SUPPLEMENTARY WRITTEN EVIDENCE SUBMITTED BY THE LAW COMMISSION OF ENGLAND AND WALES (NSB05)

NATIONAL SECURITY BILL

LAW COMMISSION EVIDENCE ON EXTENT OF IMPLEMENTATION OF LAW COMMISSION RECOMMENDATIONS

Introduction

1.1 This is the Law Commission's written evidence to the National Security Bill Committee (the "Committee") concerning the extent to which, in the Law Commission's assessment, the National Security Bill (the "Bill") implements the Law Commission's recommendations. The purpose of this evidence is to supplement the oral evidence given by Professor Penney Lewis and Dr Nicholas Hoggard before the Committee on Thursday 7th July 2022.

1.2 The Law Commission published its report, *Protection of Official Data* (the "report"), in 2020. This was a wide-ranging review of the UK's criminal law regime relating to espionage and unauthorised disclosures of official data. It was a five-year project and included wide consultation with the UK Intelligence Community, various government departments, the judiciary, the media, and the public (amongst others). It was also based on an assessment of classified evidence. The report included, in Part 1, a series of recommendations to reform the UK's espionage offences so far as they concerned official data and prohibited sites. Principally, the Law Commission recommended that the Official Secrets Acts 1911, 1920 and 1939 be repealed and replaced with a new, modern statute. Parts 2 and 3 of the report related to unauthorised disclosures (primarily relating to the Official Secrets Act 1989), public interest disclosures, and certain procedural matters.

1.3 The Bill is focussed on espionage and related matters concerning state threats; it does not substantively amend the Official Secrets Act 1989, which is concerned with unauthorised disclosures. Therefore, with the exception of certain matters relating to proceedings, the Bill does not implement (nor is intended to implement) recommendations within Parts 2 and 3 of the report. This evidence will therefore focus on those recommendations within Part 1 of the report (and those other recommendations that are relevant to the Bill).

1.4 For the avoidance of doubt, we should clarify that the Law Commission did not envision that the espionage recommendations and the unauthorised disclosure recommendations would be implemented in the same legislative vehicle. The criminal law governing unauthorised disclosures raises different (albeit overlapping) considerations than those raised by the offences governing hostile state activity and conduct with a purpose prejudicial to the safety or interests of the State. We expressly acknowledged in our report that some of the matters raised by reform of the 1989 Act are complicated and may require further work.

1.5 It is also worth noting that the scope of the Bill is much broader than the terms of reference of the Law Commission's review (which was focussed on the Official Secrets Acts and protection of *official data*). There are therefore significant parts of the Bill on which it would be inappropriate for the Law Commission to comment. The

implementation of our recommendations is contained, for the most part, in Part 1 of the Bill.[1]

Executive summary

1.6 It is our view that the Bill implements to a very significant degree the recommendations we made in Part 1 of the report.

1.7 Amongst the Law Commission's recommendations were two substantive espionage offences. These are implemented in clause 1 (obtaining or disclosing protected information) and clause 4 (entering etc a prohibited place for a purpose prejudicial to the UK). (These recommendations and clauses are addressed in the attached Annex.)

1.8 These offences reflect the balance that our recommendations were designed to effect: namely, to ensure that the offences are effective in the face of the growing and evolving nature of hostile state activity, whilst ensuring that only sufficiently culpable conduct is criminalised.

1.9 We outlined a number of concerns with the existing espionage offences under the Official Secrets Acts 1911, 1920 and 1939. These can be summarised as follows:

(1) the narrow focus on espionage as conduct benefitting "enemies" does not reflect the changing shape of the threat, which includes non-state actors and those acting on behalf of states (it also raises problems of construction, ie who counts as an enemy, and risks giving unnecessary offence to states with which the UK is not at war);

(2) the restricted territorial ambit of the offences does not reflect the modern cyber-threat and realities of data handling and storage; and

(3) the offences contain unfair provisions that do not set an adequate threshold of culpability – for example, there is no requirement to prove that the defendant was aware that their purpose was prejudicial to the safety or interests of the State.

