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Public Bill Committee

NATIONAL SECURITY BILL

Sixth Sitting

Thursday 14 July 2022

(Afternoon)

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Monday 18 July 2022

The Committee consisted of the following Members:

Chairs: † Rushanara Ali, James Gray

† Bell, Aaron *(Newcastle-under-Lyme)* (Con)
† Eagle, Maria *(Garston and Halewood)* (Lab)
† Elmore, Chris *(Ogmore)* (Lab)
† Everitt, Ben *(Milton Keynes North)* (Con)
† Hart, Sally-Ann *(Hastings and Rye)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
Hosie, Stewart *(Dundee East)* (SNP)
† Jones, Mr Kevan *(North Durham)* (Lab)
Jupp, Simon *(East Devon)* (Con)
† Lynch, Holly *(Halifax)* (Lab)
† McPartland, Stephen *(Minister for Security)*
† McDonald, Stuart C. *(Cumbernauld, Kilsyth and Kirkintilloch East)* (SNP)
† Mann, Scott *(North Cornwall)* (Con)
† Mohindra, Mr Gagan *(South West Hertfordshire)* (Con)
† Mumby-Croft, Holly *(Scunthorpe)* (Con)
† Phillips, Jess *(Birmingham, Yardley)* (Lab)
Sambrook, Gary *(Birmingham, Northfield)* (Con)

Huw Yardley, Bradley Albrow, Simon Armitage, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 14 July 2022

(Afternoon)

[Rushanara Ali *in the Chair*]

National Security Bill

2 pm

Clause 23

Offences under Part 2 of the Serious Crime Act 2007

Question proposed, That the clause stand part of the Bill.

The Minister for Security (Stephen McPartland): This is the clause that many of us have been looking forward to. I am not going to take interventions during my speech; I will set out the reasons why I believe the clause is correct, then I will listen carefully to speeches from hon. Members and then sum up.

Collaboration with key international partners is a vital part of intelligence and national security work. We cannot maximise our national security capabilities and keep people safe without sharing intelligence and benefiting from the capabilities and expertise of our close and trusted allies. Those individuals who work on behalf of the UK are highly skilled and experienced in ensuring that UK activity is necessary and proportionate. Domestic and international law is applied to all activities and there are robust safeguards in place.

The Serious Crime Act 2007 creates offences when an act is done that is

"capable of encouraging or assisting"

an offence and the person "intends" or believes that their act may encourage or assist an offence. Those offences, which were predominantly introduced to ensure that law enforcement had the tools to tackle those orchestrating serious organised crime, are complex and create an incredibly low threshold for liability. There is no minimum level of contribution to the offence that may be encouraged or assisted. The contribution can be small, it can be indirect, and there is no need for an offence to be ultimately committed.

At present, the UK intelligence community and armed forces are required to apply those complex offences to the many and varied scenarios in which they work with our international partners to help protect the UK. They exercise significant caution in their engagement with partners to prevent SCA thresholds being met and the risk of liability for individuals being realised. The impact of that approach is that vital and otherwise legal intelligence opportunities are currently being delayed or missed as the SCA risks are worked through.

There is also an important point of principle here. The Serious Crime Act offences mean that it is the individuals working within intelligence, security and military organisations who carry the risk of liability, despite operating within all authorisations and in the interests of UK national security.

The Committee heard oral evidence from both Sir Alex Younger, the former head of MI6, and Sir David Omand, the former head of GCHQ, on the fairness and appropriateness of individual officers carrying this risk. They believe that the liability risk sitting with individuals is "not right", and is "morally wrong". The Government agree with them and do not think it is right or fair to expect the risk of liability to sit with individuals who are acting on behalf of our intelligence services or armed forces for their authorised purposes. Instead, responsibility should sit with the UK intelligence community and the armed forces at an institutional level, where they are subject to executive, judicial and parliamentary oversight.

The clause removes criminal liability for offences of encouraging or assisting crime, but only where the activity is necessary for the proper exercise of the functions of the security and intelligence services or the armed forces in support of activity taking place overseas. This is not a broad general immunity from prosecution; rather we are amending a targeted piece of legislation in response to specific operational issues that are impacting the ability to keep us safe today.

The clause means that in instances where an individual has operated in good faith and in compliance with proper processes they would not face the risk of liability for the offences under the SCA. The risk I have outlined would be removed for activity that we ask of individuals in the course of their roles in keeping us safe.

I am confident that the SCA amendment is appropriate and proportionate, because the UK has one of the most rigorous intelligence oversight regimes in the world. There are myriad safeguards and processes in place that manage the way that UKIC and the MOD work with and exchange information with international partners to prevent potential wrongdoing.

I also have confidence in those we are providing protection to. They are expert and highly trained men and women undertaking intelligence and security work, whose judgment and skill we should respect and have faith in. Of course, those working with our international partners will still need to comply with all other domestic and international law and be beholden to the statutory frameworks and policies that govern the UK intelligence community and armed forces activity.

The policies include the overseas security and justice assistance guidance and the Fulford principles, the implementation of which is assessed by the Investigatory Powers Commissioner annually and reported to the Prime Minister. That means that clause 23 does not in any way make torture legal, for example. UKIC's activities also remain under the regular inspection of the Investigatory Powers Commissioner's Office—

Mr Kevan Jones (North Durham) (Lab): Will the Minister give way?

Stephen McPartland: I am not giving way. And they are regularly scrutinised by the Intelligence and Security Committee.

Maria Eagle (Garston and Halewood) (Lab): This is supposed to be scrutiny.

Stephen McPartland: The right hon. Gentleman will have the opportunity to make his own speech, and I will listen.

Let me also be clear that clause 23 will not enable activity by individuals who, acting outside the proper functions of their organisations, contribute to criminal activity by others or commit criminal offences themselves. We will retain the ability to prosecute anyone for other offences should their behaviour in support of international partners amount to a criminal offence. Further, it will not remove the ability to challenge the UK intelligence community or armed forces on their activities through judicial review, civil damages claims, or a complaint to the Investigatory Powers Tribunal in relation to the use of intrusive powers.

To conclude, clause 23 is really about supporting UKIC and armed forces officers, who we ask to undertake vital work on our behalf, by ensuring that when they work with our partners in good faith, according to wider domestic and international law, and in support of vital national security aims to keep this country safe, they do not risk personal criminal liability for any actions of that partner state. Responsibility for any action that we cannot support should surely sit at an institutional level, which is what will be the case under clause 23.

Holly Lynch (Halifax) (Lab): It will come as no surprise to the Minister—we have had the opportunity to discuss this—that we are extremely concerned about clause 23, which amends the Serious Crime Act 2007. We have had the opportunity to discuss this privately with the Minister and his predecessor, and with the UK intelligence community directly, and I am minded of just how much detail of those conversations we might want to put on the record. The clause was a big focus for Members from across the House on Second Reading. As the Minister knows, crucially, it did not have the support of members of the Intelligence and Security Committee, which has statutory responsibility for oversight of the UK intelligence community.

