

The National Security Bill
Call for written evidence by the Public Bill Committee
For publication: Response of Channel 4 Television Corporation

Executive Summary

The key points made in this submission are:

- The Bill should contain a public interest defence clause to protect journalists from being prosecuted for reporting ‘restricted’ official information in the public interest.
- The key terms of ‘restricted’, ‘prejudicial’ and ‘foreign state’ should be more tightly defined to avoid restricting responsible journalism.
- We agree with the Law Commission’s recommendation that an independent statutory commissioner should investigate public disclosures that could be an offence under the Bill.

1. Introduction

- I. At the heart of Channel 4’s purpose is the fundamental human right to freedom of expression and the right of everyone to be able to exchange information, ideas and opinions. The right is a cornerstone of our democracy and includes being able to speak truth to power without fear of prosecution. Channel 4 has a unique statutory remit, duties and functions (including as set out in sc.265(3) of the Communications Act 2003 and sc.198A-D of that same Act (as amended by the Digital Economy Act 2010)) to be innovative and take bold risks, inspire change, champion unheard voices, and appeal to the tastes and interests of a culturally diverse society.
- II. The Channel’s award-winning journalism plays a vital role in the free flow of communications that is essential for freedom of expression. The Channel also uses scripted drama, comedy and factual entertainment to promote the sharing of information, opinions and ideas within sections of society that may not be reached by other broadcasters and traditional news and current affairs programmes.
- III. As it stands, the National Security Bill could significantly restrict the Channel’s ability, as well as that of the countless journalists and production companies it works with, to continue making these diverse programmes. We therefore support work done to add a public interest defence clause to the Bill and redefine the key terms ‘restricted’, ‘prejudicial’ and ‘foreign state’. We also agree with the Law Commission’s recommendation that the Bill should create a role for an independent statutory commissioner to investigate public disclosures that could be an offence under the Bill.

We submit the following:

2. Definitions in the Bill

- I. Under the Bill it will be illegal for a journalist to report ‘restricted’ official information in the public interest if they or their organisation has received funding from a ‘foreign state’. The terms ‘foreign’ and ‘restricted’ are widely defined.
- II. David Davis MP has noted that reputable Non-Governmental Organisations (NGOs) working in the field of transparency such as Reprieve, Privacy International and Transparency International, who have received funding from other nations’ governments, could face prosecution under this wording if they use leaked information – which may not even be classified – to challenge Government policy¹. This risk also applies to programme makers that receive funding from governments abroad.
- III. The Bill also prohibits disclosing ‘restricted’ information where a person knows, or ought reasonably to know, that their action “*is prejudicial to the safety or interests of the United Kingdom, and...the foreign power condition is met*”. This offence carries a maximum life sentence, yet it is unclear how ‘prejudicial’ will be defined. It is entirely possible that an investigative journalist, working with an outside agency to expose state wrongdoing, could be prosecuted under this proposed offence.
- IV. We believe definitions of these key terms should be carefully drafted to avoid restricting responsible journalism. An example of how this can be achieved is the definition of ‘protected information’ in the Official Secrets Act.

3. Lack of public interest defence

- I. We are particularly concerned that there is currently no public interest defence in the Bill. We agree with the Law Commission that such a clause is necessary to allow campaigners and journalists to challenge any charges against them for leaking ‘restricted’ material which they assessed was in the public’s best interest to see, and which they disclosed in circumstances that supported that belief².
- II. In Official Secrets Act prosecutions, juries have sometimes refused to convict due to public interest considerations when trying such cases. This does not protect freedom of expression for journalists and leaves the media to rely on this jury generosity. We are concerned that in practice this is not really protection at all.
- III. The lack of a statutory public interest defence is likely to have a chilling effect on the freedom of expression of journalists and the media and adversely impact the right of the public to receive information. It would undermine Channel 4’s role (and the press generally) in informing the public on matters of public interest. Indeed, there is a

¹ <https://hansard.parliament.uk/Commons/2022-06-06/debates/12D4FE61-34CE-4483-BB06-591D9C14C14A/NationalSecurityBill#contribution-683F7BA6-3A5E-4404-8DCE-5271DDF2284C>

² <https://www.lawcom.gov.uk/project/protection-of-official-data/>

significant risk that stories of great public interest would never come to light due to the threat of criminal prosecution.

- IV. A public interest defence clause could consider the subject of the disclosure, the extent of disclosure, the manner of disclosure, the seriousness of the conduct exposed, the harm caused by disclosure and whether or not the disclosure was made in good faith. There are a number of successful public interest defence clauses in existence that the Government could draw on. Australia, Canada and New Zealand all have similar clauses within their national security legislation. Within domestic legislation, we believe the Public Interest Disclosure Act 1998 contains some useful precedent. It protects disclosures reasonably believed to be necessary to expose (i) commission of a criminal offence, (ii) a failure to comply with a legal obligation, (iii) a miscarriage of justice, (iv) danger to the health and safety of any individual (v) danger to the environment, and (vi) information tending to show that any of the above is being concealed.

4. Lack of an independent statutory commissioner

- I. Together with a public interest defence, the Law Commission also recommended the creation of an independent statutory commissioner to investigate public disclosures that fall foul of the Bill. We are concerned that, to date, this recommendation does not appear to have been acted on. Whilst a commissioner would not be an appropriate substitute for a public interest clause, we believe the role would work well alongside and complement a new defence and should be created.

5. Search powers in clause 20 and Schedule 2

- I. Schedule 2 allows a Police Superintendent to authorise search warrants and inspection of journalistic material where they have “reasonable grounds for believing that the case is one of great emergency and that immediate action is necessary”. We are concerned that this waters down existing protections for journalistic material under the Police and Criminal Evidence Act 1984 (PACE). Under the PACE framework, journalistic material (such as a journalist’s notebook or film rushes) is treated as ‘special procedure material’ and requires a court to consider a police application for inspection. Such a scheme protects journalistic sources and material and should be imported into this Bill to protect freedom of expression.
- II. The proposals in Schedule 2 of the Bill risk not only a chilling effect on journalism and freedom of expression, but also jeopardises the safety of sources, journalists and filmmakers. The ability of journalists to gain access to subjects and contributors in order to report on matters of significant public interest is critically dependent on the personal relationships and trust that they build with their subjects. This includes being able to assure their subjects that the journalists have control over their filmed material, are neutral and independent, are not acting on behalf of the state and can guarantee their sources confidentiality and anonymity. Without this, we have significant concerns that journalists would be hampered from doing what they do.

6. Summary

- I. The omission of a straightforward public interest defence in the National Security Bill means that programme makers who seek to expose wrongdoing will not be able to do so without fear of prosecution. We point to other countries such as New Zealand, Australia, and Canada that have reformed their security legislation while still retaining a public interest defence. We understand that the inclusion of a public defence clause in those countries has not resulted in a wave of unauthorised disclosures that are damaging or that posed a significant risk to national security.
- II. We support the cross-party work that is currently underway to draft an amendment that would add a similar public interest defence clause to the Bill, and also redefine the key terms 'restricted', 'prejudicial' and 'foreign state'. In addition, we agree with the Law Commission's recommendation that the Bill should create a role for an independent statutory commissioner who will investigate public disclosures that are an offence under the Bill. We ask that Parliament allows time for any such suggested amendments to be given due consideration.

If you would like to contact us in relation to any of the points raised please email Meriem Anou and Mary Askew at: manou@channel4.co.uk and maskew@channel4.co.uk

Submitted on 15 September 2022

Channel 4 Television Corporation