

Research Briefing

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By Joanna Dawson

National Security Bill 2022-2023



Summary

- 1 Measures to counter state threats: Parts 1 and 2
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- 3 Compatibility with the European Convention on Human Rights

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Summary

The [National Security Bill 2022-23](#) was introduced in the House of Commons on 11 May 2022. It is scheduled to have second reading on 6 June 2022.

The Bill would replace existing counter-espionage laws with a comprehensive framework for countering hostile state activity analogous to the counter-terrorism framework established since 2000. It would also limit the availability of civil legal aid and damages to those connected with terrorist activity.

Law Commission review of the Official Secrets Act

In 2015 the Cabinet Office asked the Law Commission to review the effectiveness of the laws that protect Government information from unauthorised disclosure.

The review was prompted by concern that the laws that protect the country from spying and leaks, contained in the four OSAs, 1911-1939 and 1989, are outdated and no longer fit for purpose. The Law Commission noted in particular that technological developments have changed the nature of espionage and leaks, and the potential impact.

The main recommendations of the review into the [Protection of Official Data](#) were:

- To update the “archaic” language of the OSAs, including replacing the word “enemy” with “foreign power”, to include terrorist organisations and companies controlled by a state;
- Removing the requirement that leaks by public servants cause damage in order to constitute a criminal offence;
- Expanding the territorial ambit of the espionage offences so that they can be committed irrespective of nationality where there is a significant link between the behaviour and the interests of the UK;
- That there should be a statutory public interest defence available to anyone, including civilians and journalists, charged with an unauthorised disclosure offence under the OSA 1989;
- The establishment of a new independent statutory commissioner to whom whistle blowers could report concerns;

- Consideration should be given to increasing the maximum sentences for the most serious leaks.

Government consultation: counter-state threats legislation

A [Home Office consultation](#) (PDF) on the proposed legislation set out the Government's response to the Law Commission's recommendations. It stated its intention to:

- Repeal the OSAs 1911-39 and replace them with new legislation, which would update the terminology, including the use of the word "enemy", and the definition of espionage offences; and, broaden the territorial application of the espionage offences;
- Remove the requirement to show that an unauthorised disclosure caused damage in order to bring a prosecution for disclosure offences under the OSA 1989;
- Increase the maximum sentence for unauthorised disclosures to reflect the fact that they are now capable of causing far more serious damage than when the offence was first introduced, meaning that there is not necessarily a distinction in severity between espionage and the most serious disclosures;
- Extend the territorial extent of the unauthorised disclosure offences in the OSA 1989.

It also committed to give further consideration to several other Law Commission recommendations when developing the legislation.

The Government noted the recommendations in relation to the creation of a public interest defence and a statutory commissioner and stated that they would be considered in further detail. This included reflecting on the Law Commission's suggestions that the current scheme may be incompatible with Article 10 of the European Convention on Human Rights, which protects freedom of expression. It indicated on the basis of initial considerations, that the Government's view is that the current scheme is compatible with Article 10 and that the proposals could "undermine our efforts to prevent damaging unauthorised disclosures" contrary to the public interest. The efficacy of existing whistleblowing mechanisms and safeguards would be reviewed when considering options for reform of the OSA 1989, the Government said.

Measures to counter state threats: Parts 1 and 2 of the Bill

Parts 1 and 2 of the Bill and the associated schedules would create an extensive framework for countering state threats modelled on the counter-terrorism framework established under the Terrorism Act 2000 (“TACT”) and numerous subsequent pieces of counter-terrorism legislation.

The measures include:

- New offences relating to espionage, sabotage and entering prohibited places;
- Foreign interference offences;
- Preparatory conduct relating to state threat activity;
- Powers to take state threat activity into account as an aggravating factor in sentencing;
- Powers to arrest and detain without a warrant;
- Powers to impose civil prevention and investigation measures on individuals suspected of involvement in such activity where prosecution is not possible;
- The creation of an independent reviewer to report on the use of the powers

Damages and legal aid for those connected with terrorism: Part 3 of the Bill

Part 3 of the Bill concerns individuals involved in terrorist activity. It would introduce measures to:

- Require courts to consider reducing damages in cases brought against the Crown by individuals connected with terrorist activity;
- Provide for a regime to freeze and forfeit damages where there is a real risk they may be used for terrorist purposes;
- Restrict the availability of civil legal aid to individuals with a conviction for a terrorist offence.

Other relevant information

The Government has published [overarching documents on the Bill](#), including a European Convention on Human Rights memorandum (“ECHR memo”) and impact assessments.

The [Bill pages](#) also contain links to the [explanatory notes](#), and [delegated powers memorandum](#).

The Bill would extend to the whole of the UK. The explanatory notes provide further detail on devolution matters.

This briefing is not intended to provide comprehensive analysis of every clause in the Bill. Please see the explanatory notes for a detailed description of each clause.

1 Measures to counter state threats: Parts 1 and 2

1.1 Background

The Official Secrets Acts: Law Commission review

In 2015 the Cabinet Office asked the Law Commission to review the effectiveness of the laws that protect Government information from unauthorised disclosure.

The review was prompted by concern that the laws that protect the country from spying and leaks, contained in the four Official Secrets Acts (“OSAs”), 1911-1939 and 1989, are outdated and no longer fit for purpose. The Law Commission noted in particular that technological developments have changed the nature of espionage and leaks, and the potential impact.

The OSA 1911, which was enacted in the run up to the First World War, provides the principal legal protection against espionage.

The OSA 1989 criminalises the unauthorised disclosure of certain categories of information that might harm national security or other important state interests.

The Law Commission ran a consultation in 2017 and published a final report with recommendations in 2020.

The main recommendations were:

- To update the “archaic” language of the OSAs, including replacing the word “enemy” with “foreign power”, to include terrorist organisations and companies controlled by a state;
- Removing the requirement that leaks by public servants cause damage in order to constitute a criminal offence;
- Expanding the territorial ambit of the espionage offences so that they can be committed irrespective of nationality where there is a significant link between the behaviour and the interests of the UK;
- That there should be a statutory public interest defence available to anyone, including civilians and journalists, charged with an unauthorised disclosure offence under the OSA 1989;
- The establishment of a new independent statutory commissioner to whom whistle blowers could report concerns;

- Consideration should be given to increasing the maximum sentences for the most serious leaks.

Hostile state activity

Hostile activity by those acting on behalf of foreign states or entities has been a growing security concern in recent years.

Salisbury poisonings

After the poisoning of Sergei and Yulia Skripal in Salisbury in March 2018, which was attributed to the Russian state, the Government took a number of steps in response, including expelling Russian diplomats that had been identified as undeclared intelligence officers. The then Prime Minister, Theresa May, stated that this would “degrade Russian intelligence capability in the UK for years to come”.¹ She further committed to introducing legislation to “harden our defences against all forms of hostile state activity”, including a power to detain those suspected of it at the border, and consideration of the need for new counter-espionage powers “to clamp down on the full spectrum of hostile activities of foreign agents” in the country.²

The Government subsequently passed the [Counter-Terrorism and Border Security Act 2019](#), which introduced powers to stop, question, search and detain people at ports and borders to determine whether they appear to be, or have been, engaged in hostile state activity. These are equivalent to powers which already existed in relation to terrorism related activity under the [Terrorism Act 2000](#).