1.10 The offences in clauses 1 and 4 of the Bill broaden the scope of the existing law in some ways but, importantly, they also narrow it in others. The criminal law has to adapt to the growing and evolving threat posed by activity calculated to undermine the safety and interests of the UK – a threat enabled by rapidly developing technology – whilst ensuring that the offences reflect the right threshold of culpability; the existing offences fail in both of these respects.

1.11 There are two key respects in which the scope of the new offences in the Bill is broader:

(1) <u>Foreign power</u>. The Bill contains a number of offences that are subject to a "foreign power" condition (clause 24), such that the conduct in question must be "carried out for or on behalf of a foreign power" and where "the person knows, or ought reasonably to know, that to be the case". This condition replaces the

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[1] However, even in Part 1 of the Bill, the offences in clauses 2, 3, 5, and 12-14 are beyond the scope of the report.

requirement in the OSA 1911 to prove information etc “is calculated to be or might be or is intended to be directly or indirectly useful to an enemy”. This would ensure that “entities directed by a foreign government” (as per the Law Commission recommendation) would fall within the scope of the relevant offences.

(2) Extraterritoriality. As we recommended, the offences in the Bill significantly expand the territorial ambit of the espionage offences, which is vital to ensure the effective operation of the criminal law in the face of modern espionage. The OSA 1911 only applies outside of the jurisdiction to acts committed by “British Officers or subjects”. This offers insufficient protection to sensitive data and assets abroad.

1.12 There are nonetheless a number of ways in which the scope of the criminal offences in the Bill is narrower.

(1) Fault. The fault (or mental) element for the offences in clauses 1 and 4 of the Bill is narrower in two important respects.

(a) *Purpose prejudicial:* for the purposes of the OSA 1911, it does not matter whether the defendant knows or has reasonable grounds to believe that their purpose was prejudicial to the safety or interests of the State; once it is determined what the defendant’s subjective purpose was, it is a purely objective assessment as to whether that purpose was prejudicial to the safety or interests of the State. Under the Bill, however, it must be shown that the defendant’s conduct is for a purpose that they know, or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom. This reflects our recommendation.

(b) *Foreign power*: under the OSA 1911, there is no requirement to prove that the defendant was aware their conduct was capable of benefitting an enemy. In the Bill, where there is a foreign power condition, it must be shown that the defendant “knows, or ought reasonably to know” that their conduct was carried out for or on behalf of a foreign power.

(2) Deeming provisions and reverse burdens. The Bill does not replicate some of the more draconian provisions in the OSA 1920. Section 2 of the OSA 1920 provides that, where a person has been in contact with a foreign agent or attempted to make contact with a foreign agent, that will be evidence that he has committed espionage. Further, it will be assumed that the person has been in contact with a foreign agent if the person has in their possession the agent’s name or address, or any information about that agent – unless the person proves to the contrary. This reverses the burden of proof. The Bill has repealed those provisions (in accordance with our recommendation).

1.13 The Bill also includes important other safeguards and scrutiny where this is absent from the existing OSAs. For example, the Secretary of State’s power to designate prohibited places is, by clauses 8 and 67, made subject to Parliamentary oversight. Further, the duty to provide information has been significantly curtailed in the Bill, and is made subject to judicial oversight (see paragraph 8 of schedule 2 of the Bill; cf section 6 of the OSA 1920).

Annex – Analysis of Law Commission Recommendations

Recommendation 1 – implemented

We recommend that a new statute – containing modern language and updated provisions – should replace the Official Secrets Acts 1911-1939.

2.1 The Bill, if enacted, would replace the Official Secrets Acts 1911-39 and would therefore implement this recommendation.

Recommendation 2 – implemented

In any new statute to replace the Official Secrets Act 1911, the concept of "enemy" in section 1 should be replaced with that of "foreign power". The Canadian definition of "foreign power", including reference to terrorist groups and entities directed by a foreign government, should be used as a starting point for drafting that element of the new provision.

2.2 The Bill contains a number of offences that are subject to a "foreign power" condition (clause 24), such that the conduct in question must be "carried out for or on behalf of a foreign power" and where "the person knows, or ought reasonably to know, that to be the case".[2] This condition replaces the requirement in the OSA 1911 to prove information etc "is calculated to be or might be or is intended to be directly or indirectly useful to an enemy".

