

The Government's Response to the Joint Committee on Human Rights Report: 'Legislative Scrutiny: National Security Bill'

Introduction

This is the Government's formal response to the recommendations made by the Joint Committee on Human Rights (JCHR) in its report 'Legislative Scrutiny: National Security Bill', published on 19 October 2022.

The Government is grateful to the JCHR for the close consideration of this Bill. This response seeks to provide further clarification and justification for the approach taken in the clauses contained.

This is a complex area of law, some of which has not been updated in over a century, and the threat of hostile activity against the UK's interests from foreign states is growing. The Bill brings together vital new measures to protect the public, modernise counter espionage laws and address the evolving threat to our national security. The measures have been designed in close partnership with our operational partners in law enforcement and the intelligence agencies, to provide them with the new and updated tools they need to tackle modern threats.

Many steps have been taken to ensure that the breadth of the measures in this Bill is proportionate to the threat posed, and there are significant safeguards in place to protect legitimate activity. For instance, for each offence there are a number of tests required in order to meet the offence, to limit the scope appropriately. In order for many of the powers within the Bill to be used, Attorney General consent – or Advocate General consent in Northern Ireland – must be sought to prosecute the offences providing a further safeguard. The Bill also provides for the Secretary of State to appoint an independent reviewer for the state threats prevention and investigation measures (clause 54). Finally, it is worth noting that many of the police powers in this Bill and the STPIM regime mirror that in Terrorism legislation which is an established and well tested piece of legislation. Taken together, it is the Government's position that these steps mean the legislation strikes the right balance between ensuring proportionately and capturing the intended activity.

We believe this legislation is vital to make the UK an even harder place for states to conduct hostile activity in, creating a modern set of offences to apprehend and enable prosecution of people not captured by existing legislation and increase existing maximum sentences.

The response has been structured around the subheadings in the Committee's list of conclusions and recommendations and takes each one in turn. Clause numbers have been updated to reflect the latest Bill print, but also reference their former number to be easily read alongside the JCHR's report.

The Government would like to thank the JCHR for their deliberations. A copy of this response has been deposited in the House Library.

Part 1: Offences of Espionage, Sabotage and Foreign Interference

JCHR Recommendations / Conclusions	
1	We understand that the term “enemy” within espionage offences has become unworkable and should be replaced. However, we have concerns that treating all those with links to other States as potentially hostile for the purposes of espionage laws might have the impact of stigmatising certain communities unnecessarily. There is the potential of a chilling effect on otherwise legal activity such as protest or journalistic activities. New espionage offences, with the potential for stigmatising certain communities are only proportionate if such offences, and their enforcement, focus on the sort of conduct and relations that are a risk. (Paragraph 18)
2	The Government should consider whether the definition of “foreign country or territory” in clause 25(4) should exclude Commonwealth States, European Economic Area member States, and/or the Republic of Ireland. The Government should justify any decision to include these groups of States within the definition of “foreign power” in Clause 30 (previously clauses 24–25). The Government should provide further information about how these offences are expected to be policed, how it will reduce any risks of discrimination against diaspora communities in the UK, and how it will counteract any potential chilling effect on otherwise lawful activity. (Paragraph 19)

Response:

1. This National Security Bill will replace existing espionage laws which were primarily designed to counter the threat from spies during the First World War.
2. The offence of espionage in the Official Secrets Act 1911 criminalises the obtaining or disclosing of information which would be ‘useful to an enemy’. In a modern, interconnected world it is right that we look to move away from a binary concept of a country being an enemy and ensure that the legislation covers the wide range of threats and harms that constitute espionage today.
3. It is worth noting that the Law Commission, in their 2020 Report ‘Protection of Official Data’¹ recommended that the concept of “enemy” should be replaced with that of “foreign power”.

¹ [Protection of Official Data Report](#)

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

4. The Bill follows this recommendation given that the concept of an enemy no longer serves to reflect the modern age. The change from 'enemy' to 'foreign power' is supported by other elements of the Bill such as the foreign power condition itself. These ensure that the provisions in the Bill are appropriately targeted at the harmful activity that we need to combat.
5. A number of offences in the Bill require the foreign power condition to be met. This provides a clear approach to determining whether conduct is being carried out for or on behalf of, or with the intention to benefit, a foreign power and therefore whether conduct falls within scope of the relevant offence. The foreign power condition, including the definition of "foreign power" on which it draws, is not necessarily an indication of wrongdoing: a person can meet the foreign power condition while carrying out wholly legitimate activities. It is only when the foreign power condition is met in relation to certain, specified conduct that an offence will have been committed.
6. It is an important principle in this Bill that the offences are focused on the harmful conduct undertaken by a person and not on the foreign power they are seeking to benefit. Seeking to exclude so-called 'allied' states could create an unwelcome gap in the legislation. Such an exclusion would have created a loophole for cases like Daniel Houghton, the dual British-Dutch national who attempted to sell sensitive information to the Dutch intelligence service in 2010.
7. We consider it is wholly justified to criminalise such behaviour, damages our national security, regardless of the foreign power concerned. The legislation does not seek to discriminate between different foreign powers or communities, but instead focuses on criminalising activity that is harmful to the UK and that is done for, on behalf of, or with the intention to benefit *any* foreign power. However, the National Security Bill as a whole, recognises and respects the unique circumstances and nature of politics in Northern Ireland. Accordingly, the foreign power definition excludes a political party that is both a governing political party in the Republic of Ireland and a political party registered in Great Britain or Northern Ireland. This reflects that there are political parties that contest elections in the Republic of Ireland and in the United Kingdom and ensures that the provisions in the Bill do not inadvertently impact cross-border politics.

JCHR Recommendation / Conclusion	
3	Providing support or assistance to a person should not be grounds for arrest, or a prevention and investigation measure, where there is no link to supporting or assisting them in espionage activities or otherwise in the commission of an offence. Clause 26(1)(c) should be deleted from the Bill, or alternatively the support or assistance should be explicitly linked to espionage activity. (Paragraph 22)

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

8. The Government considers that, for the most part, hostile activities linked to foreign states -such as disclosing protected information to a foreign power with a purpose that the person knows (or should know) will harm the UK - are not within the ambit of Article 10 at all, as they are not an exercise of the right to freedom of expression. Journalism and protest activities which do not meet the foreign power condition and/or are not against the safety or interest of the UK, would not be captured. The Government considers that each offence is drafted in such a way that the requirements to be met before an offence is committed will protect legitimate activities.
9. The Government agrees with the Committee that providing support or assistance to a person should not be grounds for arrest if the assistance does not link to the offending behaviour of the person being assisted. The Government assesses that this is clear in the legislation as drafted.
10. Clause 26(1)(c) is now clause 31(1)(c). The Government notes the Committee’s comments on this clause. In this clause, there is a clear link between the support and assistance and the offending behaviour, made by the reference back to paragraph (a) in 31(1)(c). It is implicit in paragraph (c) that the conduct must be intended to give support or assistance in relation to the person’s foreign power threat activity; and not simply any assistance. Thus, the provision does not risk bringing activity wholly unrelated to state threats activity in scope.

JCHR Recommendation / Conclusion	
4	The use of the “safety and interests of the United Kingdom” phrase without any indication of the severity of the potential prejudice to those interests, or as to how it may be interpreted creates legal uncertainty as to how these criminal offences might apply. It is contrary to rule of law principles to establish offences that lack legal certainty and sufficient clarity. Moreover, it is contrary to Articles 5 (the right to liberty and security) and 6 ECHR (the right to a fair trial) to prosecute and subsequently imprison people for offences that lack sufficient clarity. (Paragraph 27)
5	To ensure that there is the required level of legal certainty for the creation of a criminal offence, the Government should consider clarifying the phrase prejudicial to the “safety and interests of the United Kingdom” either to specify the types of conduct envisaged, or to include a threshold test as to the severity of the prejudice to the interests of the United Kingdom.

11. The meaning of the term ‘safety or interests of the UK’ is established in case-law having previously been considered by the courts. In the case of *Chandler v DPP*² (1964), the House of Lords considered this test, concluding in summary that the

² [1964] AC 763.

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

interests of state meant the objects of state policy determined by the Crown on the advice of Ministers.