The Labour Party will always work with the intelligence services to find solutions to any barriers that they face in undertaking their invaluable work and keeping the UK safe. As things stand, we have been unable to get an operational understanding of exactly what is broken and requires fixing. I have heard directly from the security services about why they believe they need clause 23—the Minister has sought to outline that again in his contribution. Schedule 4 to the Serious Crime Act allows for a risk of liability to individuals conducting their proper functions on behalf of the UK intelligence community. An offence can arise where support—for example, intelligence sharing—provided in good faith later makes a small or indirect contribution to unlawful activity by an international partner. The security services are keen to convey that their caution in this regard is having an operational impact that requires a resolution.

Mr Jones: My hon. Friend is outlining the protections. SIS and GCHQ staff also have protection under section 7 of the Intelligence Services Act 1994, where there is ministerial authorisation. Like her, I struggle to understand what incidents there could be of an individual being liable, if they were covered by these authorisations and the Act that she refers to.

Holly Lynch: My hon. Friend makes an important point, which I will explore in more detail in a second. I go back to the point that the security services have conveyed to us that their caution is having an operational impact, which requires a resolution. We are sympathetic to that. We recognise that a junior member of staff facing that burden of potential liability when carrying out their proper functions under instruction does not feel right. However, I look to the Minister to find a way through the matter that does not involve what can feel somewhat like a gold-plating of exemptions for the security services, which stands to entirely erode appropriate safeguards and due diligence when considering the risks and consequences of sharing information with partners. As the Minister knows, there is an existing reasonableness defence in section 50 of the Serious Crime Act, which recognises that there may be occasions when it could be shown that an individual's actions were justified in the circumstances.

Maria Eagle: My hon. Friend is right to refer to the defences that already exist because to agree with the clause, we would need to see that the existing offences and defences are not working. There does not seem to be much evidence of that. Section 53 of the Serious Crime Act sets out the factors to be considered in determining whether it is reasonable for a person to act as he did. That includes any purpose or authority he claims to have been acting under. An individual working for our intelligence service has clearly got extensive protection under that existing provision. Does my hon. Friend agree?

Holly Lynch: I am grateful to my hon. Friend. As a lawyer, she has a great deal of experience navigating some of this legislation, and she makes a powerful point about the reasonableness defence. In addition, a prosecution would have to be deemed to be in the public interest.

Mr Jones: This morning we saw the Minister use reasonableness in clause 20, but he is not prepared to use it here. Does my hon. Friend agree that reasonableness in law is a well-established notion? Does she find it odd that the Minister relies on it in one clause, but in this one he prefers to say that it will somehow not work?

Holly Lynch: My hon. Friend makes the point that, while we will get into the detail of reasonableness and the concern that it is potentially untested in these circumstances, it is a well-established principle across British law. Again, that certainly supports the robustness of the existing defences around reasonableness. On further probing of these defences, and this is exactly his point, it seems that it is not the case that the reasonableness defence is not strong enough, rather that it is untested in these specific circumstances, as no such case has been brought against the intelligence community. We do not believe that that is a strong enough case for the proposals in clause 23. We hope that properly authorised activity to protect national security would and should be interpreted as being reasonable.

I am not currently satisfied, and neither are members of the Intelligence and Security Committee, who we will hear from shortly, that there are grounds to support clause 23 as drafted. I have taken further legal advice, including from a QC with a great deal of experience of the Investigatory Powers Tribunal. Can the Minister answer the following questions? First, as has been said by the hon. Member for Garston and Halewood, given that we already have section 7 of the Intelligence Services Act—this relates to the serious end of some of what we are talking about here—which allows the Secretary of State

[Holly Lynch]

to give immunity from civil and criminal liability for pre-authorised crimes abroad, why do we need these changes?

Importantly, the existing scheme requires the UK intelligence community to secure permission from the Secretary of State in advance, requiring their personal approval, with safeguards within the decision-making process and oversight by the Investigatory Powers Commissioner, who is a senior judge.

2.15 pm

Can the Minister confirm that none of those safeguards are present in clause 23, which simply removes the relevant criminal liability? There would not be a need to go to a Minister for approval and there would not then be a warrant for the Investigatory Powers Commissioner to consider. Secondly, can the Minister clarify what it means for something to be "necessary" for the proper functions of UKIC or the armed forces with no proportionality required?

Thirdly, this clause diminishes the role of a Minister in the decision-making and accountability structures. Ministers will no longer need to consider matters and make the difficult judgments—judgments that are reviewed by the Investigatory Powers Commissioner—on whether to grant an authorisation under section 7 of the Intelligence Services Act 1994.

In Reprieve's written evidence, it said that clause 23 would give Ministers and officials a special carve-out from British justice. I know that the Government have been keen to stress their commitment to the Fulford principles relating to the detention and interviewing of detainees, and the passing and receipt of intelligence relating to detainees, making clear that

"The UK Government does not participate in, solicit, encourage or condone unlawful killing, the use of torture or cruel inhuman or degrading treatment ("CIDT"), or extraordinary rendition. In no circumstances will UK personnel ever take action amounting to torture, unlawful killing, extraordinary rendition, or CIDT."

However, those commitments are principles that are not set out in this Bill.

Finally, it is not clear to us why clause 23 proposes extending this immunity to the armed forces. The armed forces already have protection under section 7 of the Intelligence Services Act 1994 if they are acting as part of conduct that has received

"authorisation given by the Secretary of State under this section."

This section—section 7—covers lawful acts of war.

Dan Dolan, the director of policy and advocacy at Reprieve, giving his evidence last week on this matter, read out a quote given by MI6 to the Intelligence and Security Committee's inquiry on detainees, with respect to authorisations under section 7 of the 1994 Act. He said:

" The Secret Intelligence Service said that, in the cases they were talking about, 'we are…always going to go for a section 7 authorisation. Because…why should my officers carry the risks on behalf of the Government personally? Why should they? So…as we have already discussed, serious risk is…a subjective judgement. So we will go for belt and braces on this.'"

He went on to say that

"I think that 'belt and braces' is the important phrase to think about, because that is MI6 describing the separate 1994 section 7 authorisations as a belt-and-braces approach to protecting officers from criminal liability."

Mr Dolan said he felt that this was evidence that the existing regime worked, with the section 7 mechanisms being well utilised to protect officers from liability. That brings us back to the question that Mr Dolan himself asked:

"So why do we need clause 23?" —[*Official Report*, National Security Public Bill Committee, 7 July 2022; c. 66.]

I myself have to put a question to the Minister: is there a problem with the ministerial authorisation process that is generating the need for clause 23?

Before closing, I have outlined that we are not at all satisfied that the case has been made for clause 23. We have said that there are operational elements to this discussion that may not be suited to consideration by this Committee. However, I know that the Minister has pledged to seek to fully brief members of the ISC, which is entirely the right place for these operational examples to be considered further, and the judgments of ISC members on this issue will certainly inform our thinking.

If the Government and the security services can demonstrate that there is a genuine operational requirement for change, we will work through solutions, but the solutions must include entirely appropriate scrutiny and oversight, which clause 23 currently does not provide.

