

Protect Briefing on the National Security Bill for Second Reading on 6th June

May 2022

Introduction

This briefing outlines Protect's concerns about new offences in the new National Security Bill ("the bill") that may criminalise whistleblowing where it involves disclosures to foreign regulators and journalists. This could have a chilling effect on whistleblowing in the future. We are hoping these concerns can be raised at Second Reading of the bill on the 6th June. There is also an opportunity in this bill to introduce a public interest defence to the Official Secrets Act 1989, as recommended by the Law Commission in its 2020 report¹.

Protect

Protect is the UK's whistleblowing charity and has the aim of protecting the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice, we provide training and consultancy to employers and campaign for better whistleblowing protection.

The key issues

Extending official secrets

We are concerned that the bill over-extends the concept of official secrets without any safeguards for whistleblowers.

Part 1 replaces the existing offence of espionage, and other measures contained in the Official Secrets Acts 1911, 1920 and 1939, with new offences and accompanying powers. Clause 1 and clause 2 create new offences of obtaining or disclosing 'protection information' or 'trade secrets' respectively. Schedule 11 paragraph 6 brings these new offences under the Official Secrets Act 1989.

The new offences

1/ Obtaining or disclosing protected information

Under Clause 1(1) of the bill, a person commits an offence if they obtain or disclose 'protected information' to a 'foreign power' and their conduct is for a purpose that they know, or ought reasonably to know, is prejudicial to 'the safety or interests of the United Kingdom'.

Clause 1(2) defines 'protected information' as information to which access is, or can reasonably be expected to be, 'restricted for the purpose of protecting the safety or interests of the United Kingdom'.

The maximum prison term for this offence is life imprisonment.

2/ Obtaining or disclosing trade secrets

Under Clause 2(1) of the bill, a person commits an offence if they obtain or disclose ‘trade secrets’ to a ‘foreign power’ and their conduct is unauthorised, or the person knows, or reasonably ought to know that their conduct is unauthorised.

The maximum prison term for this offence is 14 years.

Whether a disclosure is made in the public interest or causes harm to the public interest (as opposed to merely embarrassing the government or the owner of the trade secret) is irrelevant.

There are no restrictions on what information can be protected in this way. This extension is inconsistent with the approach taken to protecting government information not involving a foreign power e.g., a disclosure made to a UK-based journalist. Here the disclosure would only amount to a criminal offence in limited circumstances, namely where the information was about national defence/security/relations with a foreign power or criminal prosecutions. A successful prosecution would need to also show the disclosure caused damage, not merely that it took place. *Approaching a foreign regulator/law enforcement body*

We are concerned that the wide drafting of ‘foreign power’ – defined in clause 25(1) of the Bill as including ‘an agency or authority of a foreign government, or of part of a foreign government’ – could encompass foreign regulators or foreign law enforcement bodies with whom it is vital whistleblowers feel able to raise concerns without fear of being criminalised.

Whistleblowers may raise public interest concerns with a foreign regulator/foreign law enforcement body if the wrongdoing in question has not, or cannot, be addressed by a UK regulator, and/or if the whistleblower works in the UK for a company based abroad. In 2020, of the concerns raised with foreign regulator the Security and Exchange Commission (“SEC”), after the USA and Canada, the highest number were from whistleblowers based in the UK.²

Without clarification on this point and without a public interest defence for such disclosures, whistleblowers will likely be deterred from raising public interest concerns.

Would a whistleblower raising a concern to a foreign regulator be caught by the new offences if they disclose a trade secret in the process?

We have an example of where a whistleblower could be caught by this definition:

An individual works for the UK branch of a US bank and she raises concerns with the SEC about the illegality of a banking product used only in the US. UK regulators are unable to act because it does not affect UK customers. The individual’s disclosure leads to an investigation, wrongdoing is exposed and a large fine is levelled against the bank. The bank reacts by claiming the disclosures amount to revealing a trade secret.

With no safeguards for whistleblowing in the bill, our concerns are that the legal uncertainty over a whistleblower’s liability will create a chilling effect on their ability to raise concerns about corruption or fraud.

The government’s own examples in their Explanatory Notes should also be queried further. In Example 1 below would a whistleblower -exposing corruption of the UK police officers to a foreign power (say a US enforcement agency investigating international corruption) be criminalised? What if they did so and did not receive a financial reward:

Example (1): where conduct is carried on for a foreign power

A person working for the police is asked by representatives of a foreign state to provide information to them on the identity of police officers who work with UK security and intelligence services and agrees to do so, and discloses the names, in return for a financial reward.

Approaching a journalist working for a foreign owned media organisation

We are concerned that the broad definition of a foreign power as including ‘an agency or authority of a foreign government’ could also potentially include a media organisation.³ This could again present a chilling effect on whistleblowing, especially where a whistleblower is raising concerns about corruption. The cross-border nature of the activities can often require a consortium of journalists to uncover what has happened.

We ask that the Government **clarify whether foreign regulators, law enforcement bodies and media organisations are ‘foreign powers’** for the purposes of the bill; and, if they are, a carve-out is introduced for whistleblowers;

Suggested changes to the bill

For the bill to avoid the unintended consequence of being unable to distinguish between espionage and whistleblowing we have two suggested safeguards that could be added to the bill:

Introduce a public interest defence

A clear safeguard for whistleblowers would be the creation of a public interest defence for the disclosure of official secrets. This should cover both the new offences proposed in the National Security Bill and the offences left untouched in the Official Secrets Act 1989. This is an opportunity to give whistleblowers a defence when raising concerns involving the most sensitive area of government activity, and to counterbalance the symbolic, as well as the practical, impact of this punitive law.

The Law Commission supports such an approach recommending:

- A statutory public interest defence should be available for anyone – including civilians and journalists – charged with an unauthorised disclosure offence under the Official Secrets Act 1989. If it is found that the disclosure was in the public interest, the defendant would not be guilty of the offence.

Requiring the need to prove damage

A further safeguard would be for a successful prosecution to show there was public harm from disclosing information protected by the bill.⁴ At the moment, the bar for both offences are too low; conviction is based purely on making the disclosing, rather than basing it on the harm or potential harm that could have been caused.

If you require any more information on the issues raised in this briefing, then please do not hesitate to get in touch.

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