12. The Law Commission considered the term and recommended we maintain it in the Bill. We consider that the words used in this term, taken with the case-law that has interpreted it in the existing legislation, provide a sufficient level of certainty so as to enable the public to understand the nature and limits of the offence.
13. The Government has carefully considered whether to define ‘safety of interests of the UK’ and has concluded that limiting this term by specifying certain conduct, or including an explicit threshold, risks creating loopholes that sophisticated hostile actors could exploit.
14. Our intention in using this term is that it extends to national security, and is likely to include at least state policy in the areas of national security, national defence, the economic well-being of the UK and sensitive aspects of the conduct of international relations. While we consider that the “interests of the UK” extends beyond national security, the existing and previous use of the term in legislation is focussed on matters that are at risk of harm where security or the protection of information or assets is of particular importance.
15. Furthermore, in all of the relevant offences, the SOIOTUK is only one element of the offence. For example, the espionage offence involves disclosing etc. protected information, a connection between that conduct and a foreign power, and a requirement that the conduct be for a purpose that the individual knows, or ought reasonably to know is prejudicial to SOIOTUK. In our view a court is likely to find that an individual’s understanding as to the meaning of SOIOTUK will be understood in the context of the wider offence. The combination of the different conditions applied to measures in this Bill mean that not only are the offences themselves proportionate, but an appropriately high bar also has to be met to bring a prosecution.
16. Moreover, any decision to prosecute will follow the usual process involving the Crown Prosecution Service, Direction of Public Prosecutions and the Attorney General.

JCHR Recommendation / Conclusion	
6	The Government should consider inserting a requirement in the new offences in clauses 2, 3 and 5, that conduct be “prejudicial to the safety or interests of the United Kingdom” (preferably once clarified to offer greater legal certainty). If it declines to do so, the Government should justify this decision and explain how it will ensure that these offences do not inadvertently criminalise benign activity (paragraph 30).

**The Government's Response to the Joint Committee on Human Rights Report -
'Legislative Scrutiny: National Security Bill'.**

17. The following paragraphs provide the Government's explanation for the scope of the offences of obtaining or disclosing trade secrets (clause 2), assisting a foreign intelligence service (clause 3) and unauthorised entry etc to a prohibited place (clause 5).
18. For a person to commit a clause 2 offence the information must amount to a 'trade secret' (as defined) and their conduct must be unauthorised. The addition of 'unauthorised' conduct adds a layer of protection against capturing legitimate knowledge transfer, such as that which exists between academic institutions. It also ensures that if a person is unwitting an offence is not committed. The foreign power condition must also be met and the Government considers that this offence is required to protect against the modern espionage threat from foreign powers. Foreign states seek to illicitly obtain sensitive, confidential information the value of which would be compromised or diminished if the information was accessed by, or available to, a wider audience. By obtaining this information, a foreign state may either gain an advantage for itself or reduce an advantage held by someone else. The Government considers that this conduct is in itself inherently damaging to UK interests and so no further safety or interests test is needed in this clause.
19. The introduction of the trade secrets offence at clause 2 will protect not only information in respect of which a breach of confidentiality would potentially harm the safety of interests of the UK, but also other information the target of which jeopardises the UK's position as a leader in innovation, academia and other sectors or industries.
20. The two offences provided for in clause 3 are targeted against materially assisting a foreign intelligence service in carrying out UK-related activities, rather than a broader 'foreign power'. In relation to activities that are taking place outside the UK, they must be prejudicial to the safety or interests of the UK. For activities in the UK, the Government considers it is right that that a prejudicial to the safety or interests requirement is not present, given the obvious harm which can flow from a person supporting a foreign intelligence service operating in the UK. There are, of course, circumstances in which there will be benign activity supporting a foreign intelligence service such as cross-border and international cooperation with our partners and allies. For example, a police officer in the UK may have a legal obligation to assist a member of a foreign intelligence service in the UK. There are therefore a number of defences available to cover such circumstances.
21. For the clause 5 offence to be committed, a person must engage in specified conduct in relation to a prohibited place that is unauthorised. They must know, or ought reasonably to know, that their conduct is unauthorised.
22. This protects those who have no knowledge that the activity they are conducting at that specific location is not authorised. There is no requirement to prove intent against the United Kingdom as the offence is aimed at capturing activity that is unauthorised but does not meet the higher level of potential harm of the clause 4

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

offence. For example, if a person enters a site that they know is a prohibited place with a purpose that would not meet the purpose prejudicial to the safety or interests of the UK threshold – such as entering to steal a car. This is reflected in the lower maximum penalty of 6 months for a clause 5 offence.

23. The Government considers that including a test into this offence to prove that conduct is prejudicial to the safety or interests of the UK significantly reduces the utility of this offence and would result in these provisions not being able to capture the full range of potentially harmful activity that prohibited places face.

JCHR Recommendation / Conclusion	
7	<p>The offence of obtaining or disclosing protected information in clause 1 does not make sufficiently clear what information is considered to be protected for the purpose of this offence. As such, it creates an unacceptable level of legal uncertainty, raising concerns about compliance with the right to liberty and security, the right to a fair trial, and the right to freedom of expression as protected by Articles 5, 6 and 10 ECHR. To improve legal certainty and proportionality as to when this offence should apply, the Government should consider amending the offence to clarify that it only attaches to protected information that is (or that the defendant knows or reasonably ought to know should be) subject to a certain level of categorisation, such as “Secret” or “Top Secret”. Details as to what is included within the definition of protected information could be contained in a non-exhaustive indicative list or specified in a Statutory Instrument to improve clarity and legal certainty (Paragraph 36).</p>

24. The Government considers that limiting what can be captured under “protected information” to a level of categorisation or non-exhaustive list, such as specific security classifications, risks creating loopholes within the provision which could significantly undermine the operational utility of the offence.
25. There are already limits to what “protected information” in this clause covers. Protected information is any information, document or other article where – for the purpose of protecting the UK’s safety or interests – access to it is restricted or it is reasonable to expect that access would be restricted.
26. The current definition of “protected information” would cover instances where information may have been mis-classified but would still be extremely harmful if shared widely, or instances where seemingly less sensitive information from within a Government building was obtained but could undermine the safety of the United Kingdom if disclosed to a hostile actor – this could include the floor plan to a Government building or an organisational chart of a team working within it.

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

27. It is an important fact that even certain correctly classified official documents which do not include a higher classification level may be harmful if disclosed – such as information about a UK trade deal with another country – so it is imperative that this breadth of information is also covered under the definition. The Government considers that the definition of protected information used is therefore justified. The offence will update the equivalent offence in the Official Secrets Act 1911, bringing the concepts into line with the modern behaviour of those acting to assist foreign powers against UK safety or interests.
28. There are three requirements for an offence to be committed under clause 1 – namely that a person obtains or discloses etc protected information for, or on behalf of, or with the intention to benefit, a foreign power and does so with a purpose prejudicial to the safety or interests of the UK. It is the combination of these tests that mean not only is the offence proportionate, but an appropriately high bar also has to be met to bring a prosecution. The Government considers that someone acting for a foreign power against the safety or interests of the UK would not be exercising their right to freedom of expression. If Article 10 was engaged, any interference would be justified given the risks to national security that may arise on disclosing such information.
29. Criminal offences that prevent the disclosure of information could be seen as restricting rights under Article 10 ECHR (freedom of expression). However, the Government considers that for the most part hostile activities linked to foreign states such as disclosing protected information to a foreign power with a purpose that the person knows (or should know) will harm the UK are not within the ambit of Article 10 at all, as they are not an exercise of the right to freedom of expression. Conversely, the offence does not cover disclosures of information with no foreign power link and so should not cover the types of activity to which Article 10 gives most protection, such as legitimate journalism, political expression or genuine whistleblowing activity (though other criminal offences may apply).
30. However, to the extent that the offence might engage Article 10, the Government considers any interference is justified under Article 10(2) in the interests of national security. This is first because the offence only applies to information restricted for the purpose or protecting the SOIOTUK, and second because the person committing the offence must know or ought to know that their conduct is prejudicial to the SOIOTUK.

