

**The Threat to Public Interest Disclosure from the National Security Bill** by *Paul Mylvaganam, Wyeth Thomas Chambers* (6<sup>th</sup> December 2022)

The proposed National Security Bill (NSB) aim is to *'deter, detect, and disrupt those state actors who seek to harm the UK by covertly targeting the UK's national interests, sensitive information, trade secrets and democratic way of life'*.

The Bill creates offences that are intended to target espionage: obtaining or disclosing protected information; obtaining or disclosing trade secrets; and assisting a foreign intelligence service. [The Bill repeals the Official Secrets Acts \(OSAs\) 1911, 1920 and 1939](#), which contain the existing provisions and although it purports to deal primarily with espionage threats, the Bill is likely to put journalists and legitimate NGO's, the latter even if funded by allies, at risk of criminal prosecution. **There must be an appropriate balance between the desirability of open government and exposing wrongdoing and legitimate public interest in protecting sensitive and classified information from disclosure.**

**No public interest disclosure defence (PID):** Modernising our security laws to counter undemocratic, hostile states and agents, should not require emulating their methodologies of governance in defence of the realm. Crucially the Bill has not followed [recommendations by the Law Commission \(LC\) for the inclusion of the PID](#), when they made an in-depth study on modernising the OSAs.

**Potential Breaches of International Law:** When the UK needs to punch above its weight, post-Brexit, and wishes to be seen to champion democratic values, why do we wish to be accused of playing fast and loose with international law? The LC report observed that *"we cannot be certain that the current legislative scheme, in the OSA 1989" – which does not provide for a public interest defence – "affords adequate protection to Article 10 rights under the ECHR"*. It further states, *"We have noted that a public interest defence provides an important backstop, ensuring compliance with Article 10 in those areas cases where the mechanisms for investigation and redress are rendered ineffective"*. Article 10 protects freedom of expression and equivalent safeguards exist in domestic common law.

**The concept of a public interest defence is not a novel concept in UK law:** We have a "public interest" defence to unlawfully obtaining personal data in [Section 170 of the Data Protection Act 2018](#). Also, a public interest defence to the unauthorised disclosure of personal information in the [Digital Economy Act 2017](#) and the [Public Interest Disclosure Act 1998](#), relating to employment law.

**A minority within Five Eyes Alliance:** [Canada, New Zealand and Australia have incorporated some measure of PID](#) into their national security and espionage laws. There must be a cogent reason, when our allies permit some recourse to a PID, for the UK to diverge from international legal norms.

**The wider the legislative net, the greater the need for a statutory defence:** The 'foreign power' clause 1, is so wide that a [UK anti-fracking NGO, engaged in legitimate activity with funding from the Norwegian Agency for Development, could be found guilty of an offence](#). The UK, through its development work and FCDO sponsored CCSF projects, promotes our democratic values. Many Commonwealth countries adopt or look to mirror our legislation and we value and advocate vehemently on these issues. This Bill criminalises activities well beyond the capture of modern espionage practices and absent a PID, will diminish the UK's stature in championing the rule of law.

**Peers and MPs are urged to:**

- include a PID in the Bill to **remove criminal liability for individuals making the initial disclosure** (e.g., intelligence operatives) and by anyone who later publishes the disclosure (e.g., journalists) if it is clear the disclosure is objectively in the public interest
- include manner of the disclosure within the PID if the disclosure is also in the public interest
- assess recommendations made by the Law Commission for inclusion of PID within the Bill

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