Intelligence and Security Committee: Russia Report

In July 2020 the Intelligence and Security Committee (ISC) published a report on Russia (following an inquiry conducted by its predecessor committee during the previous parliament). The Report noted that Russia considers the UK one of its top Western intelligence targets, due to its close relationship with the US, and the fact that it is seen as central to the Western anti-Russian lobby. It analysed the consequent Russian threat to the UK, covering cyber attacks, disinformation and influence, and the presence of Russian expatriates and money in the UK, and considered the UK’s response to that threat.

The report concluded that the Government had badly underestimated the Russian threat, and that the security and intelligence agencies had been under resourced, in part as a result of the need to prioritise counter-terrorism operations over Hostile State Activity since 9/11.

¹ [HC Deb 4 March 2018, c 856](#)

² Ibid

Among other things, the report recommended that new legislation be brought forward to replace the OSA regime “that can be used by MI5 to defend the UK against agents of a hostile foreign power such as Russia”.³

Calls to reform the law of treason

The Government’s consultation on countering state threats (discussed further below) referred to reform of the law of treason as an example of an additional measure that could be taken in this area. This follows calls in recent years for a new offence of treason, in part to address the threat posed by individuals who travel abroad to fight with non-state entities such as ISIS.

In July 2018 Policy Exchange published a report,⁴ authored by MPs Tom Tugendhat and Khalid Mahmood among others, proposing that Parliament should enact a new offence of treason. The new offence would cover aiding a state or organisation that is attacking the UK or preparing to attack the UK or against which UK forces are engaged in armed conflict. It would apply to anyone in the UK, and to the actions of British citizens or settled non-citizens anywhere in the world.

The report argued that the 1351 Treason Act is now unworkable, having been overtaken by changes in modern social and political conditions, and that the law should recognise and reinforce “the duty of non-betrayal”. It suggested at a minimum that the law be reformed to follow Australia and New Zealand in making it clear that it is unlawful to aid the enemy either in an international armed conflict or in a non-international armed conflict. Under the proposal, the Secretary of State would have a power to proclaim that a state or organisation was engaged in attacking the UK, which would then create a presumption that aiding them was unlawful.

The report argued that existing terrorism legislation is not an adequate substitute for a workable law of treason because it fails to recognise the wrongfulness of betrayal or the continuing danger posed to British citizens by those who use membership of British society to assist groups that plan to attack the UK. It also argued that sentences for terrorism offences for those who travel to join terrorist groups are inadequate.

In a debate in the House of Commons in March 2019, the then Home Secretary, Savid Javid, said in response to a question from Tom Tugendhat “I agree with my right hon. Friend that it is time to look at the laws on treason, and to modernise them.”⁵

In a subsequent speech he said that he had asked officials to consider the case for updating treason laws, suggesting that it might help to counter hostile state activity.⁶

³ Intelligence and Security Committee of Parliament, ‘Russia’, HC 632, 2020

⁴ [Aiding the enemy: How and why to restore the law of treason](#), Policy Exchange, 2018

⁵ [HC Deb 11 March 2019, c51](#)

⁶ [Home Secretary Speech on keeping our country safe](#), 20 May 2019

The Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, responded to the calls for reform of the law treason in a speech, focusing in particular on the Policy Exchange proposals.⁷ He suggested that there may be unintended consequences of proclaiming that groups are engaged in armed conflict against the UK. Noting that members of the IRA had not been prosecuted for treason, Mr Hall speculated that the authorities would have wanted “to avoid ‘state trials’ for treason, pitting the British government against an official rebellion”. The same considerations would apply in relation to those fighting with terrorist groups overseas, he suggested, agreeing with comments from the security minister in the House of Lords, Baroness Williams, who said that such prosecutions would give their actions a glamour and political status that they do not deserve.

He further suggested that the proposals lacked definition or clarity and thus risked over-breadth. For example, the distinction between an attack on the UK itself and an attack on individuals or property in the UK is not clear outside the context of armed conflict, and the definition of “aid” to such a group could encompass a wide spectrum of activities. This would be “particularly objectionable” to Mr Hall “for an offence carrying an automatic life sentence”.

Integrated Review

The Government’s Integrated Review of Security, Defence, Development and Foreign Policy, published in March 2021, said that with respect to strengthening security and defence, the Government’s first goal is to “counter state threats at home and overseas” by improving “our ability – and that of our allies and partners – to detect, understand, attribute and act in response to the spectrum of state threats we face ... building our collective capacity to counter state threats in the physical world and in cyberspace”.⁸

It explained that state threats to the UK are growing and diversifying, and that states are becoming increasingly assertive in how they advance their own objectives. Action that falls short of conflict can nevertheless threaten and interfere with the UK’s security, economy, democracy and social cohesion. It identified different forms of threat, including:

- Espionage;
- Political interference;
- Sabotage;
- Assassination and poisonings;
- Electoral interference;
- Disinformation;
- Propaganda;
- Cyber operations; and
- Intellectual property theft

⁷ Jonathan Hall QC, [Changing Times, Changing Treason](#), 9 September 2019

⁸ [Integrated Review of Security, Defence, Development and Foreign Policy](#), HMG, March 2021

The Integrated Review further noted that non-state actors also use these methods, and that states increasingly work with non-state actors to achieve their goals, including using them as proxies. As a result, the line between state threats and other types of security threat such as terrorism becomes blurred.

It set out the Government's priority actions in countering state threats to democracy, society and economy, including action

To bolster our cross-government approach to countering state threats. We will reform laws, policies and practices to remove impediments to the protection of national security, ensuring that the security and intelligence agencies and police have appropriate powers to combat all the threats we now face while appropriately protecting the legal rights of individuals. We will introduce Counter-State Threats legislation when parliamentary time allows. This will revise existing offences - to deal more effectively with the espionage threat - and create new offences, to criminalise other harmful activity conducted by, and on behalf of, states. The legislation will also introduce a form of foreign agent registration scheme.⁹

Current threat picture

On 14 July 2021 Ken McCallum, Director General of MI5, gave an annual threat update.¹⁰

He outlined the challenges currently posed by state threats, noting that the global context described in the Integrated Review translates into threats which directly touch “many more members of the public than we’re used to”. He cited the Salisbury attack as an example of the “most visceral concern” of physical threats to life, albeit a comparatively infrequent one. By contrast, disruptive cyber attacks have the potential to affect everyone, and may have very serious consequences, for example where healthcare service are affected.

He further explained how espionage, whilst not a new phenomenon, increasingly impacts the general public, noting that scientific research, high tech business and certain export markets are of interest to foreign spies. Interference and the spreading of misinformation were also methods used to sow or deepen division, or influence discourse for political ends.

Mr McCallum described the modernisation of state threats legislation as an important step towards boosting UK resilience, noting that the current legislation is “hugely out of date”. He said that “To tackle modern interference, we need modern powers”.

He also identified the states that currently pose the greatest threat as Russia, China and Iran.