JCHR Recommendation / Conclusion	
8	The theft of trade secrets that pose no risk to national security is more properly governed by the offence of theft (and other breach of confidence and intellectual property rules) than through new espionage offences. It is not appropriate to create espionage offences, with the potential to impact significantly on human rights, that relate solely to private commercial matters with no risk to national security. (Paragraph 41)

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

9	Clause 2 should be amended to require an adverse impact to the UK's national security in order for this specific espionage offence of obtaining a trade secret to be committed. An amendment to add in a requirement that the disclosure of the trade secret be "prejudicial to the safety or interests of the United Kingdom" would seem to address this concern. Alternatively, a reference to national security or critical infrastructure might be considered. (Paragraph 43)
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31. The Government is clear that commercial matters can and do pose a risk to our national security. There is an inherent harm to the interests of the UK in this type of unauthorised conduct taking place, as well as a clear link between economic prosperity and our national security. The distinction between economic prosperity and national security is increasingly redundant. The UK is a leader in innovation in a number of important industries such as defence, research and development, academia, and technology. Theft of trade secrets undermines not only the value of the information in question (which may have wider ramifications - for example the value of defence capabilities) but also the UK's status as a world leader for innovation and technology. An example is a foreign state backed researcher at a UK University working on a programme to develop new materials in relation to weapons systems who is passing proprietary information back to the foreign state, the dissemination of which would undermine the value of the research.
32. As set out in the Integrated Review published in 2021, we must respond to the fact that our adversaries and competitors are already acting in a more consolidated way – fusing military and civilian technology, blurring the boundaries between war and peace, prosperity and security, trade and development, as well as domestic and foreign policy.
33. There is currently no specific criminal offence of stealing trade secrets in the UK and the current options for prosecution – including fraud, theft, bribery and blackmail – do not adequately tackle the conduct or the seriousness of the threats posed by state actors.
34. The new offence targets state linked activity designed to undermine our economic prosperity and national security by criminalising the illicit acquisition of trade secrets. It seeks to tackle the whole-state approach adopted by state actors, who increasingly blur the lines between military and civilian capabilities. This, along with other offences in this Bill, will ensure we capture the modern methods of spying as well as promoting our economic and national security.
35. Given the increasingly blurred lines between economic activity and national security, limiting the offence to critical national infrastructure or activity prejudicing the safety or interests of the state would constrict the offence, potentially creating loopholes for our adversaries to exploit. For example, this would be particularly

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

limiting in areas of nascent technology, in which the UK is a key innovator and leader.

36. We want to call this activity out for what it is, punish it accordingly, and send a strong message that the UK is a tough operating environment for hostile foreign states to operate in. The Government therefore disagrees with the JCHR's recommendation.

JCHR Recommendation / Conclusion	
10	The Government should consider whether there should be a defence of whistleblowing for offences under clauses 1 and 2 of the Bill. (Paragraph 45).

37. The offences in Clauses 1 and 2 target harmful activity for or on behalf of states, not leaks or whistleblowing activity.
38. As stated by the Law Commission during oral evidence to the committee for this Bill, the requirements of these offences take them outside of the realm of leaks and into the realm of espionage. The Government judges that the combination of these requirements, including the foreign power condition, means that legitimate whistleblowing would not be caught under these offences, and therefore a Public Interest Defence is unnecessary.
39. For the offence of obtaining or disclosing protected information, the activity has to be for a purpose prejudicial to the safety or interests of the UK. It is right that we are able to prosecute disclosures of protected information where it is clear that such a disclosure has been made in order to harm the UK. Legitimate whistleblowing would not meet this requirement.
40. For the offence of obtaining or disclosing trade secrets, the activity has to be unauthorised. Someone who was using lawful and appropriate whistleblowing routes would not meet the bar of conducting unauthorised activity. Moreover, there is a damage element to the offence in Clause 2(2)(b) meaning that a disclosure that cannot be damaging if confidentiality is breached would not fall within the offence.
41. The Government does not consider that it is necessary to require an adverse impact to the UK's national security in order for this specific espionage offence of obtaining a trade secret to be committed because there is an inherent harm to the interests of the UK in this type of unauthorised conduct taking place, as well as a clear link between economic prosperity and our national security.

JCHR Recommendation / Conclusion	
11	There should be a requirement that for a clause 3 offence to be committed, the conduct must have the potential to

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

	harm UK interests. An amendment to this effect would ensure that any interference with human rights and liberties would be justified and not disproportionate. The Bill should be amended to add "prejudicial to the safety or interests of the United Kingdom" to clause 3(4)(a). (Paragraph 51)
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42. The Government considers it implicit that any foreign intelligence service activity taking place in the UK, that the UK has not agreed to, is harmful to the UK's interests. If a person was seeking to assist a foreign intelligence service of a foreign power in a way that would not generally be thought to prejudice the UK's safety or interests, that activity should be in accordance with an agreement or an arrangement to which the UK is a party (e.g., to cross-border cooperation on criminal matters), noting that no particular formality is required for the defence at clause 3(7)(c) to be satisfied.

43. It is also worth noting that the offence requires the individual to intend or know (or ought reasonably to know) that it is reasonably possible that their conduct may materially assist the foreign intelligence service in carrying out activities in the UK. The JCHR's report highlighted a concern that the offence in clause 3 would criminalise a foreign national who alerted their country to a terrorist plot. Alerting a foreign intelligence service to a potential terrorist plot against the UK would not be conduct in relation to UK activities by that intelligence service. If the UK and France have an agreement to work on such activity together in the UK then that would fall under one of the defences available.

JCHR Recommendation / Conclusion	
12	The Government should consider how best to ensure that the offences in clauses 4 and 5 do not impact the right to protest, as protected under Articles 10 and 11 ECHR. The Government and the police should produce clear guidance setting out how the powers under clause 6 will be exercised and the reviews that they will undertake to ensure these powers are only being used where it is proportionate to do so and will not be used to impact unduly on the right to protest. Clause 6 should be amended to ensure that an offence is only committed if the use of police powers was proportionate and necessary to protect the safety and interests of the UK. (Paragraph 55)

44. The prohibited places measures are not designed to impede legitimate protesting activity.

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

45. Protest activity at a prohibited place could, if all relevant conditions were met, potentially constitute a criminal offence under the Bill. However, the Government considers the legal conditions which must be met within clauses 4 and 5, namely that activity is conducted with a purpose prejudicial to the safety or interests of the UK or that activity is unauthorised and it is known – or it reasonably ought to be known – that it is unauthorised, do not unjustifiably restrict legitimate protest activity. Importantly, clause 5 does not capture activity “in the vicinity” of a prohibited place which offers further protections to legitimate protest.
46. The aim of the police powers in relation to prohibited places is not to impede legitimate protest, but rather to catch and deter activity around prohibited places which is prejudicial to the safety or interests of the UK. The threshold that must be met to use these powers (that a constable reasonably believes it necessary to protect the safety or interests of the UK) provides a safeguard to ensure legitimate protest is not caught.
47. The Government agrees with the JCHR that clear guidance is required and we are working closely with the College of Policing to develop guidance that the police should use before exercising the powers under clauses 6 and 11.
48. The legislation is clear that a constable may only exercise a power under clause 6 if they reasonably believe that doing so would be necessary to protect the safety or interests of the UK. Clearly prosecution in a case where a person failed to comply with a use of police powers that was unlawful, in being disproportionate or unnecessary, would not be in the public interest so the amendment to clause 6 set out in recommendation 12 is not required.

JCHR Recommendation / Conclusion	
13	Where land does not disclose any particular significant risk to the safety or interests of the United Kingdom, it would seem disproportionate to apply the restrictions, police powers and criminal offences in clauses 4–6. Clause 7 should be amended so that it does not apply to all Ministry of Defence land and vehicles used for defence purposes (including those easily accessible to the public), irrespective of the real risk posed by that Ministry of Defence property, but instead only applies to those areas of Ministry of Defence land whose entry would pose a real risk to national security. (Paragraph 59)

49. It is crucial for national security that the UK continues to protect all areas used for defence purposes. Carving out certain places over others risks creating gaps that hostile actors could exploit. It would also require the Government to pinpoint its most valuable defence sites and put these places even more at risk of harmful activity – the very opposite of what the prohibited places regime is setting out to achieve.

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

- 50. Ministry of Defence land that can be lawfully accessed by the public, such as certain areas of the British countryside with public footpaths, does not need to be excluded given the public will have authorisation to be in that area and therefore cannot commit an offence under clause 5. They will only be committing an offence under clause 4 if they conduct specified activity with a purpose prejudicial to the United Kingdom. It is important we are able to catch such harmful activity, even on publicly accessible land.
- 51. Ministry of Defence land which can be lawfully accessed by the public is still used by our Armed Forces, often for purposes which are sensitive in nature, and it is critical they should be afforded the protections granted by the prohibited places provisions.

