Legislation to Counter State Threats (Hostile State Activity)
NUJ response to the Home Office consultation
July 2021

Introduction

The National Union of Journalists (NUJ) is the representative voice for journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members.

The NUJ represents staff, students and freelances working at home and abroad in broadcasting, newspapers, news agencies, magazines, books, public relations, communications, online and as photographers.

The union is not affiliated to any political party and has a cross-party parliamentary group.

The NUJ welcomes the opportunity to respond to the Home Office consultation on reforming official secrets laws, introducing a new registration scheme, and creating new civil orders. However, the union is gravely concerned by many of the proposals contained within the consultation document and we highlight these in our submission below.

There is a lack of clarity with some of the terminology used by the Home Office, and there are various indications of future, additional proposals, but they are made seemingly without any corresponding commitment that there will be another opportunity to respond to the details at a later date.

The NUJ is primarily concerned with the impact of the proposed reforms on our members, and we believe the plans set out by the Home Office, as they stand, are severely lacking in any safeguards for journalists and journalism.

We are hugely disappointed that the Home Office does not support a new public interest defence, for primary or secondary disclosers, enshrined in any new law.

Dangerously, many of the proposals conflate journalism, espionage and "hostile activity" and additionally the proposals appear to be aimed at dissuading people working in government from disclosing information that would reveal wrongdoing.

It is also alarming that there is a clear intention to increase the risks and penalties for journalists and media organisations that are acting in the public interest – a fundamental purpose and tenet of journalism.

We also believe the current proposals from the Home Office directly contradict and serve to undermine the positive work being carried out by the government's national committee for the safety of journalists.

Journalists who obtain or gather information for the purposes of journalistic activity should not be deemed to be committing an espionage offence. Indeed, their work – and the actions of whistleblowers – should be valued, respected and protected.

We fear the impetus for reforming official secrets laws is an attempt to ensure the authorities are better able to punish journalists and media organisations who report on state misconduct as well as big data leaks. Even if that is not the intent, that is the effect.

We also note with concern that the entire consultation document is structured in a way that will deter responses from various stakeholders including journalists, media organisations and the public.

NUJ ethics

The NUJ code of conduct was first established in 1936 and it is the only ethical code for journalists written by journalists. The code is part of the union rules; members support the code and strive to adhere to its professional principles.

The union's ethical code states: "A journalist at all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed."

The union's code also compels journalists to do their "utmost to correct harmful inaccuracies" and it repeatedly highlights the importance of the "public interest". Furthermore, it calls on journalists to protect the identity of their sources who supply material and information in confidence.

In addition to the code, the union strongly believes that it is the duty of journalists to hold the powerful to account. This duty can involve gathering and obtaining information that can verify or refute allegations relating to dangers that threaten the public, abuses of power and/or serious crimes and misconduct.

The union's ethical framework underpins our response to the Home Office consultation and the union believes that a free press is essential for any functioning democracy.

Concerns about terminology, focus and lack of evidence

Throughout the consultation there is a lack of clarity on some the key terms contained, despite the inclusion of a glossary of terms at the start of the document. The key terms relevant to journalism – and insufficiently defined by the Home Office – are “hostile activity” and “disinformation”.

Furthermore, there is no mention of journalists, journalism or whistleblowers contained within the consultation document, and the Home Office has provided no evidence to substantiate many of the assertions made to justify the proposals. For example, the document states: "we do consider that both primary and onward disclosures have the potential to cause equal amounts of harm". This claim is not supported by any evidence.

The document states it is only the proposals relating to the Official Secrets Act 1989 that will be “of interest to legal, media, civil liberties and employment rights groups” however this claim is misleading. For example, on past occasions the government has used the threat of prosecution under section 5 of the Official Secrets Act 1989 and in some cases section 1 and 2 of the Official Secrets Act 1911 – both pieces of legislation have been used as a tool for seeking to silence journalists. More recently in the case of Julian Assange, the US submitted that his alleged conduct would amount to offences under English law, and the authorities cited the Official Secrets Acts of 1911, 1920 and 1989.

Threats to NUJ members

The consultation document claims that prosecutions using the existing official secrets legislation are "challenging and rare", but there is no commensurate consideration of how the threat of prosecution has been used as a means to attempt to silence public interest journalism.