⁹ Ibid

¹⁰ [MI5 Director General annual threat update](#), 14 July 2021

Threat from China and Russia

The Integrated Review observed that “the soft power landscape is changing” and “those who challenge the values of open and democratic societies increasingly do so through culture: systemic competitors like Russia and China invest heavily in global cultural power projection and information operations”.¹¹

China threat

In the Integrated Review, China was described as a “systemic competitor”.

The review said the UK will “do more to adapt to China’s growing impact on many aspects of our lives as it becomes a more powerful in the world”. And that the Government will invest in “China-facing capabilities” allowing the UK to better understand China and its people, and improving the UK’s ability to respond to the challenge it poses to “our security, prosperity and values – and those of our allies and partners”.¹²

However, the review also emphasised the Government’s intention to continue pursuing a “positive trade and investment relationship” with China, while at the same time ensuring that national security is protected. It also acknowledged that cooperation with China on transnational issues such as climate change is a necessity.

In September 2021, The House of Lord’s International Relations and Defence Committee released a [report on the UK and China’s security and trade relationship](#) (pdf).

The security of cyber-space was one of the areas of particular concern mentioned by witnesses contributing to the report. The Oxford Programme on International Peace and Security told the Committee that there are “growing concerns around China’s ability to gain access to critical and sensitive information through cyber-espionage, putting UK national security interests at risk”. They added that there is “substantial evidence of Chinese cyber-espionage, including commercial cyber-espionage, both within the Asia-Pacific region and the UK”, as well as “potential evidence of China’s willingness to employ malicious cyber-attacks as retaliation”.¹³

In November 2021, Richard Moore, Chief of the Secret Intelligence Service (MI6) said in a speech that the Chinese Intelligence Services are “highly capable and continue to conduct large scale espionage operations against the UK and our allies”. Targets include “those working in government, industries, or on research of particular interest to the Chinese state”. They

¹¹ [Integrated Review of Security, Defence, Development and Foreign Policy](#), HMG, March 2021

¹² [Integrated Review of Security, Defence, Development and Foreign Policy](#), HMG, March 2021

¹³ House of Lord’s International Relations and Defence Committee, [The UK and China’s security and trade relationship: A strategic void](#) (pdf), September 2021. Paras 203-205.

also “monitor and attempt to exercise undue influence over the Chinese diaspora”.¹⁴

Mr Moore further warned of China’s attempts to “distort public discourse and political decision making” across the globe, and the use of social media to facilitate such operations. He said that “adapting to a world affected by the rise of China is the single greatest priority for MI6”.

In January 2022, MI5 took the unusual step of issuing an “interference alert” to warn MPs and Peers of an alleged Chinese agent’s attempt to infiltrate Parliament to interfere in UK politics. The alert identified Christine Ching Kui Lee as having “established links” with the Chinese Communist Party, and said that she had cultivated relationships with current and aspiring MPs from different political parties.¹⁵

Russia threat

The Integrated Review stated that in the UK’s “home region of the Euro-Atlantic” Russia “remains the most acute threat to our security”.¹⁶ As mentioned previously, in July 2020 Parliament’s Intelligence and Security Committee (ISC) published a [report on the threat from Russia to the UK](#) (pdf).

Richard Moore also warned of the “acute threat” from Russia to the UK in his November 2021 speech.¹⁷ Talking of the “spectrum of threats Moscow poses”, he mentioned state-sanctioned attacks, interference in democratic processes and cyber-attacks as examples of activities Russia has directed against the UK.

As mentioned above, Russia state-sanctioned attacks in the UK include that on the Skripals in 2018, as well as on Alexandr Litvinenko in 2006. In 2016 a public inquiry concluded that Litvinenko’s death was almost certainly caused by an operation of the Russian internal security service, the FSB, and that it was probably approved by Russian president Vladimir Putin.¹⁸

In April 2021, GCHQ said it was “highly likely” that Russia’s Foreign Intelligence Service (SVR) was responsible for the SolarWinds cyber intrusion.¹⁹

¹⁴ Secret Intelligence Service, [Speech by SIS Chief Richard Moore: Human Intelligence in the Digital Age](#), 30 November 2021.

¹⁵ The Guardian, [MI5 warning shows tone has changed when it comes to China](#), 13 January 2022.

¹⁶ [Integrated Review of Security, Defence, Development and Foreign Policy](#), HMG, March 2021

¹⁷ Secret Intelligence Service, [Speech by SIS Chief Richard Moore: Human Intelligence in the Digital Age](#), 30 November 2021

¹⁸ House of Commons HC695, [The Litvinenko inquiry: report into the death of Alexander Litvinenko](#), 21 January 2016.

¹⁹ Foreign, Commonwealth and Development Office, [Russia: UK and US expose global campaign of malign activity by Russian intelligence services](#), 15 April 2021.

The Russian invasion of Ukraine has put a greater focus on Russia's doctrine of hybrid warfare²⁰ which includes using "state media, on-line media and agents of influence [...] to obfuscate motivations and justify military actions".²¹

In March 2022, the Director of GCHQ, Sir Jeremy Fleming, gave a speech on global security amid the war in Ukraine. He revealed that a new "Government Information Cell" had been set up to identify and counter Kremlin disinformation targeted at UK and international audiences. Addressing commentary that expressed surprise that Russian has yet to deploy a major cyber-attack as part of their campaign, he said that "this misses the point", and that it "was never our understanding that a catastrophic cyber-attack was central to Russian's use of offensive cyber or to their military doctrine". He added "we've certainly seen indications which suggests Russia's cyber actors are looking for targets in the countries that oppose their actions".²²

For a broad assessment of proposals for countering Russian influence, including issues such as election financing and Russia state media see Commons Library briefing: [Countering Russian influence in the UK](#).

Previous legislative proposals

The [Queen's Speech in May 2021](#) announced there would be legislation to counter hostile activity by foreign states. The [purpose of the proposed bill](#) would be to "provide the security services with the tools they need to tackle the evolving threat from hostile activity by states and actors".

The Government said the main elements of the bill would:

- Reform the Official Secrets Acts 1911, 1920, 1939 and 1989;
- Create a 'Foreign Influence Registration Scheme' to help combat espionage, foreign influence, and protect research; and
- Bring together new and modernised powers to ensure the security services can tackle hostile activity.

This proposal followed an announcement in the previous Queen's Speech of the introduction of 'espionage legislation', to provide the security services and law enforcement agencies with the tools they need to disrupt 'hostile state activity'. No such legislation was introduced during the 2019-2021 or 2021-22 parliamentary sessions.

²⁰ Defence Select Committee, HC 107, [Russia: Implications for UK defence and security](#), (see section; Russian unconventional capability), 2016.

²¹ GCHQ, [Director GCHQ's speech on global security amid war in Ukraine](#), 31 March 2022.

²² GCHQ, [Director GCHQ's speech on global security amid war in Ukraine](#), 31 March 2022.

Government consultation

Following the announcement of a counter state threats bill in the Queen's Speech, the Home Office published a consultation on [Legislation to Counter State Threats \(Hostile State Activity\) \(PDF\)](#) on 13 May 2021.