2.3 Beyond recognising the importance of expanding the offence to include foreign powers that were not "enemies" or state actors, the Law Commission did not recommend a particular form of drafting. However, we did suggest that the Canadian definition of foreign power in section 2(1) of the Security of Information Act 2001 (Canada) would be a useful starting point, and further recognised the need to ensure the definition included groups engaged in international terrorism or entities directed and controlled by foreign governments.

2.4 The foreign power condition in the Bill and the Canadian definition of foreign power differ significantly in form, rendering broad-brush comparisons difficult. Nevertheless, as to the more fundamental question (at least for these purposes) of whether the foreign power condition achieves the objectives that the Law Commission considered necessary, our view is that it does. We have reached this view after considering not only the definition of "foreign power" within clause 25, but also the provisions in clause 24 as to what counts as being "for or on behalf of a foreign power".

2.5 In particular, clause 24(2) (the foreign power condition) states that conduct will be "for or on behalf of a foreign power" if –

(a) it is instigated by a foreign power,

(b) it is under the direction or control of a foreign power,

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[2] Those offences are in clauses 1 (obtaining or disclosing protected information), 2 (obtaining or disclosing trade secrets), 12 (sabotage), 13 (foreign interference), 14 (foreign interference in elections), and 15 (preparatory conduct).

(c) it is carried out with the financial or other assistance of a foreign power, or

(d) it is carried out in collaboration with, or with the agreement of, a foreign power.

2.6 Further, clause 24(3) provides that clauses 24(1)(a) and 24(2) "may be satisfied by a direct or indirect relationship between the conduct, or the course of conduct, and the foreign power (for example, there may be an indirect relationship through one or more companies)." This is a relatively broad definition, and would therefore likely ensure that "entities directed by a foreign government" (as per the Law Commission recommendation) would fall within the scope of the relevant offences.

2.7 It is also clear that many international terrorist groups would come within scope of the foreign power condition. First, clause 25(1)(d) includes within the definition of "foreign power" those authorities who are "responsible for administering the affairs of an area within a foreign country or territory". Second, conduct will be for or on behalf of that foreign power if, for example, it is carried out with the agreement (clause 24(2)(d)) or assistance (clause 24(2)(c)) of that power.

2.8 Therefore, clauses 24 and 25, read together, very closely align with the Law Commission's recommendation.

Recommendation 3 – implemented

In any new statute to replace the Official Secrets Act 1911, the term "safety or interests of the state" should be retained.

2.9 The Law Commission considered whether the term "national security" should replace reference in the offences to "safety or interests of the state" and concluded that it should not. The Bill retains the term in the relevant offences.

2.10 Not one of the words "security", "safety" or "interests" can boast any greater precision than the others. We would, however, caution against a form of words that narrowed the scope of the offences in such a way as to fail to address the multifarious forms of hostile state activity. For example, an appropriation of hundreds of millions of pounds of government money in a state-sponsored act of cyber theft may have bearing neither on national security nor safety directly, but few would probably dispute that this falls squarely within the proper scope of an offence combatting modern hostile state activity.

Recommendation 4 – implemented

An individual should only be criminally liable for an espionage offence if he or she has a purpose which he or she knows or has reasonable grounds to believe is prejudicial to the safety or interests of the state.

2.11 The existing espionage offences in the OSA 1911 focus on espionage by *trespass* and espionage by *communication* or *collection* of information (put simply). These offences require proof that the defendant's purpose was prejudicial to the safety or interests of the state. So, once it is determined what the defendant's subjective purpose was, it is a purely objective assessment as to whether that purpose was

prejudicial to the safety or interests of the state (ie it does not matter whether the defendant knew or had reasonable grounds to believe that their purpose was so prejudicial). The Law Commission's recommendation was designed to ensure that the defendant has the requisite culpability in knowing (or having reasonable grounds to believe) that their purpose was prejudicial to the safety or interests of the state.