We have therefore highlighted some of the key historical examples where journalists and their sources have been threatened with official secrets laws. Each of these cases demonstrates the importance of quality journalism, reporting in the public interest, and exemplify the potential threats pose to journalists and journalism.

It is also important to understand the distinction between assertions about the threats to national security made by the Home Office and the vested interests of the state when attempting to use the existing laws to protect themselves from legitimate scrutiny and criticism.

GCHQ, 1976

The first journalists to report the existence of GCHQ were Duncan Campbell and Mark Hosenball. They wrote about electronic state surveillance in Time Out magazine in May 1976. Hosenball, who had been working for the Evening Standard, was subsequently deported on the grounds that he was a danger to national security.

ABC trial, 1977

According to Geoffrey Robertson QC, the trial involved charges under sections 1 and 2 of the Official Secrets Act 1911. It was the first time the existence of GCHQ had been reported and two of the three defendants were journalists. Crispin Aubrey worked as a Time Out reporter, and Duncan Campbell was working as a freelance journalist.

In February 1977, they were arrested, prosecuted and held in police cells for two days without being allowed to see their families or their solicitors. They were refused bail and Campbell's home was raided. The information taken from Campbell’s home had been gathered from published sources and it was alleged that the information was of "direct or indirect" use to a potential enemy and prejudicial to the state.

At the committal in November 1977, the prosecution claimed Campbell's activities could put lives at risk, but it was eventually conceded that there was "no suggestion that he was in the employ of a foreign power".

At the second trial, a new judge, Justice Mars-Jones, announced himself "extremely unhappy" at what he called an "oppressive prosecution". The section 1 charge was dropped and although the three had no defence to the section 2 charges, the judge conditionally discharged Aubrey and Campbell.

Zircon, 1987

Duncan Campbell was again involved in another case a decade after the ABC trial, in February 1987. Police special branch teams were sent to search his home and this time, according to Campbell, the authorities were responding to the creation of a BBC documentary program called "Secret Society".

Campbell's documentary revealed GCHQ wanted to build a British spy satellite called Zircon. The BBC director general, Alasdair Milne, agreed to ban the programme and Campbell arranged to show it in parliament, and print the story in the New Statesman magazine.

The authorities spent days searching the magazine’s offices and the government ordered a raid on the BBC. The programme was aired a year later, and the Zircon project was never completed.

Scotland, 1990

When journalist Ewen MacAskill was the political editor for the Scotsman, he worked on a story with the headline "Trident base safety fears". A whistleblower provided him with 100 pages of documentation, including an internal Ministry of Defence memo expressing concern about a shiplift at Faslane naval base that took nuclear submarines out of the water. The information warned of the consequences if it should fail and included many examples of collapses from around the world.

A primary disclosure/whistleblower working at the base had leaked this information and the MoD argued that it posed a security threat and they wanted to find the source. The MoD said the documents had been stolen and gave MacAskill a deadline for their return, which he ignored.

Libya, 1996

In March 2000, the Metropolitan Police and the government launched a legal case against the Guardian and its sister paper, the Observer, to try to obtain documents relating to its dealings with David Shayler.

Shayler, a former MI5 officer, had disclosed information alleging that MI6 had attempted to assassinate Colonel Gaddafi in 1996. Shayler had first made these allegations in August 1997 in the Mail on Sunday.

After reports that the names of the agents involved in the Gaddafi plot had been disclosed to the Observer (but not published at the time), the police contacted the paper and asked the reporter, Martin Bright, to hand over his notebooks, copies of emails, dates of meetings with Shayler and the details of any financial transactions.

The police told Bright he was being investigated under the Official Secrets Act and the police also asked for the letter from Shayler that had been published by the Guardian. The newspaper refused to hand over the material.

At the hearing at the Old Bailey and using the Police and Criminal Evidence Act (PACE), lawyers for the police argued that the full text of the letter might contain evidence that could be used by investigating officers. Detective Sergeant John Flynn, from special branch, said the full letter might reveal offences by Shayler as well as his email address, possibly opening up further lines of inquiry.