The paper defined 'State Threats' as:

overt or covert action orchestrated by foreign governments which falls short of general armed conflict between states but nevertheless seeks to undermine or threaten the safety and interests of the UK, including: the integrity of its democracy, its public safety, its military advantage and its reputation or economic prosperity.²³

It explained that the term 'hostile state activity', which has previously been used to describe the threat, has not been adopted because it is often read as being activity conducted by hostile states rather than hostile activity by states as intended.

The paper describes the threat as one which is "growing, diversifying and evolving" and suggests that states who engage in it are becoming emboldened and more aggressive. It sets out the strategic aims of such activity:

to undermine the UK's security, prosperity, social cohesion, resilience, democracy, values, institutions and strategic advantage, as well as the rules based international system and associated organisations that underpin all of the above.²⁴

The threat is broken down into five categories:

1. Physical threats to people, including assassination, forced repatriation and harassment;
2. Physical threats to things, such as damage or disruption to infrastructure, whether physical or cyber;
3. Espionage – the covert seeking of sensitive confidential information;
4. Interference – a wide range of activity through which states seek to further their aims by use of covert means or by obfuscation of intent and originator, including disinformation, bribery and coercion;
5. Threats to geostrategic interests -such as challenges to the rules-based international order, or the UK's interests or existing alliances

The paper explained that the impact and cost of hostile activity by states can be difficult to measure and quantify. The US estimates that the overall cost of hostile activity by states to the US economy is likely to be hundreds of billions of dollars. No similar figure has been calculated for the UK but it is believed to be "very significant". The impact of the public losing confidence in

²³ Page 5

²⁴ Page 7

Parliamentary democracy or the loss of the UK's strategic advantage is described as "priceless".²⁵

The Government's intention was that the new legislation should perform a similar role to the Terrorism Act 2000 ("TACT"). TACT repealed previous counter-terrorism legislation to provide the legislative basis for the UK's current response to terrorism. Similarly, the new legislation would provide "a new modern baseline of tools and powers" which may be updated, amended or complemented with new powers or tools as the threat evolves.

The policy proposals under consideration were split into three sections:

- **Reform of the OSAs** including responding to the Law Commission's review, discussed in further detail below; the creation of additional offences to address harms not captured by the existing scheme, including sabotage, economic espionage, and foreign interference; and, making hostile activity by states an aggravating factor in sentencing;
- **Foreign Influence Registration Scheme** requiring individuals in scope of the requirements to register activity within the UK that is being undertaken for, or on behalf of, a foreign state. Failure to register, or registering false information would be a criminal offence, providing an alternative means to prosecute hostile actors. This would increase the risk to foreign states seeking to conduct hostile activity, according to the consultation paper, and could be used to support efforts to combat espionage, interference, and to protect research in sensitive subject areas;
- **Civil orders** to mitigate the risk posed by individuals engaged in hostile activity who cannot be prosecuted. The orders could include a range of restrictive and preventative measures, such as preventing the subject from associating with certain people or from visiting specified sensitive locations. The paper says that the Government's initial view is that these orders would be imposed by the executive rather than the courts.²⁶

In addition to these specific proposals the consultation asked a further general question as to whether there were any other "additional or reformed tools or powers that could be utilised to address the threats set out in this consultation, such as treason reform".

The Bill

The Queen's speech 2022 announced the introduction of a National Security Bill.

²⁵ Page 9

²⁶ The proposals share a number of similarities with Terrorism Prevention and Investigation Measures, provided for by the Terrorism Prevention and Investigation Measures Act 2011

The main elements of the Bill were set out in the briefing notes:

- Reforming existing espionage laws (Official Secrets Acts 1911, 1920 and 1939) to provide effective legislation to tackle modern threats.
- Bringing in new offences to tackle state-backed sabotage, foreign interference, the theft of trade secrets and assisting a foreign intelligence service.
- We will introduce a Foreign Influence Registration Scheme requiring individuals to register certain arrangements with foreign governments to deter and disrupt state threats activity in the UK, bringing the UK into line with similar schemes in the United States of America and Australia.
- Providing powers to allow state threats to be tackled at an earlier stage, by expanding the ability to prosecute people for preparing activities, and for other offences that are committed by those acting for a foreign state to be labelled as state threats and sentenced accordingly.
- Introducing new civil measures to use as a tool of last resort where prosecution of a hostile actor is not possible. This includes the ability to restrict a state threat actor from access to certain places, or where they can work and study, preventing any harm from being done where there is no other option to prosecute or disrupt the activity.²⁷

Proposals not included in the Bill

The following proposals, put forward in the consultation, have not been included in the Bill as introduced.

- Reform of the OSA 1989;
- The Foreign Influence Registration (FIR) scheme: Home Office Minister Damien Hinds confirmed that it would be brought forward by government amendment to the Bill;²⁸
- Reform of the law of treason

The Government has not formally responded to the consultation. The Government's ECHR memorandum says that a response will be published in due course.

²⁷ [Queen's Speech 2022: Background Briefing Notes](#), gov.uk

²⁸ [UIN480, 10 May 2022](#)

1.2

Espionage, sabotage and acting for foreign powers

Part 1 of the Bill would replace the existing regime of offences under the OSAs 1911- 1939, which would be repealed.

Key definitions: state threats²⁹

Foreign power condition: this is met for the purposes of offences in Part 1 in the following circumstances:

- The conduct of the person in question is carried out for or on behalf of a foreign power, and they knew or ought to have known that was the case;
- Conduct is carried out for or on behalf of a foreign power if:
 - It is instigated by a foreign power;
 - It is directed or controlled by a foreign power;
 - It is carried out with financial or other assistance from a foreign power;
 - It is carried out in collaboration with or with the agreement of a foreign power.
- The relationship between the conduct and the foreign power need not be direct;
- The conduct may be carried out alone or with others;
- The condition is also met if the person intends their conduct to benefit a foreign power, which need not be identified;
- A person who holds office in or works for a foreign power may meet the condition.

Foreign power:

- The sovereign or other head of a foreign State in their public capacity;
- A foreign government, or part of one;

²⁹ These terms are defined in clauses 24-26 of the Bill

- An agency or authority of a foreign government;
- An authority which administers the affairs of an area within a foreign country or territory, or a person exercising its powers;
- A governing political party of a foreign government, meaning one whose members hold political or official posts in the foreign government as a result of that membership.

Foreign power threat activity:

- The commission, perpetration or instigation of acts or threats which fall within the definition of the following offences:
 - Obtaining or disclosing protected information;
 - Obtaining or disclosing trade secrets;
 - Assisting a foreign intelligence service;
 - Entering a prohibited place for purpose prejudicial to the UK;
 - Sabotage;
 - Foreign interference
 - Other serious offences, or threats to commit such offences, where the foreign power condition is met
- Conduct which facilitates such conduct;
- Conduct which gives support or assistance those known or believed to be involved in such conduct

Safety or interests of the United Kingdom (SOIOTUK): the objects of state policy determined by the Crown on the advice of Ministers.³⁰

Espionage

Clauses 1-3 would create three new espionage offences:

- **Obtaining or disclosing protected information:** any information, document or article, access to which is restricted for the purpose of protecting the safety or interests of the UK, knowing (or being reasonably

³⁰ This is not defined in the Bill but the explanatory notes state that this is how the term, which is contained in the OSA 1911, has been interpreted by the courts, see *Chandler v DPP* (1964) AC 763: Explanatory Notes, para 53

expected to know) that the purpose was prejudicial to the SOIOTUK. The foreign power condition would also need to be met.