JCHR Recommendation / Conclusion	
14	As it stands, there is a risk people will commit offences related to being in, or in the vicinity of, Ministry of Defence property without knowing they had done so. There should be an obligation on the Minister to display notices on all entrances to “prohibited places” informing the public that this is a prohibited place, and that entry would be a criminal offence. The Bill should be amended to this effect. (Paragraph 61)

- 52. The safeguards in place within clauses 4 and 5 – namely that a person must either have a purpose that they know or ought reasonably to know is prejudicial to the safety or interests of the UK or know or ought reasonably to know that their conduct is unauthorised - protect those who enter, or are in the vicinity of, a prohibited place without having any knowledge that they have done so.
- 53. Where it is reasonable, the Government agrees that every effort should be made to appropriately notify the public to areas designated as “prohibited places”, including through the use of signage surrounding these places.
- 54. However, the Government considers that making it a legislative obligation to notify the public of the location of every site designated a prohibited place is not proportionate given clause 7 already makes public the types of sites that will be prohibited places. Equally, any designation under clause 8 will set out in law any further types of sites that will be prohibited places. Furthermore, and crucially, there will be a number of sites which, due to their highly sensitive nature, it would be harmful for UK national security if they were publicly declared as a prohibited place.
- 55. Of course, as previously outlined, if an individual does not have a purpose prejudicial and is unaware that they require authorisation to be on a prohibited place (and could not reasonably know that they do), then they do not commit an offence. This is made clear in the legislation.
- 56. The police will be able to exercise their judgement in deciding whether and when to ask a person to move on, use their powers under clause 6 or arrest an

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

individual for an offence. The Government will ensure the police have access to clear guidance to support these decisions.

JCHR Recommendation / Conclusion	
15	In order for clauses 4–6 to represent a proportionate interference with human rights and freedoms, the Government must ensure that places are only prohibited if they are areas of particular defence or other national security sensitivity. The Government must also ensure that reasonable authorisation is granted for protests to take place in the vicinity of “prohibited places”. (Paragraph 64)

57. The Government considers that all places used for defence are inherently sensitive in nature – even if this is not obvious to the wider public - and require the protections afforded by the prohibited places provisions.
58. The offences and powers within clauses 4-6 can only apply if intrinsically harmful activity is conducted in, and around, these sites which results in the specific tests being met.
59. Conducting protest activity in the vicinity of a prohibited place is lawful under this Bill unless it is carried out with a purpose that the protester knows, or ought reasonably to know, is prejudicial to the safety or interests of the United Kingdom. It is permitted without any need for authorisation. A constable may only issue an order under clause 6 to protesters in the vicinity of a prohibited place if they reasonably believe it necessary to protect the safety or interests of the UK, such as where protests involve harmful activity that disrupts or impedes the functioning or operations of the prohibited place in a way that could jeopardise the safety or interests of the United Kingdom. An example would be blocking access points that causes disruption to the work being conducted at these sensitive sites. It will be a criminal offence not to comply with a lawful order under clause 6.

JCHR Recommendation / Conclusion	
16	The police must produce a clear code setting out how they will use the powers in clause 6. An amendment to the Bill to require approval by a senior police officer before the exercise of these powers could additionally assist in ensuring that these powers are not used in a disproportionate or discriminatory manner. (Paragraph 66)

60. The Government is in agreement with the JCHR that clear guidance is required. We are working closely with the College of Policing to develop guidance for the police when exercising the powers under clauses 6 and 11.

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

- 61. Due to the inherently sensitive nature of prohibited places, and the threats that they face, it is likely that the clause 6 powers may need to be used rapidly in order to prevent serious and harmful activity from taking place – activity that could well jeopardise the safety of the people working within the site itself.
- 62. Policing often relies on the judgement of officers to take quick and decisive action to prevent harm and keep the public safe. Introducing a requirement for approval from a senior officer before these powers can be exercised would make it significantly more difficult for the police to respond quickly to urgent situations related to prohibited places. The Bill does not make it lawful for a constable to exercise the powers in a manner that is disproportionate or discriminatory.

JCHR Recommendation / Conclusion	
17	References to powers in respect of an area “adjacent” to a “cordoned area” seem to constrain activity going beyond the cordoned area and into other private or common land, which would seem to lack clarity and potentially create an unjustified interference with people’s rights on private or public land. Similar concerns arise in respect of areas adjacent to “prohibited places” in clause 6. The Government should delete the references to “adjacent area” in clause 11(1)(c) and 6(1)(c) unless it produces an adequate justification for the necessity and proportionality of applying these powers in relation to adjacent areas. (Paragraph 70)

- 63. Harmful activity relating to prohibited places or cordoned areas around military aircraft can take place directly outside of the boundaries of the place or cordon – this could include conducting surveillance (including taking video or photographs) of the sensitive place or aircraft, monitoring the activities of staff located at the site or conducting close range IT attacks from outside the place. It is imperative that where the police believe a person to be conducting such activity, they should be able to order them to move away. Nonetheless, where an order is given in relation to a cordoned area under clause 11, it is a defence for a person to prove that they had a reasonable excuse for failing to comply with the order.
- 64. The effect of the amendment outlined in recommendation 17 would be that the police would be less able to proactively stop damaging activity from taking place directly outside of the boundaries of a prohibited place or cordoned area by ordering a person to leave that adjacent area.
- 65. The police guidance that is being developed in collaboration with the College of Policing will provide further advice on the use of powers in respect of an area adjacent to a prohibited place or cordoned area.

JCHR Recommendation / Conclusion	
18	Clause 9 would benefit from an amendment to make it clear that it is intended to refer to a military vehicle crash

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

	site, as set out in the Government’s Explanatory Notes to the Bill. An amendment to require a code or guidance for the use of police powers in respect of these provisions could also help to ensure that these powers are exercised in a proportionate manner that does not inappropriately impact on journalism and protests. (Paragraph 73)
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- 66. Although the primary utility of the clause 9 cordon power is in relation to crashed military aircraft, the Government considers there may well be instances where a cordon is necessary to secure a military aircraft that has not crashed but is similarly vulnerable – for example, where a sensitive defence aircraft has made an emergency landing in a non-secure location. In this instance, the police would still need the power to cordon this area to protect the sensitive technology and prevent harmful access or inspection.
- 67. The Government is working closely with the College of Policing to develop clear guidance that the police will use when exercising the powers under clause 11.

JCHR Recommendation / Conclusion	
19	A restriction of the offence of sabotage to relate to critical infrastructure or a potentially significant impact might help to clarify the threshold for this offence and to ensure that it is only applied where that would be proportionate to do so. (Paragraph 77)

- 68. The Government considers that the new offence of sabotage reflects the modern, growing threat from foreign powers. Technological developments have enabled acts of sabotage to be conducted from a foreign state with greater ease, with United Kingdom assets and interests often targeted. Methods and technologies employed are increasingly diverse and therefore the offence must be designed to capture those current and future threats.
- 69. The requirement that the person’s conduct is for a purpose that is prejudicial to the safety or interests of the UK provides a sufficient limitation on the nature of the conduct captured and the Government believes that putting a threshold of damage would create a loophole in circumstances where the damage in fact caused did not meet that threshold, despite the person’s purpose behind their conduct.
- 70. Attempting to define the infrastructure that may be damaged for the purposes of the offence would risk certain damage not being captured, despite significant impact on the UK’s safety. The nature of assets that are critical to the safety and functioning of the UK are ever changing and in such an interconnected world, it is right that we don’t seek to limit the vector used or the asset damaged. The Government considers that the other requirements for the offence are sufficient to limit it to that activity on behalf of foreign powers that is of most concern.

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

JCHR Recommendation / Conclusion	
20	It will be important to ensure that democratic political activity is not inadvertently criminalised by the foreign interference offence in clause 13. The Government should consider amending clause 13 to explicitly provide that an offence is not committed if it is an exercise of free speech (giving due weight to the importance of political speech or religious speech) or the right to protest protected under Articles 10 and 11 ECHR. (Paragraph 82)

71. The Government considers that the requirements built into the foreign interference offence will mean that these rights are protected. An offence is committed only where the three elements of the offence are satisfied: a person engages in prohibited conduct (where it involves committing an offence, coercion, or a deliberate misrepresentation), the foreign power condition is met in relation to the person's prohibited conduct or course of conduct of which their conduct forms a part, and where the person intends their conduct to – or is reckless as to whether it will – have a specified interference effect.
72. The Government does not consider that Article 10 protects expression by or on behalf of a foreign power that is intended to, for example, interfere with whether or how a person participates in a political or legal process in another State, conducted by way of an offence, coercion or a deliberate misrepresentation.
73. Where Article 10 is engaged, any interference with Article 10 will be in pursuit of the legitimate aims of national security but also the protection of the rights of others. The Government considers that the need for the foreign power condition to be satisfied will mean that any interference in political speech will be justified under Article 16. As to journalism, the Government considers that the offence is such that a professional person acting on advice will be able to understand what is and what is not permissible, and that the offence is therefore sufficiently foreseeable so as to avoid inhibiting public interest journalism.