On 17 March 2000, the judge ruled against the newspapers, and ordered them to hand over the material. The case went to judicial review and on 21 July 2000 the Guardian won at the appeal court.

Lord Justice Judge ruled that "inconvenient or embarrassing revelations, whether for the security services or for public authorities, should not be suppressed".

Northern Ireland, 2000

In 2000, journalist Richard Norton-Taylor reported that prosecutors had dropped charges against a retired army officer who had been accused of passing information to a journalist about surveillance operations in Northern Ireland.

The MoD argued for evidence against Lieutenant Colonel Nigel Wylde to be heard in secret and under the Official Secrets Act. Wylde was charged with providing information for a book called "The Irish War", which described the use of computers by military intelligence in identifying targets.

The evidence included information relating to "damage assessments" and an initial MoD assessment concluded the book did not endanger any operations. The CPS went on to say that there was insufficient evident for a conviction and all the material passed to the journalist was shown to already be in the public domain.

Phone hacking, 2011

In 2011 Scotland Yard announced that it intended to take the Guardian to court to force Amelia Hill to reveal how she obtained the information that, at the time of her disappearance, police thought that the mobile phone of missing schoolgirl, Milly Dowler had been hacked.

The order against the Guardian was sought under the Police and Criminal Evidence Act (PACE) but the application said that potential offences may have been committed under the Official Secrets Act.

The police claimed the journalist could have incited her source to break the Official Secrets Act and, in doing so, had broken the act herself. The application for the production order required the Guardian and Amelia Hill to hand over material which would disclose journalistic sources linked to the hacking scandal. The Old Bailey hearing was scheduled but the police abandoned the case following widespread condemnation.

Undercover police, 2014

In 2014, the police tried to compel Channel 4 to hand over documents and un-shown footage from the investigative current affairs programme Dispatches. The information related to the police whistleblower, Peter Francis, who claimed undercover police officers had spied on the Stephen Lawrence family.

The police said they were investigating a potential breach of the Official Secrets Act and were concerned about the naming of specific locations in the programme (although these locations had not been used by the police for more than a decade), they also suggested police officers and their families may have been put at risk.

Francis offered to speak to Operation Herne if the police withdrew their repeated threats to use the Official Secrets Act.

No Stone Unturned 2018

In August 2018 two investigative journalists were arrested in Belfast, Trevor Birney and Barry McCaffrey, were under investigation in connection with the suspected theft of a confidential report and they were accused of handling stolen goods, unlawful disclosure of information under the Official Secrets Act and the unlawful obtainment of personal data.

The confidential report was from the office of the Police Ombudsman for Northern Ireland and the leak was sent to the journalists by an anonymous source. McCaffrey had received a plain envelope in the post with no return address. The document related to the first police investigation into the killing of six men by a loyalist paramilitary group in 1994 in a Northern Ireland village called Loughinisland.

The report features in the film No Stone Unturned, which tells the story of the victims and their families. It also examines the police investigation into the murders, names the murder suspects and highlights allegations of collusion between the police and killers.

The journalists were questioned by the police for 14 hours and their homes and office were raided. The police took away phones, computers and the entire computer server from the office. The journalists were told that Durham police were leading on the investigation and had been brought in by the Police Service of Northern Ireland (PSNI).

The police had already known in advance that the film was likely to name the suspects in the Loughinisland case. During the film's pre-publication and editing process, the journalists offered the named suspects a right of reply - sent by registered mail and the letters went unanswered. They also informed the Police Ombudsman of the likely suspects the film would name. The Ombudsman passed on the information to the PSNI.

The journalists had wanted to be sure the PSNI was informed just in case there were any concerns for the safety of the suspects or in case the police had any other compelling reason why the film should not be released. The journalists received no response.

In February 2019 Belfast's High Court granted a judicial review and the journalists' legal argument rested on a series of technical points - the warrants did not cover all of the seized material, the police had used the wrong procedures (they had used the PACE legislation but not the sections that applied to journalists) and the judges' reasoning in granting the search warrants had not been recorded at the time.

After two days in session, the Lord Chief Justice Morgan decided he was "minded to quash" the search warrants and said the two journalists were acting in "nothing other than a perfectly appropriate way in doing what the NUJ required of them, which was to protect their sources".