The offence:

- Could be committed outside the UK; and
- Would carry a maximum sentence of life imprisonment;
- **Obtaining or disclosing trade secrets**, defined as any information, document or article not generally available to relevant experts, the value (industrial, economic, or commercial) of which would be damaged if it were obtained or revealed, knowing (or being reasonably expected to know) that the conduct was unauthorised. The foreign power condition would also need to be met.

The offence:

- Could be committed outside the UK, but only if the trade secret is in the possession of a UK person; and
- Would carry a maximum sentence of 14 years
- **Assisting a foreign intelligence service**, defined as:
 - intentionally engaging in conduct to materially assist a foreign intelligence agency in carrying out UK-related activities; or
 - engaging in conduct that it is reasonably possible may assist a foreign intelligence agency, knowing that to be the case, or being reasonably expected to know.

The offence:

- Could be committed outside the UK, but only if the person engaging in the conduct was a UK person or acting for the Crown in some capacity;
- Would carry a maximum sentence of 14 years.
- Would not be committed if the conduct was engaged in:
 - in compliance with a legal obligation under UK law,
 - for the purposes of carrying out functions of a public nature under UK law; or
 - in accordance with an agreement to which the UK, or someone acting on behalf of the Crown, was a party.

Accessing prohibited places

Clauses 4-11 would create a new regime of offences relating to entering prohibited places.

Key definition: prohibited places

“**Prohibited place**” is defined as Crown land or a vehicle in the UK or the Sovereign Base Areas Akrotiri and Dhekelia, used for UK defence purposes or the defence of a foreign country, or vehicle elsewhere used for defence purposes.³¹

The Secretary of State would have a power to declare additional sites as prohibited places within those territories, taking account of any use of the site.³²

A constable would be able to designate a “**cordoned area**” if expedient in order to secure an aircraft or equipment relating to an aircraft for military purposes.

Under the Bill’s proposals there would be two new offences:

- **Entering a prohibited place** for a purpose prejudicial to the SOIOTUK, knowing (or being reasonably expected to know) that was the purpose.
 - The maximum sentence would be 14 years;
- **Unauthorised entry to a prohibited place**, knowing (or being reasonably expected to know) that entry is unauthorised.
 - The offence would be summary only and the maximum sentence would be determined by the maximum for summary offences in the different UK jurisdictions

Both offences would cover taking or procuring any kind of recording of the prohibited place, and electronic or remote entry.

The Bill would provide police with specific powers in relation to prohibited places,³³ where they reasonably believe it necessary to protect the SOIOTUK, to:

- Order a person:

³¹ Cl 7

³² Cl 8

³³ Cl 6

- Not to enter a prohibited place;
 - To leave a prohibited place;
 - To leave an area adjacent to a prohibited place;
 - To move a vehicle or device from a prohibited place or area adjacent to one.
- Arrange for:
 - The removal of a vehicle or device from a prohibited place or area adjacent;
 - The movement of a vehicle or device within a prohibited place.

Failure to comply with an order would be a summary offence, subject to maximum sentence of three months.

Police would have the same powers in relation to cordoned areas. Failure to comply with an order would also be an offence, but would be subject to a reasonable excuse defence.³⁴

Sabotage

Clause 13 would create a new offence of sabotage, committed where a person intentionally or recklessly causes any damage to an asset for a purpose which they know (or could be reasonably expected to know) to be prejudicial to the SOIOTUK. The offence:

- Could be committed whether the conduct or assets are in the UK or elsewhere;
- Would carry a maximum sentence of life imprisonment

Foreign interference

Clauses 13 and 14 would create two new offences relating to foreign interference.

Foreign interference: general

The Bill proposes that an offence, subject to a maximum sentence of 14 years, would be committed in the following circumstances:

- The foreign power condition was met;
- The conduct in question had one of the following effects:

³⁴ Cl 11

- Interfering with the exercise of anyone’s rights under the ECHR, as given effect in UK law;
- Affecting the exercise of a person’s public functions;
- Manipulating whether or how any person makes use of services provided in the exercise of public functions;
- Manipulating whether or how any person participates in political processes;
- Manipulating whether or how any person participates in legal proceedings;
- Prejudicing the safety or interests of the UK; and
- One of the following conditions are met:
 - The conduct constitutes an offence, or would do if it took place in England and Wales;
 - The conduct in question involves coercion of any kind, including violence, damage to property or reputation, and financial loss, or the threat of any of those; or
 - The conduct in question involves making a misrepresentation.

The offence could be committed whether the conduct in question took place in the UK or elsewhere.

Foreign interference: examples

The Explanatory Notes provide a number of examples of the kind of scenarios the offence created by this clause is intended to cover, including:

- A person working for a foreign power threatening members of that foreign power’s diaspora in the UK in order to coerce them into renouncing views critical of that regime;³⁵
- A person working for a UK-based business owned by a foreign power, seeking to cultivate relationships with MPs in order to obtain sensitive information and use it to coerce them into representing the foreign power’s interests;³⁶

³⁵ Cl 13(2)(a)

³⁶ Cl 13(2)(b)

- A foreign power running a “troll farm” to spread disinformation and manipulate public opinion in order to sow discord and undermine confidence in Government on issues such as children’s vaccines;³⁷
- A foreign national spreading misinformation during an election campaign on behalf of a foreign power and seeking to influence the votes of members of the diaspora in a way that is favourable to that regime;³⁸
- A person acting on behalf of a foreign power seeks to influence the jury in a criminal trial in which the regime is implicated in order to achieve a more favourable outcome;³⁹

Foreign interference in elections

Key definition: election offences

A “**relevant election offence**” is one of a number of offences under the Representation of the People Act 1983 and the Political Parties, Elections and Referendums Act 2000 listed in Schedule 1 involving interfering or adversely affecting an election or referendum or failing to comply with political donation rules.

Clause 14 and Schedule 1 would provide for the imposition of higher sentences where a “relevant election offence” is committed and the foreign power condition is met.

Preparatory offences

Clause 15 would create a general preparatory offence. It would apply where a person engaged in preparatory conduct in relation to the commission of an offence of obtaining or disclosing protected information or trade secrets; entering a prohibited place; sabotage; or, another serious offence where the foreign power condition was met.

The offence could be committed in the UK or elsewhere and would carry a maximum sentence of life imprisonment.

³⁷ Cl 13(2)(c)

³⁸ Cl 13(2)(d)

³⁹ Cl 13(2)(e)

Sentencing

Clause 16 would amend the Sentencing Code to provide that in any offence where the foreign power condition is met (other than those created or specifically provided for by the Bill), it should be treated as an aggravating factor for the purposes of sentencing.

Clauses 17-19 would make equivalent provision for Northern Ireland, Scotland and service offences.

Powers of investigation

Search, seizure and retention of material

Clause 20 and Schedule 2 would confer specific powers of entry, search and seizure in relation to:

- Offences provided for by Part 1 of the Bill other than the summary only offences;⁴⁰ and
- Other serious offences in relation to which the foreign power condition is met.