Ben Everitt (Milton Keynes North) (Con): I understand that clause 23 seeks to address a specific operational challenge currently faced by the UK intelligence community and the armed forces. The clause removes criminal liability for the offences of encouraging or assisting crime, but only where that activity is

"necessary for—

(a) the proper exercise of any function of the Security Service, the Secret Intelligence Service or GCHQ, or…the armed forces"

and only in support of activity taking place overseas. That is because in a specific scenario legislation is affecting the ability to collaborate with key partners and achieve legitimate shared national security objectives.

Essentially, we are trying to avoid there being a disincentive to sharing information that makes us safe. Looking at it the other way, we are trying to remove the liability from a brave young officer who is doing their job and keeping us safe.

Mr Jones: On the hon. Member's second point, frankly there is already no liability, because that has already been covered. Can he give an example of where the security services have not been able to carry out their functions because of the absence of the clause?

Ben Everitt: That is probably beyond what I can say here, and indeed beyond what I am aware of. It is one of those situations in which, were I a Minister, I would be happy to write to the hon. Gentleman—but I am not. Far from gold-plating, as referred to by the hon. Member for Halifax, clause 23 does not create a blanket criminal law immunity for our intelligence officers. It does not change the application of other criminal law offences that overlap with those underneath the Serious Crime Act 2007. It provides no change to the UK's international law obligations.

I assume that the Minister agrees that the approach undertaken in the Bill is more limited and targeted than the approach other key allies have deemed necessary to protect those working on their behalf. Indeed, last week

we heard from Alex Younger, the former chief of the Secret Intelligence Service. During his oral evidence he noted that there is an international precedent for such measures. He was referring to Australia; I understand that it was section 41 of the Australian Intelligence Services Act 2001, where there is a much broader immunity. That Act states:

"A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency."

Clause 23 is much more limited than that example. Rather than a proposal for wholesale immunity, it will just remove the legal risk for individuals' actions that are done in good faith and following all authorised processes. That risk should not be underestimated given the chilling effect that we have discussed over the past couple of weeks. That effect can prevent or even delay the sharing of critical intelligence with international partners. Thus, the line of argument that the provision is too broad does not really hold when considered in the context of what our key allies are doing in relation to sharing information.

I express my support for clause 23, and the core principle that this is the right thing to do. We do not expect the current criminal liability of the Serious Crime Act offences to sit with trusted individuals who are conducting authorised, highly sensitive and vital national security work to keep our country safe.

Stuart C. McDonald (Cumbernauld, Kilsyth and Kirkintilloch East) (SNP): I rise to support a lot of what the hon. Member for Halifax has said already. Nobody on the Committee doubts the importance of collaboration; we all recognise how crucial that is. I do not think that any of us doubt that the services have approached the Government having identified what they perceive to be a problem, and that the Government are genuinely engaged in trying to resolve that. One of the challenges that we face as parliamentarians is the degree of confidentiality and secrecy that surrounds their operations, which sometimes makes it difficult for us—particularly if we are not members of the Intelligence and Security Committee—to properly understand the nature of the problem and how it can be resolved.

Mr Jones: I am very conscious of what the hon. Gentleman has said, but to date neither the Government nor the security services have provided any justification or examples to the ISC as to why the clause is needed.

Stuart C. McDonald: I am grateful to the right hon. Gentleman, who is a member of the ISC, for clarifying that. For that reason, I am not dead set in my opposition to the clause by any stretch of the imagination—I am open to persuasion. However, we need evidence through the ISC that there is a problem and that clause 23 is the best way to solve it. As matters stand, I cannot say that I have been persuaded of either of those things.

First and foremost, it remains difficult to see how officers of the services in question can commit an offence under the 2007 Act unless they intend an offence to be committed, or, secondly, unless they have a belief that their action will assist an offence. That is a high threshold, even before defences kick in.

We have heard already that the section 50 defence of acting reasonably applies. Given the "purpose" and "authority" under which any action of information sharing would take place, it surely seems very likely that that defence could easily be made out. That point has already been made by a member of the ISC this afternoon. It almost looks like that defence, in section 50(3) of the 2007 Act, was designed with employees of the agencies in mind. The Minister has asserted that the defence is vague, but they seem to be a perfect fit for some of the circumstances that we are considering.

Even if the Minister is correct, perhaps the better response would be to amend the defence, rather than disapplying schedule 4 altogether. It is not clear why it can be argued that the reasonable defence is any more vague than the concept in this clause of

"the proper exercise of any function".

It is not clear to me what conduct that concept is and is not supposed to cover. We need clear explanations and I do not think we have been given them.

Will the Minister give an example of conduct that is a proper exercise of any function of the services, but that is currently subject to the chilling effect of the 2007 Act and would therefore be saved by the Bill? Why is such conduct not able to get over the threshold of the reasonable defence already? Why, as has been asked, is such conduct not able to be authorised under section 7 of the Intelligence Services Act 1994? What type of data sharing is subject to this chilling effect and what causes that effect? Is it the remote possibility of data being used for a very serious crime or the significant chance it could be used for a less serious crime? Is it both? Is it neither? It is very hard to get a handle on what precisely the provisions are aimed at.

The Minister knows that concerns were raised on Second Reading about the potential for the clause to have a much more significant effect on actions that could, for example, support rendition or torture. He has set out today and in correspondence that domestic and international law means that such action would not be protected by clause 23. We will give that further consideration, but, in my view, the Government have much more to do to persuade us that there is a real problem here, and one that requires legislative intervention.

Even if a problem does have to be addressed, I am still to be convinced that this is the right response. Are there other options we could look at? Of course there are. For example, in last week's evidence there appeared to be the suggestion that it was not so much the risk of conviction that was feared, but the risk of an investigation and being dragged to the courts and having to establish a defence of reasonableness. That was one of the problems.

Different things could be done. The clause could be moved around so that it is not a defence, where the burden lies on the person accused. We could make it an intrinsic part of the offence in the first place, so that nobody is dragged to court and has to establish the defence. There are other things that could be done—for example, requiring certain authorisations for prosecutions and so on.

Let us have that discussion, assuming that we can be persuaded that there is a problem here. Are there different ways to address it? For the moment, we remain a little bit in the dark on what precisely the nature of the

[Stuart C. McDonald]

problem is, and are unconvinced that the provisions in the clause are the best way to resolve any problem that does exist.

Sally-Ann Hart (Hastings and Rye) (Con): Our intelligence and security services are this country's frontline of defence, and we need to ensure that they remain the best and most professional in the world. To do that, they need to know that if an individual makes a decision in good faith and in accordance with all relevant procedures, to keep us safe, that individual should not be at risk of criminal liability. That responsibility must lie with the organisation.

Maria Eagle: Will the hon. Lady give way?

Sally-Ann Hart: In a moment.

Last week, Sir Alex Younger, former chief of the Secret Intelligence Service, said the issue was a point of principle. Contrary to some alarmist news reports and those opposed to clause 23, Ministers and spies will not be given immunity from committing crimes overseas. Clause 23 does not have any effect on any other criminal offences that might apply to an individual's actions.

Maria Eagle: Will the hon. Lady give way?

Sally-Ann Hart: I have finished, thank you.

2.30 pm

Mr Jones: I thank the Minister for reading his speech very well, but I take issue with the implication of what he said at the end, and I feel a bit annoyed about it.

