

Guardian News & Media submission to the Commons General Committee on the National Security Bill

1. Introduction

Guardian News and Media Limited (“**GNM**”) is the publisher of theguardian.com and the Guardian and Observer newspapers, a subsidiary of Guardian Media Group, which is a British-owned, independent, commercial news media organisation. GNM has a global reputation for award-winning public-interest investigative journalism, including their exposures of the Windrush scandal and Cambridge Analytica, as well as a partner in a number of global data-led projects such as the Paradise, Panama and Pandora Papers and the Pegasus Project and, most recently, the Uber Files.

GNM believes that the draft [National Security Bill](#) (“**draft Bill**”) poses a risk to public interest journalism. In this note we highlight provisions that we believe should be amended, to ensure that public interest journalism can continue to play the key democratic role of enabling the public to understand how power is exercised by those who govern, police, surveil and represent them. Such journalism often relies on whistleblowers who expose themselves to serious risks and pressures, and to information they provide that substantiates the truth of claims that whistleblowers make. As such, it is vital that robust protections are made available to citizens who make the decision to disclose public interest information to journalists. Legislation that has the effect of chilling whistleblowing, risks undermining public access to information, and the democratic role - and sustainability - of high quality journalism in the UK.

GNM is concerned that the draft Bill poses a serious risk to whistleblowers and those who write about and investigate their claims, as well as potentially criminalising core functions of journalism: reporting on leaks of information about governments, organisations and companies. We are also concerned that at a time of climate crisis, the draft Bill is also likely to affect the coverage of environmental protests.

2. Key concerns

- **Lack of a public interest defence (point 4 below).** The draft Bill seems to rely upon the good will of the executive not to prosecute offences, which GNM considers to be inadequate. GNM considers a public interest defence should be written into law to protect public interest journalism and freedom of expression.
- **Harsh penalties (point 6 below).** The prison sentences in current legislation already constitute a significant deterrent and GNM is concerned that the proposals in the draft Bill would have a seriously chilling effect on freedom of expression, including discussions on matters of public interest.
- **Very wide definitions (point 3 below).** GNM considers the draft Bill to be too widely drawn. It is concerned that its provisions could be applied inappropriately to public interest investigations.

3. Definitions of information protected in the draft Bill

The draft Bill is too widely drawn and could therefore apply to investigations which do not involve espionage or any hostile actions for or on behalf of foreign states.

a. Definition of ‘protected information’ (s1 of the draft Bill)

'Protected information' is a very widely drawn term in the draft Bill. It is defined in s1(2) stating that

'...means any information, document or other article where, for the purpose 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
(b) it is reasonable to expect that access to the information, document or other article would be restricted in any way.'*

This would suggest that it would apply not merely to information which was deemed secret or classified but to **any** information protected from disclosure by obligations of confidence or, even more widely, information which **might** be expected to be subject to obligations of confidence but which are not. It would therefore apply to information disclosed by the Government accidentally if it is considered that the publisher of that information should reasonably have expected that the government should have restricted access.

The only restriction on this wide definition is that the person in receipt of the material leaked knew or ought reasonably to have known that the publication would prejudice the UK's safety or interests.

This change is substantial when compared with the definition of information covered under the 1989 Official Secrets Act. That Act has a more limited definition of the subject matter of the documents, namely that they relate to security and intelligence, defence, international relations or law enforcement. That legislation also has a much less severe punishment of violations (of only two years rather than a maximum punishment of life imprisonment as contained in the draft Bill s1(4)).

GNM considers it inappropriate to introduce a definition in the draft Bill that brings a much wider range of material within scope, whilst also significantly increasing the potential penalties for sharing that material.

b. Definition of 'safety or interests of the United Kingdom' (s 1 of the draft Bill)

The Government defines what amounts to prejudice 'to the safety or interests of the United Kingdom'¹ in (s1(1)(b)). This could mean that merely controversial issues - for instance relating to the national infrastructure - are considered to fall within the legislation in addition to issues of serious public safety. Without sufficient control it may be possible for the Government to view information which merely causes embarrassment to fall within this wide definition.

GNM considers that the issue of what is prejudicial to the safety or interests of the UK should be subject to a 'reasonable test' rather than solely determined by the Crown and its Ministers.

c. Definition of trade secrets (s2 of the draft Bill)

Section 2 protects trade secrets and criminalises obtaining what is, in effect, commercially sensitive information if the acquisition, retention or disclosure is for or on behalf of a foreign power (see below comments on the foreign power requirement in point 10).