Part 1 of Schedule 2 would apply to England and Wales and Northern Ireland.

It makes provision for the following:

- The procedure for a constable to apply to a justice of the peace, or a lay magistrate in Northern Ireland, for a warrant to enter and search premises or people for non-confidential material;
- The procedure for a constable to apply to a judge for a production order for confidential material,⁴¹ excluding material subject to legal privilege, and for a warrant to search, seize and retain such material. In urgent cases, authorisation could be given by a police officer at least the rank of superintendent, but a subsequent warrant would be required to retain any confidential journalistic material.

Part 2 of Schedule 2 would make equivalent provision for Scotland.

⁴⁰ Unauthorised entry to a prohibited place (clause 5) failure to comply with an order in relation to a prohibited place (clause 6) or a cordon (clause 7), offences provided for by the Schedule relating to compliance

⁴¹ 'Confidential material' is defined by reference to s 264 of the Investigatory Powers Act 2016, which defines "confidential journalistic material", and other "protected material" as defined by Sch 2, para 15

Arrest and detention

Clause 21 and Schedule 3⁴² would provide for a power to arrest without a warrant anyone reasonably suspected of involvement in foreign power threat activity.

Part 1 of Schedule 3 sets out the conditions of detention under clause 21, including where the detention should take place, identification of the detained person, and video recording of interviews.

Part 2 applies to England and Wales and Northern Ireland sets out the rights of the detained person, including:

- the right to have a named person informed of the detention;
- the right to consult a solicitor as soon as reasonably practicable, privately and at any time. A police officer would be able to direct that the detained person consult a different solicitor of their choosing if they have reasonable grounds to believe their original choice would lead to interference with an investigation or the concealment of property which might otherwise be subject to recovery as proceeds of crime.

A police officer would be able to authorise a delay to both rights where they had reasonable grounds to believe that exercising them may interfere with an investigation or the recovery of proceeds of crime.

Part 3 would make equivalent provision for Scotland.

Detention would be possible for a maximum of 48 hours, subject to review every 12 hours, unless extended by a warrant up to a maximum of 14 days. The Bill would enable the Secretary of State to make regulations extending this time limit to 28 days at time when Parliament was dissolved if they considered it necessary to do so by reason of urgency.

1.3

Prevention and investigation measures

Part 2 of the Bill would provide for a regime of ‘prevention and investigation measures’ (PIM) which could be imposed on individuals that the Secretary of State reasonably believes are, or have been, involved in foreign power threat activity.

Prevention and investigation measures are requirements, restrictions and other provisions specified in a notice (a “Part 2 notice”). The regime replicates that of Terrorism Prevention and Investigation measures (“TPIMs”) provided for by the [Terrorism Prevention and Investigation Measures Act 2011](#).

⁴² These provisions are analogous with section 41 and Schedule 8 of TACT, which provide for a power to arrest those reasonably suspected of being involved in terrorism.

TPIM notices impose restrictions on an individual in order to protect the public from a threat posed by a person suspected of terrorism-related activity. TPIMs are intrusive measures aimed at disrupting terrorism related activity and facilitating the investigation of such activity. They are intended to be used as an exceptional measure in cases where there is a terrorist threat but it is not possible to prosecute or deport the suspect.

What would be the conditions for imposing a Part 2 notice?

Five conditions would need to be met for a Part 2 notice to be imposed under **clause 33** of the Bill:

- Condition A: the Secretary of State must reasonably believe that the individual is or has been involved in foreign power threat activity;
- Condition B: some or all the activity is new activity;
- Condition C: the Secretary of State reasonably considers it necessary to impose the measures in order to protect the UK from foreign power threat activity;
- Condition D: the Secretary of State reasonably considers it necessary to impose the measures in order to prevent or restrict the individual's involvement in foreign power threat activity;
- Condition E: either
 - The court gives permission for the imposition of the measures, or
 - The Secretary of State reasonably considers that the case is sufficiently urgent for the measures to be imposed without the court's permission

Under the Bill's proposals it would be possible to impose a Part 2 on the basis of activity that took place before clause Part 2 of the Bill came into force.

Notices would last for a year, and could be renewed by the Secretary of State for up to a maximum of five years.

As with TPIMs, the Secretary of State would be required to consult on the prospects of prosecuting an individual before seeking to impose any measures.⁴³

⁴³ Cl 39

Permission from the courts

If the Secretary of State decided that conditions A-D were met they would be required to apply to the court for permission to impose a Part 2 notice, providing a draft of the proposed notice.

The court would have to determine the application applying the same principles as in a judicial review, including:

- Whether the Secretary of State's decision was obviously flawed;
- Whether to give permission to impose the measures; and
- Whether to impose alternative measures if it finds that the Secretary of State's decision in relation to Condition D is obviously flawed

If a court found that the Secretary of State's decision with respect to conditions A,B or C was obviously flawed, it could not give permission.

The Bill proposes that the subject of the notice need not be party to the proceedings, and that they could take place without their knowledge or the opportunity to make representations.

Urgent cases

Schedule 5 would set out the procedure to be followed if the Secretary of State decided that the case was sufficiently urgent for measures to be imposed without the court's permission under clause 33.

Having served the Part 2 notice, the Secretary of State would be required to refer the case to the court. The court would then determine whether to quash, confirm or vary the notice.

Review

After a court grants permission for a notice or confirms one under Schedule 5, the subject of the notice would then have the opportunity to participate in a review hearing, in which the court would determine whether the conditions continued to be met. The court would be able to quash the notice, or to quash or vary specific measures. Otherwise, the notice would be confirmed by the court.⁴⁴

Imposing a notice

A Part 2 notice would only take effect when served personally on the subject.⁴⁵ The Secretary of State would have the power to vary measures, and to revoke

⁴⁴ Cls 37-38

⁴⁵ Cl 53

and revive a notice, or to replace a notice that was quashed or revoked with retrospective effect.⁴⁶

The subject of a Part 2 notice would be entitled to appeal against any decision to extend or revive the notice, or to vary the measures imposed, under clause 45.

Schedule 7 would provide for further details relating to the conduct of legal proceedings under Part 2 of the Bill, including the power to make rules to enable ‘closed’ hearings, in which the subject of the notice and their chosen legal representative would be absent. The court would be able to appoint a ‘special advocate’ to represent the individual in these circumstances.

What measures could be imposed under a Part 2 notice?