The implication is that if someone ask questions about clause 23, somehow they are not supportive of our security services. I am the longest serving member on the Intelligence and Security Committee and a former Defence Minister, and I think most people who know me in the House know that if I am anything, I am a supporter of our security services and defence forces. It is therefore a bit churlish for people to argue that asking questions somehow means that I want to inhibit the work of our defence and security services; I certainly do not.

Having been on the ISC since 2017, I am aware of the bravery involved in the difficult jobs of our security services. I never cease to be amazed when I hear about some of the things they do. The general public would have no idea of the difficult judgment calls they sometimes have to make.

However, I am also a big supporter of proper oversight of our security services. We have the ISC, the Investigatory Powers Commissioner and the Investigatory Powers Tribunal, and that is the web we have in our democracy to ensure that the security services operate legally and that they are supported in what they do. In fact, the director general of MI5 often says in front of the ISC that those three organisations give it the legitimacy to operate. That is a good thing in a democracy, and I agree with him.

What worries me is the justification for why clause 23 is needed. We have heard it before, but we just heard the hon. Member for Milton Keynes North use the phrase "a chilling effect". In their evidence, Sir Alex Younger and Sir David Omand also supported this provision. I have huge respect for those two gentlemen: they are good public servants whose service has done this country a huge amount of good. However, from reading the transcript—I was abroad when they were here last week; I apologise—I do not quite get the point that they were getting at. They used words, which have just been used again, such as principles and morals, and the idea that the onus somehow lies on the individual officer.

If that was the case, I would totally agree that the onus should not be on the individual officer because, having seen what they do, I know they have to make key judgment calls. In their evidence, I do not think that Alex Younger or David Omand gave us any examples of why this measure is needed.

Ben Everitt: I have been listening carefully to the right hon. Gentleman. He mentioned oversight as a key part of the functions of our security services. I waited for him to develop the point further into liability, which is what we are discussing here. Will he elaborate on what he means in relation to oversight when, I think, clause 23 specifically refers to liability?

Mr Jones: It is about both. I will come to liability, because I do not think that individual officers are liable due to existing legislation. As for what I mean by oversight, I am clear that the structures we have for the authorisation of things that are not pleasant should include oversight—whether from the ISC, the tribunal or the Investigatory Powers Commissioner. We do not live in a society—thank God—where Ministers and the Executive can just say to the security services, "Do x, y and z." That would be wrong. That is why it is important to have oversight and checks and balances in the system, which were not always there. This morning, I referred to a very sad time in our history—I was a Minister at the time. It was not a good time for our security services, and we should have been ashamed of some of the things that were done.

I want to see an example of what Sir Alex Younger and Sir David Omand were talking about last week. If there is a specific problem, I would be sympathetic and say, "Right, we need to get that sorted." It may be a broad notion. We are talking about principles and morals, and it is very difficult to legislate on morals—certainly the Conservative party gets into difficulty when we talk about morals—but I would like to know specific examples that would lead to a liability.

Let me turn to the existing protections. Schedule 4 to the Serious Crime Act 2007 includes the offence of encouraging, assisting or commissioning an offence abroad. Clause 23 amends schedule 4 of the Serious Crime Act to disapply that offence when the activity is deemed necessary for the proper exercise of a function of an intelligence agency or the armed forces. The Government are basically asking for a carve-out, which I find extremely rare.

Maria Eagle: Does my right hon. Friend agree that putting in legislation a carve-out from an entire class of offences—in this case, the inchoate offences of crimes committed abroad—engenders more suspicion among those who worry about the intelligence services than would be the case if the law applied properly to them with appropriate defences?

Mr Jones: I do. Since I have been on the ISC, I have always been amazed when I read accusations made in this place or in public about what the security services get up to. Frankly, if they did, good—but, given the scope of their ability to do things, we should bear in mind the difference between fact and fiction.

The important point is that what the security services do must be proportionate, legal and in the interests of this country's national security. As I say, they have to take some difficult decisions, and there is a difference between a ministerial authorisation to do something and what happens on the ground. The Minister is not sat there with a pen, saying, "No, you can't do that. You can do that." It is down to the individual officer, and I accept that there are huge issues around that. That is why we had the consolidated guidance, which then developed into the Fulford principles. That came out of that dark time.

I was on the ISC when we did our very long inquiry into detention, mistreatment and rendition in 2018, and it was not pretty reading. Ministers—in some cases, we named them—took decisions that were not legal. I have been assured by the agencies in evidence that I and the ISC have received that the consolidated guidance has since been updated to the Fulford principles, and a large exercise has been undertaken to ensure that all officers at all levels understand the principles and how to enact them.

That gives us that legal protection. There are people who want to attack our security services. That large exercise gives me huge assurance, and it means that parliamentarians are in a strong position, when people start accusing the security services, to stand up and say, "Well, actually, that is rubbish. These are the rules that we follow, and they are of the highest standard." They protect not just the work that the security services do, but us as a country.

Carving this out worries me, as it does my hon. Friend the Member for Garston and Halewood. The Government want to disapply the measure, but there is already a reasonableness protection. We discussed reasonableness this morning. Section 50(3) of the Serious Crime Act 2007 sets out that:

> "Factors to be considered in determining whether it was reasonable for a person to act as he did include…any purpose for which he claims to have been acting"

and

> "any authority by which he claims to have been acting."

I think that is very clear.

If we now have a situation whereby the agencies and armed forces are concerned that the conduct may not be reasonable, it is difficult to see how it would be deemed necessary for the proper exercise of the functions of the intelligence services or military. The reasonableness test is there and, as I have already said, we have other protections whereby the Secret Intelligence Service and GCHQ also protect their staff from liabilities in relation to offences committed abroad through ministerial authorisation under section 7 of the Intelligence Services Act 1994. The important thing about all that is whether the Investigatory Powers Commissioner can ensure that it is done properly.

To get back to the point, what is the problem? I do not see it. Call me old-fashioned, but if there is a problem, I am up for solving it. However, I do not think that we should try to change things if there is not a problem, and none of the agencies has yet come forward to explain in detail what the problem is.

I accept what was said earlier about the ISC. The individual examples, if there are any, will cover highly classified information—that is why the ISC is there: we can take evidence and look at that information—but there has been no attempt at all by Government Ministers or the security services to give us the examples. One of my colleagues will speak in a minute, but I speak on behalf of the ISC, because we have discussed this issue. We cannot give clause 23 a nod through at this point until we have been convinced that there is a need for it.

My hon. Friend the Member for Halifax made a point about scrutiny. The great thing about having the Investigatory Powers Commissioner is that they can look at warrants and ensure that they are not just legal but proportionate. If we have this provision, who will oversee the individual cases? I get the point that the two former heads of security services made in their evidence about the onus being on the individual. Yes, it is, but those individuals rightly have a huge degree of protection. I would not want to see that in any way diminished because they have the law behind them. In some cases, they also have ministerial warrants, which add to the judicial process.