2.12 The offences in the Bill that reflect the existing espionage offences – ie clause 1 (obtaining or disclosing protected information) and clause 4 (entering etc a prohibited place for a purpose prejudicial to the UK) – and also clause 12 (sabotage), all include the following fault element:

> [the conduct] is for a purpose that [they] know, or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom.

2.13 There is no material difference here between "has reasonable grounds to believe" and "ought reasonably to know". In any case, "ought reasonably to know" is certainly not a lower threshold. "Belief" in this context tends to require a level of certainty akin to knowledge, so does not reflect a lower threshold, but simply permits that the belief may be incorrect (whereas one cannot "know" a falsehood). As a matter of drafting, it clearly makes sense to frame this element in terms of what the defendant ought reasonably to know. Nonetheless, in all material respects, this aligns with the Law Commission's recommendation.

Recommendation 5 – not implemented

> *In any new statute to replace the Official Secrets Act 1911, the requirement that the defendant's conduct was capable of benefitting a foreign power should continue to be objectively determined. There should be no requirement to prove that the defendant personally knew or believed that his or her conduct had such capability.*

2.14 The Law Commission made this recommendation on the basis that conduct in furtherance of a purpose proven to be prejudicial to the safety or interests of the state was, almost by definition, *capable* of benefitting a foreign power. The subjective fault of the defendant already having been accounted for in the purpose prejudicial element, it was not worth the risk of introducing further problems of proof. In particular, the Law Commission noted that proving a defendant knew their behaviour was capable of benefitting a foreign power may, in practice, be very difficult.

2.15 The foreign power condition in clause 24 of the Bill includes, at clause 24(1)(b), a requirement to prove that the person "knows, or ought reasonably to know" that their conduct was carried out for or on behalf of a foreign power. Whilst at first blush this would appear to be at odds with the Law Commission's recommendation, it is important to note another difference in the test: the knowledge is not as to whether conduct was *capable of benefitting* a foreign power, but whether it was in fact carried out for or on behalf of a foreign power. Albeit that a person's knowledge that they were acting for a foreign power may well be a step on the way to proving that their conduct was capable of benefitting a foreign power, this is nonetheless a different test, and thus the Law Commission's reservations about the introduction of problems of proof will not apply in the same way or at all.

2.16 The Law Commission is thus of the view that, although Recommendation 5 was not implemented, neither was it rejected: simply, the form of the underlying test differs.

Recommendation 6 – implemented in part

The list of prohibited places should be drafted to reflect the modern espionage threat.

The Secretary of State should have the power, by statutory instrument subject to the affirmative resolution procedure, to amend the list of prohibited places where it is appropriate to do so in the interests of the safety or interests of the state.

The Secretary of State should be obliged to consider taking steps to inform the public of the effect of any designation order, including, in particular, by displaying notices on or near the site to which the order relates where appropriate.

2.17 The current list of prohibited places within the OSA 1911 is lengthy but, as a result of the highly specific form of drafting and strong military focus, is under-inclusive. The Bill, in clause 7, structures the list of prohibited places by reference chiefly to the place's use or purpose – and does so in quite general terms (for example, UK defence) – which permits greater inclusivity.

2.18 Further, clause 8 provides an updated and more effective power[3] for the Secretary of State to declare additional prohibited places "if… the Secretary of State reasonably considers it necessary to do so in order to protect the safety or interests of the United Kingdom" (clause 8(2)). The assessment of whether it is necessary etc must be made with regard to matters mentioned in subclause (3), which are –

(a) the purpose for which the land or building or vehicle is used;

(b) the nature of any information held, stored or processed on the land or in the building or vehicle;

(c) the nature of any technology, equipment or material located on the land or in the building or vehicle.

2.19 These provisions meet the Law Commission's concern that the current list of prohibited places is under-inclusive and does not reflect the threat to sites that store sensitive information. Making the Secretary of State's power subject to an assessment based on the safety or interests of the United Kingdom, rather than on the somewhat narrow ground of whether something would be "useful to an enemy", aligns entirely with the Law Commission's recommendation.