Schedule 4 sets out the measures that could be included in a Part 2 notice:

- Residence measure, including a requirement to reside at a specified residence, to give notice of other people living at that residence, and a curfew requirement. The residence may be provided by the Secretary of State and could be in a location that they deemed appropriate, provided it was not more than 200 miles from the individual’s own residence;
- Travel measure, including restrictions on leaving a specified area, or a requirement to seek permission from or give notice to the Secretary of State before leaving an area; or, a requirement to surrender travel documents, including passports and tickets;
- Exclusion measure, including preventing the individual from entering a specified place or area, or requiring notice or permission to do so;
- Movement directions measure, requiring the individual to comply with directions given by a constable about their movements, including restricting their movements;
- Financial services measure, including control over bank accounts and the possession of cash by the Secretary of State;
- Property measure, including restrictions on the transfer of property, such as money, by or to the individual;
- Weapons and explosives measure, including a prohibition on possessing offensive weapons, imitation firearms, and explosives;
- Electronic communication device measure, including restrictions on the individual’s possession or use of electronic communications devices, or

⁴⁶ Cls 41-44

that of others in their residence. This could include monitoring the use of any device, or requiring its surrender for inspection;

- Association measure, including restrictions on the individual's association or communication with others, such as a requirement not to associate or communicate with other people;
- Work or studies measure, including restrictions such as a requirement not to work or study without giving notice or receiving permission from the Secretary of State;
- Reporting measure, requiring an individual to report to a police station;
- Polygraph measure, requiring an individual to participate in polygraph sessions in order to their compliance with other specified measures;
- Appointments measure, requiring the individual to attend appointments with specified persons;
- Photography measure, requiring the individual to allow photographs to be taken of themselves;
- Monitoring measure, requiring the individual to co-operate with arrangements to monitor their movement and communications, such as wearing an electronic tag;
- Provision of residence information measure, requiring the individual to disclose information about their residence/s to the Secretary of State

Oversight

As with TPIMs, the Bill proposes that the Secretary of State should report on the use of the powers to Parliament every three months.⁴⁷

It would also require the appointment of an independent reviewer to carry out an annual review on the operation of Part 2 of the Bill.

This role is analogous to that of the [Independent Reviewer of Terrorism Legislation](#), currently Jonathan Hall QC, whose statutory duties include reviewing:

- The operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, including:

⁴⁷ Clause 48

- Definition of terrorism;
- Proscribed organisations;
- Terrorist property;
- Terrorist investigations;
- Arrest and detention;
- Stop and search;
- Port and border controls
- Terrorist offences
- Conditions of detention for those detained for more than 48 hours;⁴⁸
- The operation of the Terrorism Prevention and Investigation Measures Act 2011;
- The Terrorist Asset-Freezing etc Act 2010, which enables the Treasury to freeze assets of those believed to be involved in terrorism;
- Parts 1 and 2 of the [Anti-Terrorism, Crime and Security Act 2001](#), the [Counter-Terrorism Act 2008](#); and Part 1 of the [Counter-Terrorism and Security Act 2015](#).

The role of the independent reviewer proposed by the Bill would therefore be significantly more limited by comparison.

Enforcement

Under **clause 50**, it would be an offence to contravene any measure under a Part 2 notice without a reasonable excuse. A conviction on indictment for the offence would carry a maximum sentence of five years.

If an individual subject to a travel notice left the UK, the reasonable excuse defence would not be available and the maximum sentence would be ten years.

Schedules 8 and 9 would provide for investigatory powers in relation to the imposition and enforcement of Part 2 notices.

⁴⁸ As required as part of the “National Preventative Mechanism” under the Optional Protocol to the Convention Against Torture to carry out visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment: [HKWS412, 12 January 2017](#)

Schedule 8 sets out powers of entry, search seizure and retention, with and without a warrant. Schedule 9 would govern the taking and retention of biometric material from those subject to Part 2 notices.

1.4 Reaction

During the Queen’s Speech debate in the House of Commons, opposition parties were broadly supportive of the proposals, although a number of Member’s questioned the absence of the FIR scheme.⁴⁹

In the House of Lords, Members were likewise supportive, but several noted the delay since the legislation was originally announced in 2019.⁵⁰

Lord Anderson of Ipswich (CB), the former Independent Reviewer of Terrorism Legislation, noted the disparity between counter-terrorism powers and those available to counter state threat activity, which he suggested was arguably more of a threat.

Baroness Jones of Mouslecoombe (Green) suggested that the Bill would provide unspecified new powers to the security services, constituting a continuation of a “decades-long slippery slope” towards more powers and less scrutiny.

⁴⁹ [HC Deb 11 May 2022](#)

⁵⁰ [HL Deb 12 May 2022](#)

2 Persons connected with terrorism: Part 3

Part 3 of the Bill relates to individuals convicted of terrorism offences or otherwise involved in terrorism-related activity.

2.1 Background

Damages

Concern has been raised about damages paid to former Guantanamo Bay detainees. The coalition Government confirmed in 2010 that it had agreed a settlement in relation to a civil damages claim brought by individuals detained there during the early 2000s.⁵¹ The settlement was subject to a confidentiality agreement and the identity of the claimants is therefore not in the public domain.

The [Justice and Security Act 2013](#) introduced closed material procedures to enable the Government to defend such claims more effectively without revealing sensitive intelligence information.

In 2017 it was reported that Jamal al-Harith, a former Guantanamo detainee, had died in a suicide attack in Mosul, where he had travelled to join ISIS.

During a Parliamentary debate on the issue a number of Members raised the possibility that he had been awarded a payment as part of the confidential settlement and that the money had been used subsequently to fund terrorist activity. The then Security Minister Ben Wallace declined to comment on any individual case. In response to a question about what the Government were trying to do to recover any of the compensation paid, he said:

I will go from here and make sure that any legally binding agreements are correctly monitored and that, where there is a breach, we recover any moneys we can.⁵²

Legal aid

The [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (“LASPO”) governs the availability of civil and family legal aid. Prior to LASPO, a legal matter was within scope and qualified for legal aid funding unless it was

⁵¹ [HC Deb 16 November 2021](#), c752

⁵² [HC Deb 23 February 2017](#)

specifically excluded by the Access to Justice Act 1999. LASPO reversed this position and listed in Schedule 1 those areas of legal problems that now remained in scope. It also provided for an Exceptional Case Funding (ECF) scheme to provide legal aid in cases where a failure to provide legal aid would be a breach of an individual's rights under the Human Rights Act 1998 or European Union law.

Regulations under LASPO also made changes to the eligibility criteria for civil and family legal aid, including:

- Applying capital eligibility test to all legal aid applicants;
- Increasing Income Contributions for Contributory Clients;
- Removing legal aid in cases with 'borderline' prospects of success.

2.2

Damages

Availability in national security proceedings

Clauses 57-60 would require a court to consider whether to reduce the amount of damages it would award in national security cases where the Crown was liable, but the claimant had committed wrongdoing involving the commission of a terrorist offence or other involvement on terrorism-related activity.

The duty would arise where the Crown was found to be liable but made an application to the court to consider “national security factors”. These would encompass consideration of the extent to which:

- the claimant had been involved in terrorism related wrongdoing;
- there was a connection between that conduct and conduct for which the Crown was liable in the proceedings;
- the Crown sought to limit or prevent any risk of harm; and
- the Crown's ability to prevent the conduct for which it was liable was limited by circumstances;

Human rights claims would be excluded from this proposal.

Freezing and forfeiture

Clause 61 and Schedule 10 would enable the court to make a freezing order in relation to any damages awarded to a claimant, if satisfied that there was a “real risk” of those damages being used for the purposes of terrorism.

The freezing order would be extendable up to a maximum of four years. If at the end of the extended period the court remained satisfied of the real risk, it

would be able to make an order that the damages be forfeited to the Government.