NUJ members' experiences

In all of the cases that we have highlighted above there was no "hostile activity", espionage or threat to national security involved yet the law was used in an attempt to silence or deter public interest journalism.

The Home Office consultation states the proposed reforms aim to "improve our ability to protect official data and ensure the associated offences reflect the greater ease at which significant harm can be done" - yet all of the real-life examples show that UK journalism has not caused any harm, indeed its purpose and intent has been squarely in the public interest, and informed by the collective right to know.

Responding to the specific Home Office consultation questions:

The NUJ has only responded to the questions that are applicable to whistleblowers, journalists and journalism and we have used the same numbered order as the consultation document for ease of reference.

The territorial ambit of Official Secrets Acts 1911-39 and 1989 offences

3) Do you think there would be merit in considering a 'significant link' formula, as described above, to bring into scope espionage against assets in the UK from overseas? How do you think this could work in practice?

4) Is there anything that you consider this model would miss that ought to be captured?

13) Do you think the extraterritorial ambit of offences in sections 1 to 4 (OSA 1989) should apply to formerly notified persons, Crown servants and contractors, as well as those currently employed?

14) Do you think the extraterritorial ambit of offences in sections 5 and 6 (OSA 1989) should be extended to bring into scope British citizens, residents and those with settled status (including those located overseas) when committed abroad?

15) Do you think there is a case for extending the extraterritorial ambit of offences in (OSA 1989) sections 5 and 6 to all, regardless of nationality?

The consultation document proposes to expand the espionage offenses committed irrespective of an individuals' nationality or location and make sure it is not limited to a crown employee or contractor but also extends to cases where the conduct relates to a location or data owned or controlled by the UK government.

The NUJ does not support the widening of the territorial remit to mean that a government employee, contractor or another person commits an offence when he or she makes an unauthorised disclosure abroad.

The union believes there should be explicit limits in legislation about the use of any new extra-territorial offences in regard to journalists and media organisations abroad.

Reform of the Official Secrets Act 1989 - the requirement to prove damage

5) Do you agree with the Law Commission's proposals with regards to introducing a subjective fault element, as part of offences in sections 1 to 4 of the existing Act, instead of a damage requirement?

6) Do you agree that the requirement to prove damage should remain for offences under sections 5 and 6 of the existing Act? If so, why?

The existing unauthorised disclosure offences are only applicable to former or existing crown servants, government contractors or notified persons and the proposals suggest these offences should no longer require proof or likelihood of damage.

The Home Office claim: "In practice, proving damage in an open judicial system would likely require the disclosure of additional confidential information, which in turn could cause further material damage, meaning there is often a reluctance to pursue prosecutions."

The new proposals introduce an explicit subjective fault element that could be modelled around whether the defendant knew, believed, or was reckless as to whether the disclosure would, or was likely to, risked causing, or was capable of causing damage.

The Home Office agree with the Law Commission proposal that the defence of an individual not knowing and having no reasonable grounds to believe that the material disclosed related to security or intelligence, should continue to apply.

The Home Office goes on to add: "…we do consider that both primary and onward disclosures have the potential to cause equal amounts of harm."

The NUJ strongly condemns this proposal, which would remove the requirement for prosecutors to prove that a disclosure was damaging.

A requirement to prove damage must remain a prerequisite to establishing criminal liability in the area of unauthorised disclosures or onward disclosures of information in any new legislation.

Anything short of a clear requirement to prove damage is likely to have a serious chilling effect on the exercise of public interest journalism.

We urge the Home Office to make it clear that there will be no recommendations or support for legal changes that would relax or abandon the requirement to prove damage before a journalist could be prosecuted.

Our concerns are in no way assuaged by the recommendations on the introduction of a requirement to prove subjective fault.

The case of the Snowden disclosures provides an instructive illustration as to how the state could manipulate this type of legal test proposed. Journalists held the material disclosed by Snowden for weeks as they analysed the material and decided what they could publish. During this period, the government was constantly warning that publishing any of this material was capable of damaging national security. Journalists facing such pre-publication warnings, faced with the authorities claiming a monopoly on defining what amounts to a threat to national security (or "hostile activity" or espionage), would clearly have reservations about publishing the information.