For those who say that if someone ask questions about this provision, they are against the security services, let me put it the other way. If it is not justified, it will be used as a way to say that the security services now want to go back to the bad old days when things happened that were not under the scrutiny of either Parliament or the judiciary. That would be a retrograde step and would give opponents—as I say, they are against whatever the security services do—a stick to beat them with. I am certainly not in favour of giving those people anything with which to beat the security services.

We could vote against the clause, but I do not think that is the right way forward. I and other members of the ISC would like the Government to provide us with examples of where the chilling effect has been a problem for intelligence sharing, so that we can at least have a look. I accept that other members of the Committee might wonder why they cannot see it—trust me when I say, "You can't." I think most people would understand the reasons why that is.

2.45 pm

Stephen McPartland: I wanted to be very clear earlier—I wanted to make a point. I agree that the Government will give the ISC examples.

Mr Jones: That is very welcome, but we do not just want that in writing—we want to have the agency heads actually come and speak. I think we have a meeting with them scheduled for some time in October. We would like to get them to come and argue why they need these changes. We need that as well.

The Minister might need to give it a bit more thought, too. I accept that he is new to his post, and he obviously has time to look at this over the summer—depending on what happens at the beginning of September. I know that I have poked fun at the Minister, but we get on well, we have worked closely on other Committees and I even got him promoted on a Committee once, which he was

[Mr Kevan Jones]

eternally grateful for. Can he just look at the oversight, too? If the Bill does go through, what are the oversight mechanisms for it?

Maria Eagle: I will not go through all the points that have already been made, although I do feel quite strongly about some of this. I generally endorse what has been said by my hon. Friend the Member for Halifax and my right hon. Friend the Member for North Durham—my fellow member of the ISC. Like him, I do not think it is true to say that anybody on this Committee or any of our parliamentary colleagues are intent on trying to stop the intelligence and security services doing their job. They do a very important job and they do it very well. It is dangerous work and we want to support them as much as we can.

But we are a democracy. One of the things that concerns me about clause 23 is its wholesale disapplication of an area of the law that applies to all the rest of us. If we are going to do that for the intelligence services, it is important that we are very clear that it is necessary. It applies only for a certain type of offence in a certain place—overseas—but it is a wholesale carve-out. The clause says that an entire schedule to the Serious Crime Act 2007, which sets out inchoate offences abroad, does not apply if "any relevant behaviour" was necessary for "the proper exercise of any function"

of the relevant services. That is a wholesale carve-out. I cannot think of too many other examples of that. I do not know if the Minister has a list of examples of other wholesale carve-outs from liability from the criminal law for particular officers of state organisations, but I think it is quite rare.

In those circumstances, I could tell from the evidence we were given that the Government have been asked for this by the relevant services. It did not seem to me that it was coming from the Government—that the Government were saying, "You must have these extra powers." I accept that they are responding to requests, but because this is a wholesale carve-out from liability for criminal acts, it is important that it is properly justified. We all know about the difficulties of properly justifying it, because a lot cannot be brought into the public domain, but what we have had in the public domain has not been very convincing.

I expect that many people in their day-to-day life would like to have impunity from criminal liability for something that they might do, but it is not something we should be granting easily. The arguments for it need to be very strong. There are already defences that make it harder for people working in the intelligence community to be found guilty of some offences. They have defences that others do not. By the way, it is probably philosophically right that the law should apply to those people but that they should have extra defences. In legislative terms and for the good of society as a whole, it is probably better to do it that way round than to disapply the law to a particular type of person.

I would expect to hear why the current arrangements do not work, but I have not heard that. I did not hear it in the evidence we took from Sir Alex Younger and Sir David Omand. If I can characterise the issue in this way, they both said, "We would rather have this. We feel very strongly that we would rather have this," but they were unable to give us any examples of why the current arrangements did not work. In fact, I asked Sir Alex whether some of the current arrangements worked. I asked him about the ministerial authorisation, and he just told me that he was not a lawyer, which is not a convincing answer when someone is asking for a whole area of the criminal law to be disapplied. Sir Alex obviously felt strongly about the matter—I could see that. That is perfectly legitimate, but as a scrutiny Committee and as parliamentarians, we need to hear a little bit more.

I hope the Minister will understand—I do not particularly like the fact that he refused to take interventions, but that is his choice—that everybody on this Committee is seeking to do the right thing. We do not want to make a change to the law that opens up our intelligence and security services and our armed forces to accusations that they can act with impunity abroad. Based on some of the evidence that has been sent to the Committee from those who campaign on these issues, some people think that the clause does precisely that. I do not agree with some of what is in the submission from Reprieve that we received recently, but that submission contains quite a representative sample of what people in our society would probably think if they were to take a look at this clause.

A wholesale carve-out from liability under an area of the criminal law is a very serious step to take. I am not saying it is not the right thing to do, because we should take requests from the agencies and armed forces seriously—as the Minister is clearly doing—but I remain unconvinced. Such a carve-out could have unintended consequences, such as making it much less likely that thoughts will be focused on making sure that activity is lawful. We need to make sure these proposals are the right way forward, and that their advantages outweigh their disadvantages. We have been told that reasonableness is a vague concept, but it is vague only in the sense that it is very flexible and can, and does, apply in many areas of the law; its meaning is relatively well known. To my mind, if the agencies and armed forces are concerned that their conduct might not be considered reasonable, it is difficult to see how it could be necessary for the proper exercise of their functions.

Mr Jones: The other safeguard in this area is surely that if there were to be any prosecution of an agency staff member or a member of the armed forces, the Attorney General would also have to agree to that prosecution. That would be a pretty high bar to get over.

Maria Eagle: It would be a very high bar to get over. If we are being told—there was an element of this in the evidence we heard—that there is a chilling effect on individuals trying to do their jobs, those individuals may need to be a bit better trained in what the law says, what it means and what they are able to do. In any event, whatever the law ends up being—whether it is this Bill, or what we already have—it is not a bad thing for those who operate at its margins to know precisely what they can and cannot do. I worry slightly that having a complete carve-out from liability might swing activities a bit too far in the other direction.

There are pros and cons to any way of doing this. I do not want the Minister to think I am being hostile; I am certainly not. I just want us, as the House of Commons, to be sure, when we consider this further, that this way is

right and will work better than what we already have. I, for one, cannot see how this will be better than what we already have; I think that in many ways it will be worse.

Stephen McPartland: It has been a great pleasure to listen to the debate and Members' speeches. I can feel the frustration in the room. I share that frustration, because I have been told by the intelligence services that we need clause 23 because the schedule it amends is having a damaging impact on critical operational activity aimed at keeping the UK safe. That is the reason why we need clause 23. I wish that we could tell the Committee everything, and that we could just all agree to it, but that is what I am told by the intelligence services, so I have frustration too.

I will try to answer some of the questions, and then sum up. We have been asked about section 7 authorisations. Some of the Committee have been in their roles a little longer than I have been in mine, so they will be aware that section 7 authorisations can be sought only by SIS and GCHQ—not by the MOD or MI5—so this is about trying to create reassurance across all the UK intelligence community.

On section 50 and the reasonableness defence, the defence has never been tested in the context of activity of the intelligence services and the armed forces, so we feel it is more appropriate for them to demonstrate that their actions were carried out as necessary in the proper exercise of their functions.