2.20 Further, permitting the Secretary of State to have regard to the "nature of information" held etc on the land, or in the building or vehicle, is an important expansion of a power that hitherto only permitted consideration of information relating to or damage to the place itself.

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[3] There is already a power contained in section 3(c) of the OSA 1911, but only on the grounds that "information with respect thereto, or damage thereto, would be useful to an enemy".

2.21 The power does differ in two respects from the Law Commission recommendation. First, the power is subject to a negative resolution procedure (clause 67), rather than an affirmative resolution procedure. Although we considered the affirmative resolution procedure the appropriate one in this context, the exercise of the Secretary of State's power will nevertheless be subject to Parliamentary scrutiny under the terms of the Bill. The opposition, for example, could table a motion objecting to the statutory instrument, necessitating debate on the matter.

2.22 Second, there is no obligation to display notices on or near prohibited places. Given the form of the offences in the Bill, this is perhaps understandable. Depending on whether the person is being charged with an offence under clause 4 or clause 5, the prosecution would either have to prove (i) that a person knew or ought reasonably to have known that their purpose in entering/inspecting etc the prohibited place was prejudicial to the safety or interests of the United Kingdom, or (ii) that a person knew their entry/inspection was unauthorised. Given these fault elements, there is perhaps not much to be gained by signage (albeit that displaying notices would tend to put the matter beyond doubt, certainly with respect to knowledge of authorisation or lack of it; a government could therefore determine whether the benefit in proving (i) or (ii) is worth any attendant risk or difficulty with respect to signage).

Recommendation 7 – implemented

> *There should continue to be no restriction on who can commit the offences contained in the Official Secrets Act 1911 or in any replacement legislation.*
>
> *There should continue to be separate offences of espionage by trespass and espionage by collection or communication of information.*
>
> *The espionage by trespass offence should also continue to apply to those who approach, inspect, pass over or enter any prohibited place within the meaning of the Act.*
>
> *The collection and communication offence should continue to be capable of being committed not only by someone who communicates information, but also by someone who obtains it.*
>
> *References in the Official Secrets Acts 1911 and 1920 to a sketch, plan, model, note and secret official pass word and code word are anachronistic and should be replaced with "document, information or other article". Information should be defined to include any program or data held in electronic form.*

2.23 The Bill does not place any restriction on who can commit the offences (save, of course, with respect to conduct outside the United Kingdom – extraterritoriality will be considered below). The Bill therefore aligns with the Law Commission's recommendation.

2.24 The Bill does replicate the existing distinction between espionage by trespass (clause 4) and espionage by collection or communication of information (clause 1), and thus implements the Law Commission's recommendation.

2.25 Clause 4(1)(a)(i) provides that a person commits an offence if the person "accesses, enters, inspects, passes over or under, approaches or is in the vicinity of a prohibited

place" (or, under (ii), causes an unmanned vehicle or device so to do). There are minor drafting differences which presumably take account of the increased scope of "prohibited places", though the spirit of clause 4 aligns exactly with the Law Commission's recommendation.

2.26 Clause 1(1)(a) provides that a person commits an offence if the person –

> (i) obtains, copies, records or retains protected information, or,
>
> (ii) discloses or provides access to protected information…

This distinction is therefore in accordance with the Law Commission's recommendation to allow espionage to be committed both by obtaining information and by communicating ("disclosing") that information.

2.27 Clause 1(2) of the Bill defines protected information as "*any information, document or other article* [emphasis added] where, for the purposes of protecting the safety or interests of the United Kingdom –

> (a) access to the information, document or other article is restricted in any way, or
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> (b) it is reasonable to expect that access to the information, document or other article would be restricted in any way."

This implements the Law Commission's recommendation, albeit that the subsequent constraint on "any information, document or other article" is now framed in terms of whether access was restricted etc for the purposes of protecting the safety or interests of the UK, rather than whether it was calculated etc to be useful to a foreign power (this purpose is now served by the foreign power condition, which is also subject to a further fault element, as noted above, at paragraph 2.15). There is no provision to define "information" as including a programme or other data, although that is likely because such a definition may have been deemed unnecessary rather than undesirable (on the basis that it almost certainly meets the definition of "information" anyway, failing which it would fall under "other article").