Applying the latest proposals to past incidents helps to exemplify the substantial chilling effect that may arise from the removal of a requirement to prove damage and its replacement with a subjective fault element.

The Law Commission propose that the unauthorised disclosure offence concerning individuals notified that they are subject to its provisions (most commonly crown servants and contractors) should not be amended to require proof that disclosures were damaging. The NUJ is opposed to the lack of a requirement to prove damage.

Although the NUJ does not want to encourage the further use of in camera proceedings, it is also the case that the official secrets laws (and the common law) permits courts to hear evidence in private. Where there are concerns that proving damage would require the authorities to adduce sensitive evidence, these powers could be deployed where essential and appropriate.

If the proposed changes are made in law it will lower the threshold of culpability before an individual commits a criminal offence – the NUJ strongly believes the Home Office should abandon these proposals.

Reform of the Official Secrets Act 1989 – Sentencing for unauthorised disclosure offences

7) Do you agree that maximum sentences for some offences under the Official Secrets Act 1989 should be increased?

8) Do you think there should be a distinction in sentencing between primary disclosure offences - committed by members of the security and intelligence agencies, Crown servants, government contractors and those notified - and onward disclosure offences - which can be committed by members of the public?

The NUJ strongly believes that whistleblowers and journalists acting in the public interest should not be subjected to increased prison sentences for unauthorised disclosure offences.

We are particularly concerned that the Home Office appears to be recommending reforms which would make it easier to prosecute journalists.

The NUJ urges the Home Office to make it clear that any new law should never be used to prosecute journalists who are not proven to be agents of foreign states or organisations.

It is crucial that journalism is not equated with espionage and media workers should not be criminalised under any future espionage law on the basis of onward disclosure offences.

The vetting of lawyers to protect official information

9) Do you agree with the Law Commission's proposed recommendations on how sensitive official material could be better protected during the process of obtaining legal advice?

10) Do you have any other suggestions on how it can be assured that sensitive official information is adequately protected during the process of obtaining legal advice?

The NUJ does not support the reform proposals as they would impact negatively on media organisations. The proposals would impact on the ability and willingness of a media organisation to provide sufficient advice and/or fund external, independent advice for the source.

These proposals would severely restrict the choice of lawyer in relevant circumstances. They would exclude most, or all in-house media organisations' legal teams and it is questionable whether there is any justification for this sort of intrusion into the rights of the person concerned to instruct the lawyer of their choice.

Disclosure of information in the "public interest"

16) Do you support the potential creation of a Statutory Commissioner to support whistleblowing processes? If so, why?

17) Do you have any evidence for why existing government whistleblowing processes would necessitate the creation of a Statutory Commissioner?

18) Do you have a view on whether a Public Interest Defence should be a necessary part of future legislation?

The Law Commission proposed that an independent statutory commissioner should be established with the purpose of receiving and investigating allegations of wrongdoing or criminality, where otherwise the disclosure of those concerns would constitute an offence.

The Law Commission also recommended a right of appeal by the complainant against decisions of the statutory commissioner and that the jurisdiction of the Investigatory Powers Tribunal should be expanded, such that it can hear appeals against decisions of the statutory commissioner.

The Law Commission also recommend the introduction of a public interest defence and that a person should not be guilty of an offence under the Official Secrets Act 1989 if that person proves, on the balance of probabilities, that: (a) it was in the public interest for the information disclosed to be known by the recipient; and (b) the manner of the disclosure was in the public interest.

The Home Office consultation says they will consider these proposals in more detail and believe the existing offences are compatible with Article 10. The Home Office go on to add:

> "Press freedom is an integral part of the UK's democratic processes, as is the ability for individuals to whistleblow and hold organisations to account, when there are serious allegations of wrongdoing. However, a balance must be struck with safeguarding official information (including national security information), where its compromise could harm the UK, its citizens or interests, given the unlawful disclosure and/or subsequent publishing of sensitive documents can lead to serious harm in many cases. We are not convinced that the Law Commission's recommendations strike the right balance in this area.
>
> "Our fundamental concern is that a person seeking to make an unauthorised disclosure, whether in government or otherwise in possession of official material, will rarely (if ever) be able to accurately judge whether the public interest in disclosing the information outweighs the risks against disclosure. Even if the case is subsequently made that the disclosure was not in the public interest, and the person who published the information has committed a criminal offence, this does not undo the potential damage caused by the disclosure."

