection.

26. We are concerned that the breadth of these criteria could result in journalists working for news organisations that receive funding from foreign governments being at risk of criminal prosecution offences of espionage and foreign interference through the course of their work. This is directly relevant for international public service broadcasters as highlighted previously in this briefing.

27. Clause 24(2)(c) fails to take into account the funding environment for media outlets and civil society organisations, where donor agencies connected to foreign states play an increasingly important and prominent role in funding a wide range of public interest work. Those connected to robust and multi-party democracies often include stringent rules and regulations as to the fundee's actions and reporting obligations, as well as contractual protections against funder overreach. Failing to make any distinction between this form of legitimate and traceable funding and espionage forces media outlets and civil society organisations to choose between their mandate and funding.

28. The breadth of the clause as it stands means that no distinction is made between those working for organisations funded by 'friendly' governments, and those funded by governments with interests hostile to the United Kingdom. This means, for example, that journalists reporting from the United Kingdom for public broadcasters such as RTÉ in Ireland, the ABC in Australia and the CBC in Canada (all fellow democracies with whom the United

Kingdom enjoys a close alliance) are put at risk of being prosecuted for espionage for simply reporting on matters of public interest.

29. We are also concerned about the lack of clarity contained within this clause of the Bill as to what can be classed as foreign collaboration. If a UK-based journalist was investigating alleged misconduct by UK authorities in a third country would the grant of a visa by a foreign government be enough? Would an agreement to facilitate access to witnesses and/or archive material be sufficient to criminalise the investigation? Greater clarity is required than is currently provided in the Bill.

30. In a Public Bill Committee hearing on 14 July 2022, on behalf of the government, Stephen McPartland MP stated, in response to concerns about the scope of Clause 24, that: *"the Government's interpretation is that there would have to be a link between the funding they receive and any activity that they carry out that could meet the offence for that activity to be for or on behalf of the foreign power."*[2] There is no specific limitation in the Bill on when funding will be considered to satisfy the Foreign Power Condition. In any event, acts of investigation and publishing are the core activities of journalists and many civil society organisations. As such, any grant is likely to be in the understanding they will undertake that work.

Recommendations

The coalition has three key recommendations in order to improve the Bill and ensure the protection of journalists and free expression are at the forefront of the Bill. These are: reforming the offences by narrowing and clarifying definitions, establishing a statutory public interest defence and the appointment of an independent commissioner.

Narrowing and clarifying definitions:

31. Overly broad and vague definitions are deployed throughout the Bill, which can extend the Bill beyond what is intended. This could further threaten media freedom and free expression more broadly.
32. As highlighted, the definition of protected information in Clause 1 of the Bill is overly broad and expansive. This could enable the Bill to be used to avoid necessary public scrutiny of the Government instead of protecting national security concerns.

33. This expansiveness is also reinforced by the maximalist definition employed for the 'safety and interests of the United Kingdom', which enables offences within the Bill to be directed at the full range of policy decisions made by the Government of the day, outside national security concerns. The Official Secrets Act 1989 limited the definition to *"any information, document or other article relating to security or intelligence".*

34. Limiting the Bill to information or documentation that is directly related to national security, and is classified would redraw the parameters of the bill in line with international standards and best practice.

[2] Parliamentary Debates, House of Commons, Official Report - National Security Bill, Sixth Sitting, Thursday 14th July 2022, pg. 202.

35. A number of the offences contained within this Bill rely on the Foreign Power condition (Clause 24) being satisfied for a successful prosecution. However, the definition of this foreign power condition is far too broad.

36. We propose a narrowing of the foreign power condition in clause 24, to safeguard the work of journalists and civil society organisations, particularly those who receive foreign funding but act in the public interest. In particular, the definition of financial assistance included in clause 24 (2) (c) could be narrowed to protect journalists who work for news organisations that receive foreign funding but are editorially independent, such as public service broadcasters. This suggestion would protect public service broadcasters, but further conditions would be required to protect all journalists.

37. The provision in clause 24 (3) could also be narrowed to specify the types of indirect funding that would make an individual liable for an offence under the provisions of this Bill.

38. Narrowing the definitions found in the Bill will also ensure the Bill is protecting what it is intended to protect, that of national security. If it is too broadly defined it risks being deployed in a manner that could erode public confidence and trust in the processes by which the Government protects both national security and the democratic principles of open government.

Establishing a statutory public interest defence:

The Bill lacks a public interest defence. Due to the breadth of protected information in this Bill, and the dangers this poses to journalists reporting in the public interest, the Bill should include a public interest defence. A public interest defence would not remove the legal uncertainties in the Bill. However, a clear defence would require prosecutors and the Courts to consider when an investigation or charge would be a disproportionate interference in free expression (and contrary to the public interest).

39. A public interest defence would keep the UK in line with international norms and the practice of key British allies, such as among Five Eyes nations, Australia, Canada and New Zealand. No evidence has been provided as to why the UK should diverge from this international standard.

40. The existence of a public interest defence allows for the court to consider a number of key factors that can help determine whether the public interest in the disclosure outweighs the public interest in non-disclosure. This includes the subject matter of the disclosure; the seriousness of the conduct exposed; and the harm caused by the disclosure.

41. The absence of a public interest defence also raises significant questions as to whether this Bill is compatible with Article 10 of the European Convention of Human Rights (ECHR). This concern was raised by the Law Commission in their review of the Official Secrets Acts: *"We have noted that a public interest defence provides an important backstop, ensuring compliance with Article 10 in those cases where the mechanisms for investigation and redress are rendered ineffective."*

42. A public interest defence is needed as there are no defences written in the face of the bill. During the third sitting of the Public Bill Committee on 12 July 2022, Stephen McPartland MP, on behalf of the government stated: *"most of the offences in part 1 of the Bill need sign-off from the Attorney General…the Crown Prosecution Service has to be satisfied that prosecuting is in the public interest."*[3] This, however, relies entirely on the decision of the Attorney General. It offers no general protections that can be relied upon in all cases. As a result, the law presents neither guidance nor reassurance for journalists.

Implementing an independent commissioner:

43. The commission, with reference to the reform of the Official Secrets Acts, recommended establishing an independent commissioner to investigate illegal wrongdoing within government. The coalition supports this role and feels it would be a necessary additional safeguard within this Bill.

44. The Commission stated that, *"The primary concern in respect of public servants is that there should be an effective investigative mechanism for addressing their concerns of illegal wrongdoing… Accordingly, we have concluded that for public servants there should be created in statute a procedural mechanism whereby their concerns about possible wrongdoing can be investigated effectively. This would take the form of an independent commissioner to receive and investigate complaints of serious wrongdoing where disclosure of the matters referred to may otherwise constitute an offence".*[4]

45. We support this recommendation and propose that such an independent commissioner would act as a mechanism to safeguard disclosures of information related to illegal wrongdoing within government. To ensure the Commissioner enjoys the trust of both the Government and civil society, its independence must be guaranteed and enshrined in law. Any reporting or oversight roles should fall to Parliament directly and not Government.

46. However the statutory Commissioner should not be established to dissuade or discourage whistleblowers sharing protected information with journalists and media outlets in the public interest, and added alone would not be a sufficient safeguard to protect journalistic activity.

[3] Parliamentary Debates, House of Commons, Official Report - National Security Bill, Third Sitting, Tuesday 12th July 2022, pg. 78.
[4] The Law Commission – Protection of Official Data Report, 2020, pg. 8.