JCHR Recommendation / Conclusion	
21	The preparatory conduct offence in clause 16 (previously clause 15) could criminalise preparing to protest at certain key sites—and indeed could carry a maximum sentence of life for preparing to protest. It will be important to ensure that those exercising their right to protest are not inadvertently caught by this provision and, importantly, that it is not policed in a way to suggest that they would be so caught. The Government should set out how they intend to ensure that clause 16 (previously clause 15) is not used to unduly interfere with the right to protest. (Paragraph 84)

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

74. The prohibited places measures are not designed to impede protest. The offence in clause 4 is only aimed at catching and deterring activity in and around prohibited places which is prejudicial to the safety or interests of the UK.
75. Any preparatory activity must be carried out with the intention of committing the clause 4 offence which requires a person's conduct to be for a purpose prejudicial to the safety or interests of the United Kingdom. Activity to prepare for legitimate protests would not satisfy that requirement and therefore the preparatory conduct offence would not be committed.
76. Preparatory conduct is only criminalised where it is done with the intention that very serious acts will result. In order to bring a prosecution, evidence will be required of a person's intent to commit a relevant act (or intent that another person will commit a relevant act). Intent is an important safeguard as it will ensure that individuals who unwittingly engage in conduct preparatory to a relevant act will not be caught by the offence.
77. The maximum penalty for this offence recognises that preparatory conduct can fall on a scale which ranges from lower-level acts to advanced preparation to commit acts which have or can lead to very serious ramifications. As such, this maximum penalty will provide the courts with the flexibility to select the most appropriate penalty based on the nature and severity of the conduct, the severity of the intended act and the culpability of the defendant.
78. A maximum penalty of life imprisonment will of course not mean that all persons convicted of a preparatory conduct offence will face the highest penalty. Rather, it will enable the courts to select the most appropriate penalty based on the criminality in question.

JCHR Recommendation / Conclusion	
22	The Government must justify the necessity of the police warrant powers in paragraphs 10 and 24 of Schedule 2 and should consider whether further safeguards might be appropriate. In particular, the Government should consider including greater protections for confidential journalistic material. (Paragraph 87)

79. Owing to the nature of state threats, we must ensure that the police are able to search for and obtain material important to the investigation of a relevant act in very urgent cases, as is the case with the equivalent power in terrorism legislation (Schedule 5 Terrorism Act 2000). It will only be in extremis, i.e., cases of great emergency where immediate action is deemed necessary, that a Superintendent will be able to grant authority to enter, search and seize material from premises, such as when the time taken to apply for a warrant would compromise the success of a vital investigation.

The Government’s Response to the Joint Committee on Human Rights Report - ‘Legislative Scrutiny: National Security Bill’.

80. The Government considers that there are already sufficient safeguards in place for the use of the urgent powers under paragraphs 10 and 24 in Schedule 2. For example, the officer must not only be satisfied that the same conditions as for a warrant are met but also have reasonable grounds for believing that the case is one of great emergency and that immediate action is necessary. Where an application is authorised by a Superintendent, the Secretary of State must be notified.
81. In an unusual case where confidential journalistic material is seized during a search authorised under the urgent procedure, a warrant must be sought from a judge to retain that material, and – where a warrant is refused – a judge may direct that the confidential journalistic material be returned or destroyed. The Government considers that this reflects the greater protection that the courts have considered important for confidential journalistic material under Article 10 ECHR, such as in *R (Miranda) v Secretary of State for the Home Department [2016] EWCA Civ 6*, providing appropriate protection for journalists and their sources.

JCHR Recommendation / Conclusion	
23	The reviews of detention without warrant should only be able to be postponed for well-defined and justified reasons. Paragraphs 29(1)(b) and 29(1)(c) of Schedule 3 should be deleted from the Bill. (Paragraph 90)

82. The Government’s approach to reviewing a person’s detention is the same as that taken with equivalent requirements in the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 and its subsequent Police and Criminal Evidence Act Code of Practice. The reviewer must be independent of the investigation and the reason for delaying a review must be recorded in writing in the presence of the detained person.
83. As drafted, these provisions ensure a wide range of instances which might result in a review not being able to be carried out are covered – for example, if the suspect is undergoing medical treatment. It would be impossible to outline every scenario that may impact a review in legislation, therefore this approach is preferable.

JCHR Recommendation / Conclusion	
24	The process for a judicial warrant contains some guarantees. However, we have some concerns given the potential for a person’s access to their lawyer to be delayed, the potential for a detainee to be excluded from part of the hearing, and the potential for information relied upon to be withheld from the detainee and their legal representative. As a result, it is possible that a detained

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

	person may not be told sufficient information to enable them to be in a position to counter any claims made against them in a part of the hearing from which they are excluded. There are therefore risks that this process does not contain sufficient protections against arbitrary detention. A requirement that a person should be able to know the case against them might improve the protections in paragraph 40 of Schedule 3. (Paragraph 92)
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84. Interference with the right to know the case against a person might be justified in certain circumstances, for example for national security reasons, protecting investigative techniques or preventing alerting other suspects. In exceptional circumstances, limiting access to legal advice is justified and the reasons for which this right can be delayed are set out in the Bill.
85. Given the sensitive nature of investigations into hostile activities by foreign powers, it may not be appropriate to disclose to a detainee or their legal representative all of the information on which an application for a warrant for extended detention is made. The likely complexity and evolving nature of investigations into hostile activities by foreign powers, including identification of other individuals, links to a foreign power and the reliance on sensitive intelligence, mean that restricting access to information may be justified in the circumstances of a particular case, as determined by the judge, and in accordance with the reasons set out in the Bill.
86. Similar provisions under terrorism legislation have been considered by the courts, which indicated that provisions which enabled withholding information or excluding the detained individual from proceedings are conceived in the interests of the individual as they enable a judge to thoroughly examine the grounds justifying further detention³.
87. Further detail on the exercise of these provisions will be provided in a Code of Practice including covering the investigating officer determining what information can be released to the detainee and their legal representation. The Government intends that the Code of Practice will include equivalent provisions to the terrorism Code. For example, upon arrival at the place of detention, the custody officer must ensure that the suspect is told of their right to be informed about why they have been arrested and detained on suspicion of being involved in foreign power threat activity. The information about the circumstances and the reasons for the detainee's arrest must be recorded in the custody record, which the detainee and their solicitor are able to view upon request at any time whilst being detained. Documents and materials which are essential to effectively challenge the lawfulness of the detainee's arrest and detention must be made available to the detainee and their solicitor. The decision regarding what needs to be

³ See, for example, *Sher & Others v The United Kingdom* (5201/11, 20 October 2015) at paragraph 153.

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

disclosed rests with the custody officer in consultation with the investigating officer who has the knowledge of the document and materials in the case. A note must be made in the custody record if any information is withheld.

JCHR Recommendation / Conclusion	
25	We note in particular that the provisions to withhold information from the detainee and their legal representative extend, under paragraphs 41(3) and (4) of Schedule 3, to matters relating to recovering the proceeds of crime, rather than anything relating to national security. The Government should justify the use of detention based on undisclosed/closed material where the concern relates solely to proceeds of crime. Failing a compelling explanation, paragraphs 41(3) and (4) of Schedule 3 should be deleted. (Paragraph 93)
26	Restrictions and delays on access to a lawyer and on letting a person's loved ones know where they are constitute serious impediments to accessing basic rights for a person detained without charge. Whilst such restrictions may be proportionate if necessary for imperative reasons of national security, such as to prevent immediate serious harm to another person, the case is less compelling where the objective is solely asset recovery. Paragraphs 9(4) and (5) of Schedule 3 should be deleted from the Bill. (Paragraph 96).

88. The Government considers that, if the matters relate to the proceeds from crime from state threats activity, in most cases this will be highly sensitive information and every effort should be made to prevent the suspect from having any knowledge that our law enforcement agencies are aware of where these proceeds are located.
89. If a suspect is aware that this information is known by the authorities, they may simply ask someone to hide the relevant proceeds elsewhere which could jeopardise an investigation.
90. The judge, when approving the warrant at a hearing, will have approved an order to withhold any information from the detainee and their representative, and will therefore be aware of the level of detail the suspect knows regarding the case against them and this will be factored in when hearing representations.
91. The criteria on which these rights can be delayed are set out clearly in the Bill. In the case where withholding information relates solely to the proceeds of crime, the judge must be satisfied that there are reasonable grounds to believe that the detainee has benefitted from their criminal conduct and that the recovery of the value of the property would be hindered if the information were disclosed. The detained person must be told of the reason for any delay and the reasoning must

**The Government's Response to the Joint Committee on Human Rights Report -
'Legislative Scrutiny: National Security Bill'.**

be recorded. These provisions follow similar measures in other legislation, such as under the Police and Criminal Evidence Act 1984. The Government considers that the police should be able to delay access to these rights, if a senior officer has reasonable grounds to believe that otherwise they may be prevented from recovering proceeds of criminal activity.