Maria Eagle: If what the Minister says is accurate—that the defence has never been tested—how can he say that it does not work?

Stephen McPartland: What I am trying to say is that we want our UK intelligence services to be focused on keeping us safe and not to worry about whether or not they will be able to deal with a long court case on their actions. As things currently stand, the UK is—

Sally-Ann Hart: Let me give an illustration of the issue. If my hon. Friend saw someone in need of cardiopulmonary resuscitation on the floor, would he give them mouth-to-mouth and pump their chest? Is that something he would do? Would he do it if he thought he could be prosecuted for causing grievous bodily harm if he broke a rib? That would be his defence. That is a simplistic example to illustrate the issue.

Stephen McPartland: I am grateful to the hon. Lady for her intervention. I do not think I would be any good at giving anybody CPR. However, I understand the spirit in which she made the intervention and am grateful for that.

Mr Jones: Will the Minister give way?

Stephen McPartland: I do not want to get distracted, because this is very serious. I will give way to you in a minute, Kevin; I want to get this point across. *[Interruption.]* Sorry—I will give way to the right hon. Member for North Durham in a moment.

As the law stands, a member of staff acting in the proper exercise of their organisation's functions would bear the burden of proving that they had acted reasonably when there is no precedence as to what "reasonably" means in those circumstances. The provision would change that position so that the prosecution would need to prove that a member of staff's actions were not necessary for the proper exercise or function of their organisation, taking into consideration all the information about the legitimate ways in which those functions could be exercised.

Mr Jones: The Minister has just said that the reasonableness test has not been used. The Attorney General would also have to get over that bar. Alongside that sits the old consolidated guidance—now the Fulford principles—which is quite clear about what actions officers should take in certain circumstances to avoid what we had before. If it has not been tested, I cannot see what the problem is.

Stephen McPartland: The problem is that the UK's intelligence services are telling us that, every single day, their operatives are second-guessing themselves on operations to keep this nation safe. I believe what they are telling me.

The provisions in section 47 of the Serious Crime Act mean that a person need only believe their activity will encourage or assist such an act, but they might also be reckless as to whether the act is done, with all the necessary elements required for that particular offence to be committed—the offence does not have to be committed. We are talking about the intelligence operative's state of mind at the time of sharing intelligence. That is what is relevant.

3 pm

Mr Jones: If that is the justification, why do we not just bin the consolidated guidance and the Fulford principles, on which such judgments are based? The rendition inquiry has great examples of where we passed on information knowing that it would be used for rendition and torture. I have been assured by the agencies, and I have no reason to doubt them, that there has been a huge training programme to ensure all officers fully understand the consolidated guidance and the new Fulford principles. This is clutching at straws, frankly.

Stephen McPartland: I am grateful for the right hon. Gentleman's point of view.

Clause 23 is primarily aimed at removing the risk and fear of prosecution from individuals within these organisations when undertaking their necessary authorised duties. Sir Alex Younger said:

> "Through this legislation and other measures, we can make sure that these risks are attached to the appropriate person or people or entity. I am much less comfortable as a leader about the idea that we therefore ask individual men and women in the UK intelligence community to suck it up. I do not think that is right."—[*Official Report, National Security Public Bill Committee,* 7 July 2022; c. 14, Q26.]

We have already had a conversation about the difference between theory and practice, and the reality is there is a risk that individual UK IC officers will face criminal sanctions for doing their job. I agree with Sir Alex Younger that that risk should not exist.

Question put and agreed to.

Clause 23 accordingly ordered to stand part of the Bill.

Clause 24

THE FOREIGN POWER CONDITION

Stuart C. McDonald: I beg to move amendment 54, in clause 24, page 19, line 5, at end insert—

"(2A) The conduct in question, or a course of conduct of which it forms part, is not to be treated as carried out for or on behalf of a foreign power if financial or other assistance of a foreign power under subsection (2)(c) is provided otherwise than specifically for the conduct or course of conduct."

This amendment ensures that organisations that receive funding from foreign powers are not guilty of offences if that funding was not for the conduct or course of conduct that would otherwise amount to the offence.

The Chair: With this it will be convenient to discuss the following:

Clause stand part.

Clause 25 stand part.

Stuart C. McDonald: We now come to two of the most important concepts in the Bill: the foreign power condition and the meaning of "foreign power." Proving that the foreign power condition has been met is crucial to establishing many of the serious criminal offences for which we are legislating in this Bill, and all sorts of consequences flow from it in the powers to seize and search. It is vital that we get clauses 24 and 25 absolutely correct.

On the whole, the concepts are broadly in the right area, particularly in clause 24. The concept includes an agent acting on behalf of a foreign power, and with knowledge, or reasonable knowledge, that that is the case. The idea of "ought reasonably to know" being sufficient to make out a connection is perhaps a concern, but I understand why it is required for the legislation to work. I look forward to hearing more from the Minister on the thinking behind it.

To cut to the chase, the Committee will recall that, thanks to a briefing from Article 19 on clause 1, I raised the potential problem that the foreign power condition could be attached to certain unintended groups, and I highlighted two groups in particular: non-governmental organisations that receive some funding from foreign powers for perfectly good and positive reasons, and I gave an example of NGOs that fall within that bracket; and journalists who work for state broadcasters, including in countries that are our very close allies. These two groups are at risk of being caught up in the Bill because the foreign power condition is expressly met when conduct is "carried out with the financial or other assistance of a foreign power".

The Minister set out three protections during our consideration of clause 1: the foreign power condition itself; the discretion of the Attorney General; and the public interest test applied by the Crown Prosecution Service. Several members of the Committee spoke about why the AG's oversight and the CPS's discretion are insufficient. We had a debate about the chilling effect, a concept that we have just been discussing, and the fact that that would essentially leave NGOs and journalists to make decisions about whether to publish information or not based only on the very vaguest of ideas that the CPS or the AG might come to their rescue. That is not really protection at all.

As for the third protection—the foreign power condition—as far as I recall, the Minister did not dispute or expressly accept that the foreign power condition would be met in these cases. Does the Minister accept that the conduct of those NGOs and journalists could meet the foreign power condition, simply because of what they do? That is the most important question I will ask him in this debate.

Our amendment tries to stop groups being caught up in the provisions of the Bill as a result of simply receiving funding from a foreign power, when that funding has been put to perfectly legitimate and reasonable uses. The amendment requires there to be a connection between the funding and the conduct that is being complained about. For example, if the US State Department funds an NGO for human rights research, completely unrelated conduct, in particular the publication of "protected information", would not be treated as a foreign power activity or espionage unless it was specifically linked to that funding. I accept that my amendment may not be perfect, and I can see there would be problems with it, but I think there has to be an acceptance that the clause as it stands is not perfect and there has to be protection for NGOs and journalists.

I have another concern about clause 24, particularly subsection (5) and the interaction between subsection (5) and (6). The idea of someone being brought within the ambit of espionage legislation on the basis that their act is motivated by an attempt to benefit a foreign power, even an unknown foreign power, and that is all—none of the other factors in clause 24(2)—seems dangerously liable to be able to attach itself to behaviour to which it should not be attached. Behaviour that is motivated by trying to help people in a foreign country could suddenly take on a new angle and be seen as helping a foreign power.