2.3 Legal aid

Clauses 62-64 would amend LASPO to limit the availability of civil legal aid for individuals with convictions for terrorism offences.

A new section 9A would be inserted into LASPO which would prevent such individuals who would otherwise be entitled to legal aid from receiving it unless one of the following exceptions applied:

- The conviction was before 19 February 2001;⁵³
- The offender was under the age of 18 when they applied for legal aid;
- The conviction was more than 30 years before the application for legal aid;
- The offender was under 18 when convicted and the conviction was more than 15 years prior;
- The application for legal aid was made before clause 62 came into force or before the date of the conviction;
- Where they would be entitled to exceptional case funding under section 10 of LASPO.

Under the proposals, the Legal Aid Agency would be able to request information from relevant competent authorities⁵⁴ about an individual who applied for funding in order to determine whether they had a terrorism conviction.

2.4 Reaction

The Independent Reviewer of Terrorism Legislation has published a note commenting on the proposals relating to freezing and forfeiture of damages and restrictions on civil legal aid.

Noting that a regime for freezing and forfeiture already exists under the Anti-Terrorism, Crime and Security Act 2001 (“ATCSA 2000”), he questioned why a further regime might be required.

⁵³ The date when key provisions of TACT came into force

⁵⁴ As defined by section 30 of the [Data Protection Act 2018](#) to include Government departments and law enforcement and criminal justice agencies.

He suggested that a policy aim of enabling damages to be frozen at the point of award, rather than in separate proceedings, could have been achieved by adapting the procedures under the ATCSA 2001.

He also made a number of observations about the fact that the provision would introduce a lower threshold than the existing regime, only requiring that there is a “real risk” that the damages will be used for terrorist purposes, rather than a requirement that they are “intended to be used” for that purpose:

- A lower threshold may be justified for an interim freezing measure but final deprivation of property based on an assessment of risk is novel.
- Assessment of terrorist risk is not only imprecise, but it is quintessentially a matter for the authorities in the light of considerations of national security and public safety, on which a Court will accord the authorities appropriate respect for reasons of institutional competence and democratic accountability.
- It follows that this measure not only makes it easier to deprive individuals of damages to which a court has found they are entitled, but it passes an advantage to the authorities who are most likely to be the defendants in proceedings in which this measures are invoked.
- Moreover, if damages awarded against the government are eventually forfeited they will be returned to the government via the Consolidated Fund.⁵⁵

He concluded that the measures go further than necessary, and risk giving the impression that the Government would have a special advantage not available to other unsuccessful parties in litigation if it is sued.

In relation to the legal aid proposals, Jonathan Hall QC suggested that they represented the first time that Parliament had been asked to consider automatic symbolic restrictions on terrorist offenders, and questioned their differential treatment on the basis of something other than risk.

He noted the importance of reintegration of offenders who have served their sentence, and suggested that even symbolic restrictions may have unintended consequences.

⁵⁵ Jonathan Hall QC, [Note on Terrorism Clauses in the National Security Bill](https://terrorismlegislationreviewer.independent.gov.uk), May 2022, terrorismlegislationreviewer.independent.gov.uk

3

Compatibility with the European Convention on Human Rights

The Government's ECHR memo acknowledges that the Bill's provisions engage a number of Articles.⁵⁶ In particular:

- Article 5 – the right to liberty, may be engaged by:
 - The arrest and detention powers in clause 21 and Schedule 3. However the Government argue that the provisions contain sufficient safeguards against arbitrary use to meet the requirement that it is “prescribed by law” as required by Article 5, and the length of the proposed detention is justified and proportionate given the nature of the threat.⁵⁷
 - The Prevention and Investigation Measures (PIMs) provided for by Part 2, in particular any curfew measures. The memo notes that this issue has been reviewed extensively by the courts in the context of control orders and TPIMs and it has been found that the principle of imposing a curfew under civil prevention measures does not breach Article 5. It also notes the duty on the Secretary of State to act compatibly with Convention rights when determining measures to be imposed.⁵⁸
- Article 6 – the right to a fair trial, may be engaged by:
 - PIMs, in particular the use of closed proceedings, in which the subject of the measures is excluded. The Government's memo again relies on control order case law to justify its approach, and points to paragraph 5 of Schedule 7, which makes clear that the relevant provisions do not require the court to act incompatibly with Article 6.⁵⁹
 - Powers to arrest and detain under clause 21 and Schedule 3, including in particular the power to delay access to a lawyer or to prevent access to the lawyer of the detainee's choosing. The Government considers that the safeguards contained in these provisions will ensure that any interference is justified.⁶⁰

⁵⁶ [European Convention on Human Rights memorandum](#) (PDF), gov.uk

⁵⁷ Paras 26-27

⁵⁸ Para 38

⁵⁹ Paras 42-46

⁶⁰ Paras 29-31

- The legal aid provisions in clauses 62-64. The memo states that the Government is satisfied that the exceptional case funding scheme is a sufficient safeguard to ensure that the provisions are compatible with Article 6.
- Article 8 – the right to privacy may be engaged by:
 - PIMs which include measures providing for restrictions on movement, communications and association, and requiring monitoring. The memo states that the measures are compatible because they will be prescribed by law, in pursuit of the legitimate aims of national security, public safety, the prevention of crime and the protection of rights and freedoms. It further states that the numerous safeguards will ensure that any interferences is proportionate, and points to the experience of TPIMs, which have not been found to be incompatible with Convention rights.⁶¹
- Article 10, the right to freedom of expression, would be engaged by a number of the Bill’s provisions, including:
 - Foreign interference provided for by clauses 13-14 and Schedule 1, which would criminalise conduct which involves deception of some kind. The Government considers that this expression is not entitled to the protection of Article 10, which it says does not protect expressions by or on behalf of a foreign power that is intended to affect the public functions of another State, or to manipulate whether or how the public in another State make use of public services or participate in legal or political processes. It further states that any interference would be in pursuit of the legitimate aims of national security and protecting the rights of others.⁶²
 - Search powers in clause 20 and Schedule 2, which would enable the police to obtain material including journalistic material. The memo states that safeguards in the form of prior judicial approval will ensure that the powers are exercised proportionately, going no further than necessary to achieve their legitimate aim.⁶³
- Article 14, the right not to be discriminated against in the enjoyment of Convention rights may be engaged by clause 62, limiting civil legal aid for terrorist offenders, when taken together with Article 7, which prohibits retrospective punishment. The Government takes the view that being a terrorist offender does not establish ‘other status’ because the restrictions make a distinction on the basis of a particular type of offending in light of Parliament’s view of that type of offending.⁶⁴

⁶¹ Paras 47-49

⁶² Paras 17-19

⁶³ Para 25

⁶⁴ Para 102

- Article 1 of protocol 1, the right to peaceful enjoyment of property, may be engaged by several provisions, including in particular the damages provisions in clause 61 and Schedule 10. The Government recognises in particular that forfeiture of damages may constitute an interference but considers that the provisions pursue a legitimate aim and do so proportionately.⁶⁵

The Home Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 indicating that she is satisfied the Bill's provisions are compatible with the Convention rights.

⁶⁵ Paras 75-85

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