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

The principle of open justice & the power to exclude public from proceedings

JCHR Recommendation / Conclusion	
27	The principle of open justice is fundamental to the proper administration of justice and the right to a fair trial. We welcome the replacement of section 8(4) OSA 1920 with clause 36 (previously clause 31), such that the public could only be excluded where this was "necessary in the interests of national security". The Government should reconsider the need to include a reference to the interests of justice as part of this test. The test in clause 36 (previously clause 31) might thus be amended to read "necessary for the administration of justice, having regard to the risk to national security". (Paragraph 103).

92. The Government has reformulated the drafting of the equivalent clause in section 8(4) OSA 1920 by ensuring there is a necessity test.
93. The Government considers the drafting of this necessity test in what is now Clause 36 to be proportionate given the highly sensitive nature of material that may be discussed during court proceedings of relevant offences under the Bill.
94. It is important to note that the decision to exclude the public from proceedings is taken by the court, on application by the executive. We consider the judiciary is already well placed to assess the impact of any such decision on the administration of justice. In England and Wales, for example, the Criminal Procedure Rules 2020 would apply which have as their overriding objective that criminal cases are dealt with justly. Part 6.2 requires that a court must have regard to the importance of dealing with criminal cases in public, when determining whether to exclude the public from any part of proceedings.

Criminal Immunity: Offences under Part 2 of the Serious Crime Act 2007

JCHR Recommendation / Conclusion	
28	Any provisions that seem to grant criminal immunity to officials go to the heart of respect for the rule of law, human rights and the fundamentals of justice and fairness. Given the existing defence of acting reasonably in section 50 Serious Crime Act 2007 (including based on subjective information), we do not consider that the case has been made for clause 23. We recommend the deletion of clause 28 (previously clause 23). (Paragraph 111)

95. Clause 28 (previously clause 23) will not create blanket criminal law immunity or change the application of all other criminal law offences. The intention of clause 28 is to protect individuals from the risk of personal criminal liability when they have operated in good faith, and in compliance with all proper processes, to conduct authorised conduct. The Government does not believe it is right or fair to expect fear of criminal liability to sit with dedicated individuals who are conducting highly sensitive and vital national security work which is properly authorised on behalf of the UK.
96. While the Government considers that properly authorised activity to protect national security should be interpreted as being reasonable, the application of the reasonableness defence to UKIC and armed forces activity is untested. A legal protection which focuses on the statutory functions within which the UK Intelligence Community and the armed forces are required to operate, provides greater clarity and certainty to those tasked with carrying out this important work.
97. The amendment does not remove the ability for legal challenges to be brought in relation to allegations of unlawful behaviour, including criminal proceedings for an offence under the SCA should the action not have been necessary for the proper functions of the intelligence agencies or armed forces. In addition, other criminal offences would still be available, such as secondary liability or misconduct in public office. Nor does the amendment to the SCA affect the ability for individuals to seek civil remedies, such as through a damages claim or judicial review.
98. However, the Government has heard the concerns of the JCHR and a wide range of Parliamentarians on Clause 28. We are considering possible solutions which address these concerns, but which crucially also tackle the issues the SCA offences are creating for the intelligence and security services and Armed Forces.

**Part 2: Prevention and Investigation Measures (Clauses 37-61)
(Previously Clauses 32–56)**

JCHR Recommendation / Conclusion	
29	Given the intention that these measures should be used in “cases that cannot be prosecuted or otherwise disrupted”, a requirement that the Secretary of State confirms with the police that prosecution is not realistic or feasible before a PIM is imposed would appear to be consistent with the policy justification. We recommend that the Bill is amended to include such a provision. (Paragraph 117)

99. It is always the Government’s preference and priority to seek prosecution against those engaged in foreign power threat activity and where we can prosecute, we will.
100. STPIMs are a tool of last resort in cases where prosecution isn’t possible. Therefore, if we can prosecute then STPIMs will not be required.
101. Clause 44 reflects our commitment to prosecution and requires prior consultation with the police, before the imposition of a STPIM notice, in relation to whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to state threats. The police must also consult with the relevant prosecuting authority on the same matter before responding to the Secretary of State.
102. This requirement to consult mirrors the same requirement in Terrorism Prevention and Investigation Measures (TPIMs). In the TPIM regime, wherever the consultation results in evidence coming to light that a prosecution is feasible, such a prosecution is pursued over the imposition of a TPIM. We expect the same to apply to in the STPIM context.
103. Furthermore, as set out in Clause 44(5), through the lifespan of the STPIM, the police must continue to investigate the relevant individual’s conduct, with a view to pursuing a prosecution if possible. The police will refer the case to the prosecuting authorities if sufficient evidence comes to light.

JCHR Recommendation / Conclusion	
30	The use of closed proceedings in the review of Prevention and Investigation Measures (PIMs) raises concerns in respect of Article 6 ECHR, the right to a fair trial. However, the Bill provides for material to be disclosed, or not relied upon, if keeping it from the subject of the PIM would result in impermissible unfairness. This should be enough to ensure compliance with Article 6, as long as adequate legal aid is made available to the subjects of PIMs. To ensure that legal aid is available to a subject of a PIM in any legal proceedings concerning the Prevention and

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

	Investigation Measures, an Order should be made under section 11(6) Legal Aid, Sentencing and Punishment of Offenders Act 2012, exempting PIMs proceedings from the criteria in that section. (Paragraph 121)
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104. Individuals subject to STPIMs will be able to access two levels of legal aid: initial advice and assistance and legal representation (as per paragraph 19, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012). The initial advice and assistance will be non-means tested, as it is likely that urgent advice will be needed to understand the Notice and the broader regime. Legal representation will be subject to both means and merits testing.
105. The relevant means and merits tests must be met in every case and if they are not, legal aid funding may be refused. These tests apply to all legal aid cases.
106. The Government will not be removing the merits test in STPIM cases. The merits test is one of the key eligibility criteria to ensure that limited legal aid funding is targeted at those most in need. There is no rationale to depart from that fundamental principle.

JCHR Recommendation / Conclusion	
31	Restrictions and obligations imposed under Prevention and Investigation Measures (PIMs) are likely to engage the right to private and family life under Article 8 ECHR. Article 8 issues will need to be raised in court proceedings where PIMs are reviewed. Given the likelihood of material being considered in closed proceedings, hampering the ability of the individual subject to the PIM to challenge it, it is vitally important that national security assessments are carefully and accurately produced and that closed advocates are given the time and resource needed to represent the individual's interests effectively. (Paragraph 125)

107. The Government confirms that a special advocate will be appointed in relation to any STPIM closed proceedings, who will attend all parts of the proceedings – both open and closed – and, like the judge, will see all the material, including the closed material not disclosed to the individual. Their role will be to act in the individual's interests in relation to the closed material and closed hearings.
108. Furthermore, each individual subject to a STPIM must be given a gist of the key allegations against them and it is the judge reviewing each case, rather than the Government, that will decide on the level of disclosure required.

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

JCHR Recommendation / Conclusion	
32	A more effective protection against interference with Article 5 rights would be to include within the National Security Bill a strict limit on the number of hours for which a subject of Prevention and Investigation Measures could be required to remain in their residence: for example, 14 hours per day. The Government should consider amending the Bill to include such a limit. (Paragraph 128)

109. Each STPIM case will be different and the measures and the terms under the measures will be decided on a case-by-case basis. Flexibility is therefore key to ensure the most appropriate suite of measures can be imposed.
110. Protection against interference with Article 5 rights is already provided for under the residence measure.
111. Condition D (which must be met in order to impose a STPIM) outlines that the Secretary of State must reasonably consider that the individual measures applied are necessary to prevent or restrict the individual's involvement in foreign power threat activity. This covers not just the imposition of the measure but the exact terms of the measure and therefore, in the case of the residence measure, the number of hours an individual must reside in their residence.
112. In addition to this the Court must agree, at both the permission hearing and review hearing, to the number of hours, set by the Home Secretary, that the individual subject to the residence measure must remain in their residence. The number of hours a person must stay at home will be determined by the facts of the individual case and the individual subject to the measure also has the right to apply for a variation of measures imposed – both short term, for example if there is a reason why they need to be out at different times on a given day, and long term.

JCHR Recommendation / Conclusion	
33	We welcome the inclusion of an independent reviewer of the Prevention and Investigation Measures regime under Clause 54 (previously clause 49) of the Bill. However, this role should be extended to cover other parts of the Bill and other core national security legislation in the same way that the Independent Reviewer of Terrorism Legislation has a remit wider than just the Terrorism Prevention and Investigation Measures regime. We recommend that the Independent Reviewer's role be extended to cover Parts 1 and 2 of the National Security Bill. The Government should review whether the Independent Reviewer could also cover other core national security legislation. (Paragraph 130).