The draft Bill widens the usual definition of a trade secret (see s2(2)) so it is similar to that used in the Trade Secrets (Enforcement, etc.) Regulations 2018 in order to include within the

¹ See the [Consolidated Committee debates on the bill](#), page 82 which refers to case law which has defined this as meaning 'the objects of state policy determined by the Crown on the advice of Ministers, which includes national security.'

protection ‘early stage ideas’². This also has extraterritorial effect for offences undertaken by UK nationals and companies (s2(4)).

GNM is concerned that this offence could chill public interest journalism by raising the prospect of UK journalists and media organisations partially or fully funded by a foreign power (whether or not that foreign power is hostile) being potentially criminally liable if reporting on commercially sensitive information in the public interest.

4. No public interest defence

The only safeguard which may prevent offences in the draft Bill being applied to journalists and whistleblowers is that the Attorney-General has to consent to prosecutions (s30) and also that the Crown Prosecution Service has to consider that prosecution is in the public interest. It is to be assumed that the DPP [guidance on assessing the public interest in cases affecting the media](#) would be taken into account in such a case, but there is nothing on the face of the draft Bill to guarantee that. Further, the DPP guidance holds no legislative force, and therefore could be changed without any consultation.

There is no statutory public interest defence to the criminal offences in the draft Bill. Without a public interest or an equivalent defence in the draft Bill (for instance by inserting a requirement that to be criminal the disclosures have to have actually harmed the UK national interests) freedom of expression is inadequately protected. Legislation which is dependent on the discretion of a Minister of State and/or the discretion of the DPP in order to protect freedom of expression creates a potential chilling effect. Adequate protections for freedom of expression should be in primary legislation, rather than depending upon the good will of the executive. The absence of a public interest defence potentially criminalises the publication of information that might otherwise be defended from a breach of confidence on the grounds of the public interest, if the Government takes the view that that publication is ‘prejudicial to the safety or interests of the United Kingdom’.

GNM considers a public interest defence should be written into the law to provide explicit protections for those seeking to reveal wrongdoing or other matters of public interest. There should also be an explicit statutory prior publication defence to protect those who publish information that is lawfully in the public domain or widely disseminated to the public.

5. Journalists’ sources

The way that the draft Bill is currently drafted poses a risk to civil society organisations that are engaged in legitimate activities which may be funded by foreign Governments (even those sympathetic to the UK) when similar civil organisations which are not the recipients of such funds from foreign sources will not be subject to such possible liabilities. Civil society organisations frequently form a useful source of information for journalism.

There is also a potential risk that sources who might reveal restricted information, such as trade secrets, during the course of disclosing information in the public interest to organisations that accept financial assistance from foreign governments, may be committing a criminal offence under the draft Bill. This may deter sources from wanting to make public interest disclosures to such organisations.

Investigative journalism often relies on leaks that are shared with other organisations. The Guardian carries out collaborations with UK and international organisations, some of which

² See the [Consolidated Committee debates on the bill](#), page 53,

receive financial assistance from foreign governments. For example, the OCCRP website³ states that its donors include, *inter alia*, the US Department of State and the Ministry of Foreign Affairs of Denmark. The draft Bill could potentially affect those relationships and the investigations that arise out of them.

If the prosecution could show that a leak related to protected information (i) was restricted to avoid prejudicing the UK's safety or interests; and (ii) its use was for a purpose that they knew or ought to know is prejudicial to the UK's safety or interests, any individual employed by an organisation with financial assistance from a foreign government or those who financially benefit from such funding, as they might do so by collaborating with such journalists, would be at risk of prosecution. On conviction, those individuals could face life imprisonment. That creates a significant chilling effect on public interest journalism.

GNM considers that safeguards need to be added to the draft Bill so that financial assistance from a foreign state alone does not tip the balance as to whether a criminal offence may have been committed and/or add a public interest defence to ensure that such collaborations, undertaken between UK journalists and journalists all of the world, in the public interest are not potentially criminalised.

6. Penalties

The legislation imposes very high penalties for breaches of its terms with potential life imprisonment for some of the offences listed with limited protections or defences. The maximum penalty imposed for breaching s1 (obtaining or disclosing protected information), sabotage s12 and preparatory act s15 is life imprisonment. The maximum penalty imposed for breaching s2 (obtaining or disclosing trade secrets), s4 (entering etc a prohibited place) and s14 (foreign interference) is 14 years' imprisonment. Offences with punishments as severe as these and inadequate protections included for freedom of expression are likely to have a chilling effect on freedom of expression. ECtHR case law highlights the dangers of imposing criminal punishments on journalists, which can have the effect of seriously chilling freedom of expression and seriously hamper the potential contribution of the media to discussion of matters of public interest⁴.