Recommendation 8 – implemented

> *We recommend that section 1(2) of the Official Secrets Act 1911 and section 2(2) of the Official Secrets Act 1920 should be repealed.*

2.28 Section 1(2) essentially has the effect of placing the burden on the defendant to show that his or her purpose was a "right" one, rather than prejudicial to the safety or interests of the state. Section 2(2) of the OSA 1920 provides certain circumstances in which it will be assumed that a person has been in contact with a foreign agent (for example, if the person has in their possession the agent's name or address, or any information about that agent) – unless the person proves to the contrary.

2.29 The Bill does not replicate these deeming provisions, which inappropriately place the burden of proof on the defendant. This recommendation is therefore implemented.

Recommendation 9 – implemented in part

We recommend that section 7 of the Official Secrets Act 1911 and section 2(1) and section 6 of the Official Secrets Act 1920 should be repealed without replacement.

The offence of doing an act preparatory to espionage should be retained. Save for that, section 7 of the Official Secrets Act 1920 should be repealed.

2.30 Section 7 of the OSA 1911 creates a number of offences connected with harbouring spies. The Law Commission's opinion was that the continued existence of these offences was anomalous given the existence of the offence of assisting an offender in section 4 of the Criminal Law Act 1967.

2.31 Section 2(1) of the OSA 1920 provides that communication with a foreign agent shall be evidence of the commission of the offences in section 1 of the OSA 1911. The Law Commission agreed that communication with a foreign agent may be relevant to the question of whether a defendant has committed an espionage offence, but considered it best dealt with as circumstantial evidence admissible in accordance with the normal rules of evidence.

2.32 Section 6 of the OSA 1920 creates a mechanism for the police to apply for the power to require an individual to give information relating to an offence or suspected offence, or to require that individual to attend a place specified by the police officer. An individual who fails to comply with the request for information, or to attend the specified place, commits a criminal offence. This offence is anomalous in the criminal law and stakeholders, including the Government, stated that section 6 ought to be repealed.

2.33 Section 7 of the OSA 1920 criminalises acts preparatory to the commission of an offence under the Official Secrets Acts. It also makes it an offence for any person to solicit, incite or endeavour to persuade another person to commit an espionage offence, or to aid or abet the commission of an espionage offence. The preparatory offence does serve a purpose, because it criminalises acts at an earlier stage than would be the case for criminal attempts generally (the conduct element of the offence contained in section 7 includes "doing an act preparatory" to an espionage offence, whereas the conduct element of the offence contained in the Criminal Attempts Act 1981 is "doing an act *more than merely* preparatory"). The remaining offences within section 7 are duplicated by other statutes (such as Part 2 of the Serious Crime Act 2007), and thus the Law Commission considered these offences unnecessary.

2.34 Clause 15 of the Bill creates an offence of preparatory conduct that reflects the nature of the offence in section 7 of the OSA 1920. This is in accordance with the Law Commission's recommendation. It is vital that the criminal law can meet the present threat and do so at a stage early enough in a course of that hostile conduct to prevent really serious harm. The clause does go further than the existing law in that it also criminalises conduct preparatory to committing acts involving violence, endangering life, or creating a risk to the health or safety of the public (see clause 15(4)); on the basis that these go beyond the scope of the Law Commission's terms of reference (which focussed chiefly on the protection of official data), the Law Commission would make no comment on these further provisions.

2.35 Paragraph 8 of Schedule 2 of the Bill provides that a judicial order may be sought by the police, requiring a person to provide an explanation for material seized under this Schedule (other than legally privileged material). Paragraph 9 creates an offence, punishable by two years' imprisonment, of making a statement that is intentionally or recklessly false or misleading following an explanation of material order. Whilst on its face, this would appear to be a somewhat similar duty to that under section 6 of the OSA 1920, there are important differences that render the provisions distinct.

(1) Section 6 provides that a person could be compelled to provide *any* information relating to an offence or suspected offence (if it is believed that person may have information relating to the offence or suspected offence). It is not limited to providing an explanation for information already seized or produced subject to warrants/judicial orders (which is the limitation in the Bill, where those warrants/judicial orders are themselves a product of statutory powers under Schedule 2 of the Bill).