**The Government's Response to the Joint Committee on Human Rights Report -
'Legislative Scrutiny: National Security Bill'.**

113. The Government is actively considering whether any additional oversight is required beyond Part 2 of the Bill.
114. We must ensure that any additional oversight is appropriate and does not duplicate or unhelpfully interfere with the responsibilities and functions of the existing mechanisms governing both the UK intelligence agencies and the police. Should we decide to extend oversight, it is important that we don't create confusion or uncertainty.

Part 3: Persons Connected with Terrorism: Damages and Legal Aid

JCHR Recommendation / Conclusion	
34	It is important that remedies for human rights violations are not reduced by the courts, simply because they have been identified through claims brought otherwise than under the HRA. The Bill should be amended to ensure that all damages awarded for what amount to human rights violations are exempted from the restrictions on damages in clauses 82-84 (previously clauses 57-59). (Paragraph 138)

115. This legislation is not intended to limit damages available in human rights claims. Claimants are free to choose the basis for their claim and may rely on the Human Rights Act for violations of human rights.
116. Clause 82(1)(b) (formerly Clause 57 (1)(b)) expressly excludes the application of these provisions to claims brought under Section 7(1)(a) of the Human Rights Act. However, arguments about the entitlement to damages for breaches of Convention rights may also be raised in existing proceedings under Section 7(1)(b) of that Act. Therefore, where that comes to pass, Clause 83(6) (formerly Clause 58(6)) ensures that a court considering a reduction of the tortious damages will at the minimum award damages that the Claimant has established they are entitled to for a breach of their Convention rights.

JCHR Recommendation / Conclusion	
35	Damages should not be reduced based simply on factors identifying the claimant as unworthy of compensation or excusing the Government for actions that have been found to be unlawful. Before any reduction in damages should be made in the widely defined "national security proceedings", the defendant should be required to satisfy the court that the damages are likely to be used for terrorist purposes. Furthermore, to avoid the defendant being able to avoid legal consequences for its unlawful conduct, the Government should explore whether any amount by which damages are reduced could be paid to an appropriate charitable cause, such as a charity supporting the victims of terrorism. (Paragraph 145)

117. The Government believes that clauses 82-84 (formerly Clauses 57-59) are vital. At present when damages are paid out to claimants involved in terrorism activity a court is not required to consider whether damages should be reduced to reflect

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

the claimant's involvement in wrongdoing. The Government considers that in these exceptional cases of national security and the complexity of the activity of the security services required to keep society safe from the most terrible harm, questions of culpability of the claimants and defendants have some particular factors that are not relevant in other contexts but need to be considered in quantifying the damages payable.

118. Clauses 82-84 rectify this and contain measures that mean courts will be formally required to consider whether to reduce or withhold damages awarded when they find for the claimant in a national security claim where the claimant's own wrongdoing of a terrorist nature should be taken into account. This measure is aimed at those cases where a claimant, often based overseas, makes a claim against the UK intelligence community that is based on or related to that claimant's own involvement in terrorist activity.
119. That is not to say that the courts' discretion as to the application of those factors must require a reduction of damages. That is for courts to decide in identifying where justice lies. All of these powers will be exercised after an objective assessment by judges based on evidence that is tested. The issues will be determined in these cases using the civil burden of proof, the balance of probabilities, and upon which matters the claimant will have sufficient opportunity to be heard. The courts in reducing damages will have been satisfied that this is necessary to achieve justice to both parties. There will also be a right of appeal to a higher court.
120. Therefore, in applying these provisions courts will be able to ensure that the Government is not improperly excused from any culpability and will also be able to ensure that unworthiness of a claimant is only a factor where it is relevant to the consideration of the justice of an award of damages.
121. The Government tabled an amendment at Commons Report Stage (16 November 2022) that removes any ambiguity on scope and clarifies that applications to reduce damages would only be possible where a claimant has committed terrorist wrongdoing (see paragraph 140 of the JCHR Report).

JCHR Recommendation / Conclusion	
36	The need for a new regime to allow for damages awarded in legal proceedings to be seized and ultimately forfeited on the basis of a real risk that they will be used for terrorist purposes has not been made out. To prevent damages awards being spirited away for terrorist purposes, the existing freezing and forfeiture regime could be extended so that applications can be made to the court dealing with the damages award. (Paragraph 151)

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

122. Clause 86 and schedule 15 (formerly Clause 61 and Schedule 10) aim to nullify the threat to the public where damages awarded to claimants in court cases may be used for terrorist purposes.
123. Protecting the public is a fundamental policy objective for all Governments. That is the context in which this reform should be viewed. The Government considers it important to ensure that where there are risks that money would be spirited away before other regimes can operate, those risks should be countered with the most appropriate legal regime and not merely for convenience one that already exist so that both the risks are met and justice to claimants is done. Other regimes are not specifically geared to existing litigation where a court is seized of many matters very particular to the claimant and their circumstances, nor do those regimes have the safeguards of multiple freezing applications before forfeiture. To impose them would not do justice to the claimants.
124. Therefore, by the time a case reaches a forfeiture application under these provisions there will have been two court processes over a four-year period and two decisions by a judge that a claimant represented a real risk in terms of using their damages to fund terrorism. The courts will be able to consider carefully other avenues to ensure damages are not at risk of supporting terrorism but are still able to achieve the purposes for which they were awarded. For example, arrangements for payment directly to care providers can be considered. Furthermore, the court will hold in abeyance any forfeiture until the claimant has had sufficient opportunity to remedy those risks. But where they are not remedied or cannot be remedied it is right the money is forfeited.
125. These are also not arbitrary powers which the state is exercising, nor ones exercised for the benefit of the Government, but for society as a whole. They have been designed so that a court will have complete discretion on whether to make a freezing or forfeiture order or not and form an independent view, based on an objective assessment of the evidence provided by UK security services, and taking account of submissions made by the claimant. There will be a right of appeal to a higher court. Courts will determine these matters upon established legal principles, using the civil burden of proof, the balance of probabilities.

JCHR Recommendation / Conclusion	
37	In the absence of significant reform to the system of Exceptional Case Funding, it is likely that the provisions of the Bill removing legal aid for terrorist offenders will impede access to justice and the enforcement of basic human rights. There is also potential for them to be counterproductive in respect of reducing terrorist offending. These provisions have been proposed for symbolic reasons, and as such, the Government has not provided sufficient justification for the impact they will have. Clauses 87 and 88 (previously clauses 62 and 63) should be removed from the Bill in the interests of access

**The Government's Response to the Joint Committee on Human Rights Report -
'Legislative Scrutiny: National Security Bill'.**

	to justice and the effective enforcement of human rights. (Paragraph 164
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126. Individuals who commit acts of terrorism are rejecting the values of our state and society. They are committing violence against the very state that provides the benefit of legal aid. It is appropriate that the benefit of civil legal aid is restricted to stop those individuals from accessing public money. Clauses 87 and 88 (previously clauses 62 and 63) will ensure that limited legal aid funding is targeted at individuals who support our society and democracy. The safeguards built into the policy ensure that legal aid remains available where it is needed to ensure access to justice.
127. The European Court of Human Rights and the Supreme Court have recognised that in general legal aid is required only where a lack of funding would deprive an individual of a fair hearing, and that the requirements of effective access to justice are to be assessed as a case-by-case basis. The Exceptional Case Funding (ECF) scheme makes funding available in those cases where it can be demonstrated that without legal aid, there is a risk of a breach of human rights. 74% of applications to the ECF scheme were granted last year, demonstrating that the continuing ability to apply for ECF is a sufficient safety net for those terrorist offenders subject to the restriction.