GNM believes that the prison sentences in current legislation already constitute a significant deterrent and should not be increased.

7. Prohibited sites (ss4 and 5 of the draft Bill)

The draft Bill includes potential powers for the Government to impose restrictions on a wider range of prohibited sites than is currently the case. This turns civil powers of trespass into criminal trespass offences (see s4 and s5) if the person knows, or ought reasonably to know, that their conduct is for a purpose prejudicial to the safety or the interests of the UK. This power also authorises increased police powers in respect of those sites and adjacent sites (s6).

³ <https://www.occrp.org/en/aboutus/who-supports-our-work>

⁴ In this connection, the ECtHR has reiterated that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (*Cumpăna and Mazăre v. Romania* [GC], § 115; *Ruokanen and Others v. Finland*, § 50; *Balaskas v. Greece*, § 51; see also *Fatullayev v. Azerbaijan*, §§ 129 and 177, where the Court described the prison sentence of two years and six months imposed on the applicant as "grossly disproportionate" and instructed that he was to be released immediately).

The s4 offence extends to offences if a person ‘inspects...approaches or is in the vicinity of a prohibited place’. It could therefore make it a criminal offence if journalists are merely overlooking a prohibited place from public property which journalists have a legitimate right to access (see s4(1)(i)) or ‘inspecting’ a prohibited place (taking photographs or videos of a prohibited place or inspecting photographs of a prohibited place including photographs taken by drone or even possibly by other people) if the conduct is for a purpose ‘that the person knows or ought reasonably to know is prejudicial to the safety or interests of the United Kingdom’. It is not clear to what extent the requirement that it is prejudicial to the safety or interests of the United Kingdom will limit the application of the offence.

The s5 offence applies to ‘unauthorised entries’ rather than prejudicial ones (s4) and applies to those who ‘know or ought to know that their conduct is unauthorised’. It can be committed by ‘taking or procuring the taking of photographs, videos or other recordings of the prohibited place’ which could happen from the vicinity of that prohibited place which could give rise to possible liability depending upon how liberally ‘procuring’ is interpreted and whether it could include film provided to journalists by third parties.

The ‘prohibited sites’ involved are not identified except by general descriptions in the draft Bill (s7 and s8). It includes not only defence sites but also sites used to extract oil, metals and minerals (for use for UK defence purposes) and vehicles used for defence purposes. There is scope for this to give rise to criminal offences by journalists, especially on those prohibited sites used to extract minerals, metals and oils or nuclear industry sites since these are the sites most likely to involve environmental protests. The sites used for defence purposes are defined as including ‘use for the purposes plans and measures for the maintenance of essential supplies and services that are or would be needed by the United Kingdom in time of war’(s7(2)(d)) – which is potentially wide ranging.

GNM believes there is potential for this power to be abused without sufficient oversight and without such sites being adequately and clearly identified. Offences could be committed by those unaware of the particular sensitivity of prohibited sites. GNM considers that it would be better if such sites had to be identified on the site with warning notices and for there to be a public interest defence to the offences.⁵

8. Foreign interference (s13 of the draft Bill)

In theory, section 13 of the draft Bill could criminalise some journalistic activities undertaken by those who receive funding from a foreign power. For instance, if a UK journalist working for a foreign state funded broadcaster publishes a report about the possible side effects of a vaccine, which led to people being less willing to have those publicly-provided vaccinations (s13(2)(c)), and it becomes apparent that the journalist was misinformed and misrepresented the side effects in their report, he or she would potentially be criminally liable under the draft Bill. This would be the case notwithstanding that the report was honestly produced on a matter in the public interest.

It could also apply if a UK journalist receiving foreign state funding uses subterfuge in the public interest to ask a politician questions to reveal that politician’s real character. If during undercover filming the politician reveals that he/she is prepared to behave inappropriately and this film is published then the journalist would, on the face of it, commit all the elements of this offence. By using subterfuge he/she would be making a misrepresentation, the foreign condition would be met and the publication of the film which was made without the consent

⁵ Similar to those provisions contained in section 131 of the Serious Organised Crime and Police Act 2005 requiring the Secretary of State to take such steps as he or she considers appropriate 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

of the politician would interfere with that politician's convention right to privacy s13(2)(a) and/or the aftermath of the publication might result in the politician losing his/her public position s13(2)(b). Such a journalistic investigation could all be done in the public interest, yet all the elements of the criminal offence under the draft Bill may nevertheless be established.