(2) An explanation obtained under paragraph 8 (explanation of material order) cannot be used as evidence against the person in a prosecution (other than for the offence in paragraph 9), which preserves the rule against self-incrimination.

(3) The offence in paragraph 9 does not include an offence of mere failure to comply with the order (unlike section 6 of the OSA 1920). Whilst failure to comply with the order would ultimately constitute a civil contempt of court, it would not constitute a criminal offence.

(4) The order (and any subsequent contempt hearing) are subject to independent judicial oversight, rather than political. This also permits judicial consideration of any potential freedom of expression arguments in relation to article 10 of the European Convention on Human Rights, for example.

2.36 The provisions in paragraphs 8 and 9 of Schedule 2 are therefore materially different from the existing power under section 6 of the OSA 1920.

2.37 The Bill does not replicate the other provisions referred to above, and therefore aligns with the Law Commission's recommendations.

Recommendation 10 – implemented in part

The territorial ambit of the offences contained in the Official Secrets Acts 1911-1939 should be expanded so that they can be committed irrespective of the individual's nationality. The test should be whether there is a "significant link" between the individual's behaviour and the interests of the United Kingdom.

"Significant link" should be defined to include not only the case where the defendant is a Crown employee or contractor, but also the case where the conduct relates to a site or data owned or controlled by the UK government (irrespective of the identity of the defendant).

To ensure that sensitive UK assets overseas receive maximum protection, any new definition of "prohibited place" (see recommendation 6) should explicitly provide that such places may be overseas.

2.38 The Law Commission's concern was that the territorial ambit of the existing espionage offences was too restrictive. Of particular concern was that the nature of modern espionage and modern data storage meant that the safety or interests of the UK could be targeted outside the jurisdiction. The overriding objective of the Law Commission was therefore to ensure that the new espionage offences had extraterritorial application.

2.39 The Law Commission considered that proving a "significant link" between the defendant's conduct and the interests of the United Kingdom would be an effective way of defining and justifying the extraterritorial scope of the offences. It was recommended as a way of achieving the overriding objective.

2.40 The Bill does not adopt the "significant link" language, although it does reflect the policy objective in the Law Commission's recommendation by significantly expanding the extraterritorial application of the offence. The way that the offence has been drafted, particularly with respect to the definition of "protected information", achieves a similar result to the "significant link" model. Clause 1(2) defines "protected information" as being any information etc "where, *for the purpose of protecting the safety or interests of the United Kingdom*… access to the information is restricted in any way…" [emphasis added]. The link to the United Kingdom is thus embedded within the definition of the offence.

2.41 The extraterritorial provisions in the clause 1 offence therefore accord with – albeit in a different manner – the Law Commission's recommendation, and align with the policy objective.

2.42 The offence in clause 4 can also be committed outside the United Kingdom (as made clear in clause 4(4)), although of course the offence is necessarily committed only with respect to prohibited places (which provides a clear link to the safety and interests of the United Kingdom). This therefore also aligns with the Law Commission's policy recommendation.

Law Commission recommendations – miscellaneous

2.43 It is worth noting one final recommendation outside of Part 1 of our report that is relevant to the Bill.

Recommendation 29 – implemented

> *We recommend that the power conferred on the court by section 8(4) of the Official Secrets Act 1920 ought to be subject to a necessity test, 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 (replacing the term used in the 1920 Act: "prejudicial").*

2.44 Clause 31 provides that a court may exclude the public from proceedings under the Bill (and sentencing proceedings) if "*necessary* in the interests of national security".

2.45 The Law Commission's policy objective was to subject the existing power in section 8(4) of the OSA 1920 to a necessity test, which is precisely what this clause achieves. It is not clear that much is gained or lost by reference to "national security" rather than the existing wording of "national safety", save that "national security" has the benefit of

consistency with other provisions within the Bill. Either way, this would not appear to be a material departure from the Law Commission's recommendation.

THE LAW COMMISSION OF ENGLAND & WALES

20th July 2022