Other Matters Arising

JCHR Recommendation / Conclusion	
38	It is important that Parliament is given sufficient time to consider any foreign influence registration scheme; it is unfortunate that these clauses were not in the Bill as introduced. Any foreign influence registration scheme must contain adequate protections to ensure that it does not interfere unduly with democratic rights, including freedom of association and free speech. (Paragraph 166)

128. The Government introduced the FIRS Scheme at Committee Stage in the House of Commons. The Government had been considering the need for such a scheme for some time but the delay was necessary to ensure the scheme's requirements provide an effective and proportionate tool to deter and disrupt state threats activity.
129. The Government consulted on the concept of a registration scheme between May and July 2021. A consistent message throughout the consultation was that a UK scheme must strike the right balance between increasing transparency around foreign influence in the UK and protecting those involved in legitimate activity from disproportionate compliance and regulatory costs.
130. The Government recognises the importance of international collaboration across UK sectors. The scheme will not halt or obstruct such open and transparent collaboration, nor do we do intend for it to create unnecessary barriers or to deter those engaged in legitimate activities with foreign states in the UK.
131. Openness and transparency are vital to the functioning of UK democracy. Covert influence deployed by foreign powers, directly or through third parties, undermines the integrity of our politics and our institutions. It is for this reason that we consider the scheme is proportionate to meet the objectives of achieving transparency and protecting national security, thus in accordance with our obligations under the ECHR. The scheme will require the registration of 'political influence activities' where they are to be carried out within the UK at the direction of any foreign power or foreign entity; or where they are to be carried out by a foreign entity itself. It will also require the registration of any activities carried out by, or as part of an arrangement with, a limited number of "specified persons", for whom an enhanced level of scrutiny is necessary in the interests of national security. Certain registered information will be made available to the public via a scheme website, similar to the schemes of our Australian and U.S. partners.
132. The scheme does not seek to interfere with democratic rights of freedom of speech and association. It does not prevent any person from engaging in activities on behalf of foreign entities; it only requires openness and transparency

**The Government's Response to the Joint Committee on Human Rights Report -
'Legislative Scrutiny: National Security Bill'.**

around such activities.

133. In regard to freedom of expression, the Government considers that the significant exemption for legitimate media activity shall remove the obligation to register from the majority of persons who would have a claim to Article 10 rights in this context. The media exemption works by exempting the following from the requirement to register foreign influence arrangements, the offence of carrying out political influence activities pursuant to unregistered foreign influence arrangements, and the prohibition against foreign principals carrying out unregistered political influence activities (Clause 67):
- a recognised news publisher (as defined in clause 51 of the Online Safety Bill), or
 - a person who makes a foreign influence arrangement with a recognised news publisher where one of the purposes is the publication of news-related material.
134. Where those conducting public communications do not fall within the definitions for recognised news publishers, the only journalistic-type activity that would be regarded as political influence activity for the purposes of this part of the scheme is where a public communication is not reasonably clear that it is made at the direction of a foreign principal. In practice, it is considered that where a public communication is made by or for a specific news outlet, then this shall be reasonably clear as it will appear below the outlet's banner or otherwise in the outlet's name. If the article has been directed by a foreign entity other than that which is publishing the article, then a by-line or other words to the effect that it has been so directed will suffice. This shall be set out in guidance.
135. PR activity could be caught by the scheme, as well as those reporting or publishing material not for a recognised news publisher. Should any such interference exist for those who remain registerable, the Government considers it necessary to require the registration of those persons in order to achieve the legitimate aim of transparency in political decision-making, and in the interests of national security. Some might ask whether there is any risk that the obligation to register might cause people to restrict their expression in order to avoid having to expose such activity via the register, particularly in respect of political speech or PR. However, the Government considers that the need for the activity to be both for a political purpose and to a specific UK decision-maker means that this is unlikely to arise, unless the activity is specifically of the type that should be exposed to the public at large, because the source of the influence has been deliberately obfuscated or concealed.
136. With regard to the freedom of association, restrictions may be placed on the exercise of this right if necessary for national security or in the protection of the rights or freedoms of others. Transparency around which foreign entities have organised and directed protests in the UK would be beneficial for the public and

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

for our democratic institutions, as it would provide the public with an awareness of which entities are involved in seeking to impact our decision-makers. It is considered that FIRS places no restriction on the ability of persons to protest or organise to do so. The register is not a prohibition and the Government considers that there should be no impact upon individuals who appear on the register.

137. The other key ECHR right that is likely to be engaged by the scheme is the right to privacy under Article 8. The Government is of the view that there are good arguments that there is limited opportunity for any interference with Article 8, and any interference that may occur is justifiable under Article 8(2) of the ECHR, and necessary in a democratic society both in the interests of national security and for the protection of the rights and freedoms of others.
138. It is accepted that there may be service providers or business people who are obliged to register due to the nature of their business. Should it be established that the collecting and publishing of their personal information does interfere with their Article 8 rights, the Government considers that this is legitimate. The purpose of registering foreign influence arrangements is twofold: to secure transparency in political affairs and decision-making, and to protect national security by forcing the transparency of previously hidden foreign intervention in UK affairs or providing for a means of prosecution for those who continue to conceal the source of such influence. Registration of legitimate activity on a public register may also result in deterring and disrupting state threat actors who seek to infiltrate UK political systems. Operational colleagues are clear that foreign powers routinely obfuscate their influence activities through proxies such as companies, organisations or charities.
139. The Government considers that the requirements of the Scheme are proportionate to the aims. The information that will be required about persons and foreign principals will not go beyond what is necessary in order to achieve the underlying policy objective. Indicative Draft Regulations are in the process of being prepared which set out the extent of information to be obtained and published; we will share these as soon as possible. There are also a number of exemptions to registration which will render the scheme as proportionate as possible to achieve the aim.
140. Activity registered with the scheme is often likely to be lawful and may be driven by purely legitimate interests, and therefore much of the registerable activity may be of no interest to the security services.
141. However, the breadth of the specified person register is a means of providing information to security partners that can help them identify the small percentage of those who register who *are* a national security threat. Investigations into hostile activities by foreign powers are complex and it will often be difficult to reach the evidential threshold for charging given the nature of the intelligence available. Retention of personal data allows the security services to identify where hostile

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

activity may be, or about to be, taking place and seek to disrupt it at an early stage before harm has been caused. We do not consider that obliging some legitimate persons to register renders the scheme disproportionate, particularly as any person can avoid registering by not engaging in arrangements with certain specified foreign states or entities (which can only be specified if necessary to do so to protect the safety or interests of the UK).

JCHR Recommendation / Conclusion	
39	We are concerned that the Official Secrets Act 1989 may be incompatible with Convention rights, including the freedom of expression and the right to a fair trial. We consider that the Government should take action to address these concerns as soon as possible. There seems to be a certain level of consensus that a whistleblowing or public interest defence is needed—and that such a defence should not catch data dumps but should be available for genuine cases of whistleblowing. The Government should set out its timetable for addressing these concerns given the potential of this legislation to negatively impact on free speech. (Paragraph 172).

142. The Government is confident that the Official Secrets Act 1989 (OSA) is compatible with the ECHR, and notes that the Law Commission did not make a conclusive determination about compatibility with Article 10 in their 2020 report on Protection of Official Data.
143. The House of Lords decision in *R v Shayler*⁴ remains binding law in the UK on the compatibility with Article 10 in relation to the OSA 1989. The Government considers that the offences in the OSA 1989 can be applied compatibly with Convention rights.
144. The Government is not bringing forward reform of the 1989 Act in this Bill and consequently there will be no changes to the scope of the offences in that Act.
145. The Government recognises that there may be situations where an individual has a legitimate need to raise a concern, for example in situations where there may have been wrongdoing and they think there is a public interest in disclosure. But disclosing information protected by the OSA 1989 and then relying on a public interest defence (PID) is not the safest or most appropriate way for an individual to raise these concerns and have them rectified.
146. The existence of a PID would not directly address the underlying wrongdoing. In contrast, existing, authorised routes for raising a concern are designed to enable any claims of wrongdoing to be thoroughly investigated and provide a remedy for

⁴ [2002] UKHL 11

The Government's Response to the Joint Committee on Human Rights Report - 'Legislative Scrutiny: National Security Bill'.

this where there has been wrongdoing.

147. There are already a number of existing internal and external authorised routes in Government through which individuals can raise a concern. The number of routes available to those seeking to raise a concern has increased since 1989 and the Government considers these routes to be safe and effective. These include but are by no means limited to: Government departments' internal policies and processes; a staff counsellor for the national security community; organisational ethics counsellors; the Chair of the Intelligence and Security Committee; the Investigatory Powers Commissioner's Office; and the Attorney General's office for legal concerns. The Government is committed to ensuring that these channels are safe, effective, and accessible.

JCHR Recommendation / Conclusion	
40	The Government should clarify whether, if the Bill of Rights is passed as introduced, it intends to preserve the interpretations made using section 3 Human Rights Act. If it does not intend to preserve these interpretations, it should explain how it intends to remedy the incompatibilities in Official Secrets Act 1989. (Paragraph 176)

148. The Bill of Rights is awaiting Second Reading in the House of Commons.
149. Under clause 40 of the Bill of Rights, we are proposing a power to preserve section 3 interpretations in future where it is considered appropriate to do so. This will provide legal certainty and ensure that interpretations already made under section 3 are preserved so that they continue in future where this is necessary.