The NUJ in its submission to the Law Commission in 2017 welcomed the proposal that members of security and intelligence agencies should be permitted to make disclosures to a statutory commissioner without risking criminal proceedings, adding that it was important that the proposals were further developed in consultation with the organisations representing workers employed within the relevant organisations.

The union also warned that without concomitant changes to employment legislation there was a real risk that the creation of a statutory commissioner could encourage employees to contact the commissioner without any guarantees that this contact would not lead to detrimental consequences for their employment.

We still believe that the proposed statutory commissioner model and the introduction of a public interest defence should not be regarded as mutually exclusive options. These safeguards would enhance each other and serve discrete functions. They are equally important for ensuring that wrongdoing is exposed, investigated and addressed.

The right to make protected disclosures to a commissioner is, of course, primarily relevant to insiders. From the perspective of NUJ members and the media, we emphasise that the commissioner model does nothing to improve the protections available to journalists investigating and reporting in the public interest.

The NUJ strongly believes there should be a public interest defence for whistleblowers and for journalists. The category of secondary disclosers (re-termed as an “onward disclosure” by the Home Office in this consultation) includes journalists and media workers and the union wants to secure a public interest defence in any future law proposed by the government.

There needs to be a public interest defence for the publication or republication of classified/protected data received from whistleblowers and/or sources, as well as for obtaining such material/data.

The NUJ supports the introduction of a statutory public interest defence for primary disclosers (including government employees, contractors and anyone else notified under official secrecy laws) and for secondary disclosers of information (including but not limited to journalists and media workers). This should apply to all offences under any future legislation.

A public interest defence is an essential safety net for whistleblowers/primary disclosures who are prosecuted for exposing wrongdoings the government would prefer to keep secret.

Making these kinds of disclosures will always be fraught with risk, and a public interest defence would offer succour to individuals considering raising concerns.

Secondary disclosures should not be criminalised, but if they are, a public interest defence is essential. It would strengthen democracy and offer improved safeguards for journalists who investigate and expose wrongdoing in or by the state.

The availability of a public interest defence would strengthen the media when facing threats of prosecution aimed at supressing legitimate, public interest journalism.

Public interest journalism is chilled primarily by the possibility or threat of prosecution under official secrecy or (any new) espionage law which can be used whilst there is no recourse to a public interest defence.

Official secrets laws have been used, in the recent past, to threaten journalists and editors to prevent them from publishing material and/or in an attempt to force media workers and organisations to surrender journalistic sources and/or material.

The need for a public interest defence for journalists cannot properly be considered without analysing the use of official secrecy legislation as a means for threatening and/or controlling the media. That is why we have included specific examples in our submission above.

Public interest tests, defences and exemptions already exist throughout English law. This includes statutory public interest tests contained within statutes governing the disclosure or publication of information, including the protected disclosure provisions of the Employment Rights Act 1996, section 4 of the Defamation Act 2013, section 32 of the Data Protection Act 1998, section 55(2)(ca) of the Data Protection Act 1998.

In addition there are various public interest provisions in the Freedom of Information Act 2000. There are also long-established common law public interest defences or justifications in, among other areas, the law of breach of confidence and copyright. The courts have considerable experience of applying such tests.

There is no evidence to suggest that there is a correlation between the availability of a public interest defence, and the level or frequency of genuinely harmful disclosures.

Furthermore, primary and secondary disclosures made in an irresponsible, untargeted or cavalier manner are less likely to be accepted as meeting the criteria specified as part of the statutory public interest defence. The same is true of disclosures which have caused harm.

Search warrants under the Official Secrets Act 1911

22) Do you have any concerns about the continuation of this power? If so, what kind of mitigating actions could be put in place to address these concerns?

The Home Office consultation highlights that under section 9 of the Official Secrets Act 1911, a court can authorise a search warrant to the police where there are reasonable grounds for suspecting that an offence under the law has been, or is about to be, committed.