I will give a final example of what I am trying to get at here, which is basically whistleblowing. What if a person working for an international company here discloses a trade secret of that company to a regulator in an allied country, because the product that that company supplies there is a dangerous breach of that other country's regulations? It seems to me that the drafting of the foreign power condition confuses whistleblowing with some of the espionage offences. Have we drawn the foreign power condition too broadly?

In relation to clause 25, on Second Reading I wondered whether the definition of foreign power was too narrow and might not cover enough of the damaging actors who engage in some of the behaviours we are so concerned about. However, the key point is that an actor can form part of an indirect relationship between the conduct of the foreign power under clause 26.

I will close my remarks there. Does the Minister accept that some of these examples are caught by the foreign power condition, in particular NGOs, journalists working for a foreign state broadcaster and whistleblowers who reveal a trade secret to a regulator working overseas? Are they caught by the foreign power condition? If so, surely we must change the drafting of the Bill.

Holly Lynch: I will speak to clauses 24 and 25 and, having heard the contribution from the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East, about his amendment 54.

Clause 24 provides for the foreign power condition that is fundamental to almost all the new offences created by the Bill. I appreciate that the Minister has confirmed that we will see the detail of a foreign interference registration scheme before we return to Committee in September, but it will be particularly interesting to see how the provisions in clause 24 interact with a registration scheme, and what an asset that stands to be if it is done properly.

Clause 24(1) provides that the condition is met if a person's conduct or a course of conduct is carried out for or on behalf of, or with the intention to benefit, a foreign power. In addition, for the condition to be met, the person must know, or reasonably ought to know, that the conduct has that relationship to the foreign power, which I think is clear enough.

Subsection (2) sets out a welcome but non-exhaustive list of different types of relationship between the foreign power and the person engaging in the conduct that would result in a person being considered to be acting for or on behalf of the foreign power.

Under this clause, conduct is deemed to be 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, or it is carried out in collaboration with or with the agreement of a foreign power. It strikes me that thousands of people in the UK could meet all the foreign power stipulations in subsection (2) without ever engaging in any criminality—for example, if they work for a legitimate state-owned company, such as an airline operating out of the UK, or in a foreign embassy. I am keen to see the detail of the registration scheme, so that we have transparency and clear lines about what is welcome and entirely appropriate conduct on behalf of a foreign power and what is not.

Subsection (6) states that is not necessary to identify the particular foreign power that the person intends to benefit. That provision is intended to cover when a person attempts to help a foreign power, but has not yet determined the particular foreign power. I can see how this part of the clause rightly captures the conduct of someone motivated by financial gain, who seeks to sell information or intellectual property to the highest bidder, or perhaps by a desire to cause harm to the UK as a result of a grievance.

For the reasons I have outlined, I imagine that we will come back to clause 24 when debating further parts of the Bill. It would have been advantageous to consider the clause alongside the detail of the foreign influence registration scheme. We will have to undertake that separately, but we recognise that clause 24 is fundamental to this legislation.

Clause 25 defines a foreign power for the purpose of clause 24 and sets out the persons and bodies that comprise a foreign power. We welcome the much-needed update and clarity of what constitutes a foreign power for the functioning of clause 24 and the new offences created by the Bill. I note that the Law Commission's report, "Protection of Official Data", made a clear case for replacing "enemy" with "foreign power" and looked to the Canadian Security of Information Act 2001 and the US Congress's Espionage Statutes Modernisation Bill, which was introduced in 2010, as starting points.

The Official Secrets Act 1911 provides that it is an offence for a person to make or obtain

"any sketch, plan, model, or note"

or

"any secret official code word, or pass word…or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy".

The Law Commission felt that as the term had been drafted with enemy states in mind, it was unclear whether a court would construe "enemy" broadly enough to encompass non-state actors, such as an international terrorist group. It was further concerned that the inclusion of the term "enemy" had the potential to inhibit the ability to prosecute those who commit espionage. We have already heard quotes from Sir Alex Younger's testimony last Thursday. In response to a question about how threats to the UK have changed, he said:

"What I would call grey threats…often presented us with real challenges, particularly when actors or states felt themselves at war with us and we did not feel ourselves at war with them."—[*Official Report, National Security Public Bill Committee,* 7 July 2022; c. 11, Q21.]

I therefore welcome the change from enemy to foreign power to ensure that we can secure prosecutions against the right people.

That said, concerns were raised in submissions to the Law Commission's consultation and I wonder if the Minister can respond to those. Guardian News and Media gave the following example:

"If a journalist obtains information that a nuclear defence installation is unsafe, that concerns have been reported to the appropriate authorities, but have been discounted, and the journalist then proceeds to investigate whether the information is true, they should not be placed at risk of prosecution. Under the existing wording of section 1 OSA, the 'of use to the enemy' requirement would it is submitted make such a prosecution unlikely, however if that wording were changed to a foreign power, and a foreign state-owned institution was thinking of bidding to decommission the plant, this could catch the journalist. Such activity by a journalist should not be considered to be espionage."

Again, it would have been advantageous to consider this clause alongside the foreign influence registration scheme, which will presumably be clear about who needs to register and why, aligned with subsections (1) and (2) of clause 25, but I hope that the Minister can respond to the concerns raised in that example.

Stephen McPartland: We have already spoken in some detail about the foreign power condition, but I will now specifically address that condition and the meaning of "foreign power". In doing so, I hope to cover some residual concerns from our first day in Committee and some concerns that I have heard today.

Throughout the Committee's sittings so far, I have tried to demonstrate that I am listening and am trying to work with colleagues across party lines to get to a position in which we are providing what the United Kingdom's intelligence community needs and are comfortable that we have scrutinised the Bill. The hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East may be reassured when I get to the end of my speech, just as the hon. Member for Halifax was reassured about her amendment earlier.

3.15 pm

As the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East waits in excitement, let me say that the foreign power condition provides a single and consistent means by which a link to a foreign state can be drawn in

relation to offences of obtaining or disclosing protected information or trade secrets, sabotage, foreign interference and the state threats aggravating factor. The foreign power condition can be met in two scenarios: first, where a person is acting for or on behalf of a foreign power; and secondly, where a person intends that their conduct will benefit a foreign power.

I will start with the first scenario. Clause 24(2) provides a non-exhaustive list of situations in which conduct will be treated as being carried out for or on behalf of a foreign power. They include acts instigated by or under the direction or control of a foreign power. Such links may be either direct or indirect. States are known to work through proxies to deliver harmful effects, and it is important that states cannot use that approach to evade prosecution.

I reassure the Committee that this provision will not capture people who do not know or could not possibly know that they were acting for or on behalf of a foreign power. Clause 24 requires that

"the person knows, or ought reasonably to know"

that their conduct is being carried out for or on behalf of a foreign power. That is an important part of the test: it ensures that a person who actively chooses to turn a blind eye to something that should rightly raise concern, or who acts in wilful ignorance of the facts before them, cannot argue that they did not commit the offence because they did not know about the link to the foreign power. What a person ought reasonably to know will be considered in the light of the relevant circumstances of the case. For example, what a civil servant who is acting in the field of national security and has received relevant training and guidance on the threat ought reasonably to know is likely to differ from what is expected of a member of the public.