GNM believes this provision (as with many of the provisions in the draft Bill) needs a public interest defence to prevent the legitimate activities of journalists being criminalised.

9. Preparatory offences (s15 of the draft Bill)

s15, which applies to conduct preparatory to other criminal offences described in Part 1 of the Bill (s1,2,4 and 12), could potentially be applied to journalists. The preparatory offences are committed if, 'with the intention of— (a) committing acts to which this section applies, or (b) acts to which this section applies being committed by another person, the person engages in any conduct in preparation for the commission of such acts.'

The only limitation on this requirement is that such acts (a) involve serious violence against a person in the United Kingdom, (b) endanger the life of a person in the United Kingdom, or (c) create a serious risk to the health or safety of the public, or a section of the public, in the United Kingdom.

This definition is incredibly wide since the 'preparation for the commission' of an offence is not defined in the draft Bill and could in theory involve minimal engagement. The draft Bill is drafted widely – designed to catch those preparing for threats to the state rather than just those who have actually threatened the state. We are concerned that there is potential for journalists investigating such activities to inadvertently come within the scope of the draft Bill themselves.

Again, a public interest defence would protect journalists from the possibility of being prosecuted under this section and would mitigate the chilling effect that this provision might otherwise have on their work.

10. Journalism and foreign states (s24 of the draft Bill)

The intention of the draft Bill appears to be to deter those acting for any state who may seek to harm the UK by attacking its national interests. However, the way that 'foreign power condition' is defined in s24 of the draft Bill is by reference to financial assistance from any foreign Government and if the person knows or ought reasonably to know that it forms part or is carried out for or on behalf of a foreign power.

There is no longer a requirement that such action be taken on behalf of a Government **hostile** to the United Kingdom. There is no requirement that such funding should have been directed by the foreign Government **to attack** the UK national interests. It could therefore apply to organisations that are given a grant from a foreign state in order to pursue legitimate aims. There are many such civil society organisations - for example, NGOs in the UK - who receive funding from foreign powers for work on areas such as climate change, human rights and freedom of expression. It can also apply to those who have only indirect relationships with the foreign power through one or more companies. It could potentially include a large number of organisations and individuals including those working for nationalised state industries and bodies based in friendly countries such as the USA or members of the European Union (including state broadcasters).

The draft Bill poses a risk to any journalist working for state broadcasters for another country or news agencies who receive financial assistance from foreign Governments, even if the countries funding that journalism are sympathetic to the UK. The draft Bill would mean that by reporting on leaks of Government information or trade secrets, those journalists could be found guilty of a serious criminal offence, if that information was subsequently deemed to be prejudicial to UK interests. Since the draft Bill has extraterritorial application it may be applied to activity that takes place wholly outside the UK if committed overseas by a UK national. It is conceivable that it could apply to UK journalists working for such news agencies or civil society organisations financed by foreign Governments wherever in the world they work. The draft Bill might also be applied to joint international investigations where information has been leaked to a foreign media organisation or civil society organisation or individual (that receives some financial assistance from a foreign state) which shares that information with media organisations from different countries during the course of a journalistic investigation.

GNM considers that it is inappropriate for the foreign power condition to be met by ‘financial assistance’ alone and that a safeguard needs to be added so that financial assistance from a foreign state alone does not tip the balance as to whether a criminal offence may have been committed.

11. Police searches (Schedule 2 of the draft Bill)

The draft Bill introduces search and arrest powers to investigate the wide ranging offences laid out within it. This allows a warrant to be issued for searching premises for evidence but applies further protections where a warrant is applied for in premises where there are reasonable grounds to suspect there is confidential material in those premises. Paragraph 3 of Schedule 2 specifies that this includes confidential journalistic material (ie not normal journalistic material but journalistic material held under an obligation of confidence). In such a case it is necessary for the applicant to establish a reasonable belief that the material should be produced in the public interest and will be of substantial value to an investigation.

GNM considers the draft Bill expands the powers granted under the terrorism legislation and appears to reduce the protections for journalistic material under PACE. GNM considers that all journalistic material should have the same level of protection in the draft Bill and that all inspection should be subject to a court order having been made.

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