The warrant will allow the police to enter and search any place named in the warrant, and to search every person found therein, and to seize any relevant material and where there is "great emergency" for which immediate action is required, a superintendent may authorise a warrant.

The Home Office also refer to the search powers under the Police and Criminal Evidence Act 1984 (PACE) and assert that they have not been found to provide adequately swift preventative powers to address the espionage threat.

The Home Office states that PACE does not allow for a search for excluded or special procedure material, when an offence is not yet believed to have been committed, without a provision in another law to allow for this.

The Home Office goes on to state that excluded material under PACE is often particularly relevant in Official Secrets Acts investigations, where such material may form the central evidence in an offence.

The Home Office also state their intention to seek to carry over the section 9 provision into reformed legislation and to consider whether there is a need for other enhanced investigative tools to support the new offences and powers in the legislation.

The NUJ would be extremely concerned to see any amendments that weaken the existing protections for journalists and journalism contained within the PACE legislation. We are urging the Home Office to make explicit commitments that the existing protections and safeguards under PACE will be maintained.

Consultation Proposal – Foreign Influence Registration (FIR) scheme

23) What do you think the implications would be for you, your employer, or your sector in making certain information about registrants, their registerable activity and their registerable links to a foreign state available to the public?

The Home Office state this new scheme will be a government-managed register of declared activities that are undertaken for, or on behalf of, a foreign state.

The consultation document states that: “The types of activity that we are currently considering could include lobbying, the funding of political campaigning, the work of think tanks, political communications and public relations; or the acquisition of ideas, information or techniques where produced by certain sensitive science and technology sectors.”

The NUJ believes the Home Office has not provided sufficient details about the scheme’s eligibility criteria and its operation in order to offer a comprehensive response, and the union is seeking reassurances from the Home Office that there will be no requirements for journalists or media outlets to submit information or register their activity on this proposed register.

In addition, the union would urge the Home Office to provide further clarity on the reference to “political communications and public relations” activity as this may impact on NUJ members or members of our sister unions that are working in these areas and/or professional roles.

Consultation Proposal - Civil Orders

38) Do you think preventative and restrictive measures are a desirable way of addressing the threat posed by those engaged in hostile activity where prosecution isn't viable?

The Home Office claims there may be circumstances where it is not possible to adduce evidence to support a prosecution, or to take immigration action against an individual where they are not a UK national, and therefore there is a need to provide preventative and restrictive measures through a civil order.

It is proposed that these measures could prevent an individual associating with certain people or from visiting specified sensitive locations, and the orders could be imposed by the executive rather than the courts.

The NUJ is seeking assurances that civil orders would never be used to stifle or prevent public interest journalism. Furthermore, if these measures are introduced then there needs to be clear and explicit commitments to offer protection for journalists and journalism.

There is the potential that civil orders could be used to prevent journalists speaking to whistleblowers and the NUJ would strongly oppose this.

The Home Office should also recognise that journalists can often communicate with a 'foreign agent' and this activity can be a legitimate part of their work.

Annex B – The Government's Response to Law Commission recommendations

19.Do you have any views or evidence you'd like to provide on any of the other final Law Commission recommendations, or the Government's response, in Annex B?

Annex B includes the following statement: "The government notes the [Law] Commission's recommendations with regards to Protocol on a Leak Investigations and the Crown Prosecution Service's guidance on 'Prosecuting Cases Where Public Servants Have Disclosed Confidential Information to Journalists,' and will consider them further. The NUJ would like to urge the Home Office to consult with the NUJ and other organisations as part of their further considerations.

Conclusion

The NUJ supports journalists exercising their fourth-estate duty including the monitoring of state in the public interest, not least because of the vast powers and capabilities it now wields in secret. Journalists have often proved to be the most effective champions of accountability, oversight, and reform because the media has consistently exposed state misconduct.

The NUJ strongly believes that if the Official Secrets Acts are repealed with no public interest defence, it would have a chilling effect on public interest journalism and a consequential and detrimental impact on all UK citizens. We hope that the Home Office will seriously consider and reflect upon the range of issues and examples we have raised.

We believe the consultation proposals show a lack of media expertise and we want to increase the Home Office understanding of the detrimental impact the current proposals would have on journalists, journalism, and media freedom in the UK.