Where our authorities consider a person to be carrying out harmful activity with a state link, this can be drawn to a person's attention, providing a strong deterrent against a person continuing with that activity. This aspect of the foreign power condition will be met if a person's conduct, or the course of conduct of which it forms part, is carried out for or on behalf of a foreign power. The clause provides that "course of conduct" covers circumstances in which a foreign power has tasked a person with carrying out conduct in general but not with carrying out a particular act, such as an act of sabotage, or in which an act forms part of a wider course of conduct that includes the acts of other people. In such cases, it would be sufficient to demonstrate that the individual was operating under the general tasking of which the conduct forms part, rather than needing to show an explicit arrangement in relation to the specific conduct, which may not necessarily exist.

Let me move on to the intention to benefit. Not all state threat activities will be orchestrated or instigated by a state. For example, individuals could act to benefit a state independently for financial gain or out of ideological sympathy or dissatisfaction with the UK. In that situation, the individual might not even have decided which foreign power they intended to benefit at the point when they engaged in the particular conduct, so the foreign power condition will be

"met in relation to a person's conduct if the person intends the conduct in question to benefit a foreign power",

regardless of whether the foreign power can be identified.

Stuart C. McDonald: I just want to repeat that I find that potentially worryingly broad. If somebody does something motivated by the interests of the people of country Z, I worry very much that they could suddenly be treated as if they were benefiting the Government of Z. The foreign power condition would therefore be met and they could be guilty of espionage for whatever act they had undertaken. It just seems incredibly broadly worded. Someone who is simply doing something for the benefit of a people could be caught up in this legislation.

Stephen McPartland: I think the intention that we are trying to get across is clear. I understand that the hon. Gentleman has a concern about how broad the scope is, so if he gives me a few moments, I will try to move on to that point.

My view is that clause 24 forms a key concept that will determine the circumstances in which activities will come within the scope of the Bill or beyond it. Amendment 54 seeks to make it explicit that those who receive funding from a foreign power legitimately will not be guilty of an offence under the Bill where that funding is entirely unrelated to the harmful conduct. I want to reassure the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East that this reflects the intention of the provision. The provisions are designed to provide that the funding of an organisation must have a sufficient link to the offence in order for the foreign power condition to be met and an offence to be made out; a tangential link will not suffice. To help contextualise that, and reflecting on Tuesday's debate, I thought it would help to provide a bit more detail on how the foreign power condition interacts with the offences.

Using the offence of obtaining and disclosing protected information as an example, the offence will be made out only if all the limbs of the relevant test are satisfied. This means that a person would commit an offence only if they obtain, disclose or carry out other specified conduct in relation to protected information. That conduct is for a purpose they know, or reasonably ought to know, is for a purpose prejudicial to the safety or interests of the UK, and the foreign power condition is met in relation to that conduct.

I want to be really clear that a person who engages in the harmful conduct above would commit the offence only if they have a purpose prejudiced in relation to that specific conduct. So it is not sufficient to prove that a person has a genuinely prejudicial position against the UK; the conduct has to be carried out with that prejudicial purpose.

The same is true of the foreign power condition. The foreign power condition has been designed to apply in relation to the conduct that is caught within the offence. So where the foreign power is satisfied because the conduct in question, or a course of conduct of which it forms part, is for or on behalf of the foreign power, the defendant must also either actually know or should know that to be the case.

The hon. Member cited the example of an NGO that receives funding from a foreign power. My and the Government's interpretation is that there would have to be a link between the funding they receive and any activity that they carry out that could meet the offence for that activity to be for or on behalf of the foreign power.

So the NGO would also have to know the conduct was linked to this funding, or they should know that it is. They should not be convicted of an offence unless that link was demonstrated beyond reasonable doubt in a court of law.

I want to be really clear. The foreign power condition, as a standalone concept, is not a statement of wrongdoing. So a person can meet the foreign power condition while carrying out wholly legitimate activities. It is an issue only if the foreign power condition is met in relation to harmful conduct specified in the Bill. In the case of a person who obtains or discloses protected information, the offence is designed so that a person would commit the offence only if they had a purpose prejudicial to the safety or interests of the UK and then either knew or ought reasonably to have known that they were acting for or on behalf of the foreign power in relation to that conduct. For example, they had an arrangement with the foreign power under which they would obtain or disclose that protected data, or they intended the foreign power to benefit from obtaining or disclosing of protected data.

So the foreign power condition would not cover a case where a foreign power incidentally benefits from activity. Nor has it been designed to apply in cases where a person receives general funding from a foreign power not linked to the relevant conduct. But clearly it is right that a person can be prosecuted for an offence where all the relevant conditions, including the foreign power condition, are satisfied and can be proven beyond reasonable doubt.

I hope the Committee is reassured that the intention behind our provisions and the hon. Member's amendments align, but I recognise the importance of ensuring that the legislation clearly gives effect to that intention, and while I do not think the hon. Member's amendments are the answer, I will consider further whether there is any more that we can do to ensure that this intention is properly reflected in the legislation.

Having set out the conditions under which acts in the Bill will be considered as linked to a foreign power, I now turn to clause 25, which gives meaning to the term "foreign power". The Bill follows the Law Commission's recommendation to replace the existing link of "an enemy", as set out in the Official Secrets Act 1911, with a definition of a foreign power. As we have already debated, the concept of an enemy no longer serves to reflect the modern age. The change from "enemy" to "foreign power" is accompanied by a wider set of changes in the structure of the Bill, such as the foreign power condition itself, which ensures that the Bill's provisions are appropriately targeted at the harmful activity that we need to combat.

It is important that the legislation captures the various components of a state that could seek to influence or direct harmful activities in or against the UK. As such, a foreign power will include a Head of State acting in his or her public capacity, a foreign Government or parts of the Government, or person exercising such functions, a local government organisation, an agency or authority of a foreign government, part of Government or local government, and a political party that is a governing political party of a foreign Government.

Clause 24, and indeed the Bill as a whole, recognises and respects the unique circumstances and nature of politics in Northern Ireland. Accordingly, clause 25 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 from the definition of a "foreign power". This reflects the fact 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. The foreign power definition provides the parameters within which persons and bodies will comprise a foreign power for the purposes of the Bill and is a critical part of ensuring that the provisions in the Bill address the right harmful activity.

Stuart C. McDonald: I am grateful to the Minister for setting that out. It is particularly helpful to hear his views on the NGO scenario and his explanation of the requirement for some sort of link between the financial arrangements and the specific conduct being complained of. The reason for tabling the amendment is that we did not think that that was necessarily clear enough on the face of the Bill. We will give further thought to whether this aspect needs to be tidied up, so that it is absolutely clear, and I am grateful for his undertaking to look at that as well. I will have to work through some of the other scenarios as well, but it has been helpful to get quite a lot of that on the record. We shall give it some further thought, but in the meantime, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clauses 24 and 25 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(Scott Mann.)*

3.28 pm

Adjourned till Tuesday 19 July at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

NSB03 The Russell Group and Universities UK (UUK)