National Security Bill

This note has been drafted by Peter Carter KC on behalf of the Bar Council and sets out our key concerns in the Bill.

Summary

1. The Bill is currently going through the House of Lords with Committee Stage due to begin shortly. The legislation starts with the provisions in Part 1 (clauses 1 to 12) which implement the sensible recommendations of the Law Commission on reform of the Official Secrets Act. The Bar Council proposes to make no further comment on them.

2. It then goes on to legislate the proposals from the Home Office consultation paper on "hostile state activity", which we roundly criticised as ill-thought out.

Hostile state activity

3. As we stated in our response to the consultation paper[1], countering the activity of a foreign state by the criminal law runs into two fundamental issues of international law – (i) state and sovereign immunity and (ii) diplomatic immunity. This is recognised in Schedule 14 (Clause 70) which creates exemptions for foreign states, persons having diplomatic status together with their immediate family households and employees, and also for foreign media organisations. This leaves the foreign state perpetrators of the hostile activity and most of those likely to execute it effectively outside the law.

4. Clause 29 defines the kind of conduct which is to be controlled or prohibited by these new offences under the rubric of "hostile state activity". It is described as the "Foreign Power Condition".

   29 The foreign power condition

   (1) For the purposes of this Part the foreign power condition is met in relation to a person's conduct if—

   (a) the conduct in question, or a course of conduct of which it forms part, is carried out for or on behalf of a foreign power, and

   (b) the person knows, or ought reasonably to know, that to be the case.

   (2) The conduct in question, or a course of conduct of which it forms part, is in particular to be treated as carried out for or on behalf of a foreign power if—

   (a) it is instigated by a foreign power,

[1] https://www.barcouncil.org.uk/uploads/assets/19229b70-2807-4d30-97068f46e0e88935/Bar-Council-response-to-HO-consultation-on-legislation-to-counter-state-threats.pdf

(b) it is under the direction or control of a foreign power,

(c) it is carried out with financial or other assistance provided by a foreign power for that purpose, or

(d) it is carried out in collaboration with, or with the agreement of, a foreign power.

(3) Subsections (1)(a) and (2) may be satisfied by a direct or indirect relationship between the conduct, or the course of conduct, and the foreign power (for example, there may be an indirect relationship through one or more companies).

(4) A person's conduct may form part of a course of conduct engaged in by the person alone, or by the person and one or more other persons.

(5) The foreign power condition is also met in relation to a person's conduct if the person intends the conduct in question to benefit a foreign power.

(6) For the purposes of subsection (5) it is not necessary to identify a particular foreign power.

(7) The foreign power condition may be met in relation to the conduct of a person who holds office in or under, or is an employee or other member of staff of, a foreign power, as it may be met in relation to the conduct of any other person.

Comment: On the wording, this definition will apply to any, and all, of the EU states. Is that what the Government intends?

5. Sentencing – Clause17 provides that where the "foreign power condition" [defined in Clause 29 above] is satisfied in relation to an offence which is not an offence under this Act, it will be treated as an aggravating factor for sentencing. We do not normally comment on sentencing. However, this provision gives rise to the same concern as the similar provision concerning terrorism, namely that the qualification for an enhanced sentence is unduly amorphous.

6. Clause 34 makes these offences extra-territorial, both whether committed by individuals or by corporations. How prosecutions in such cases will be possible is not clear.

7. The first set of hostile state offences is contained in Clauses 3 to 20 which create criminal offences of "engag[ing] in conduct intending that the conduct, or a course of conduct of which it forms part, will have an effect within [subclause] (2)". Subclause (2) ranges from interfering with a person's exercise of a Convention right, to prejudicing the safety or interests of the United Kingdom.

8. The second set of hostile state offences are contained in Part 3, Clauses 62 to 65. This requires those who engage in "foreign activity arrangements" (by which a specified person "directs" the person to carry out activity in the UK) to register the arrangement with the Home Secretary. Schedule 13 contains details of what amounts to "control" of an individual or company by a foreign power. It will be an offence to engage in such activities without registering.

9. The third set of hostile state offences are contained in Part 3, Clauses 66 to 70. These provisions mirror those in Clauses 62 to 65 but are concerned with "foreign influence" in political activity in the UK. Again, registration of the activity is required. Failure to register will be a criminal offence.

10. Who are the intended targets? How likely is that anyone engaged in hostile foreign state activity will register? The rule of law requires that criminal offences should be clearly understood and capable of enforcement. We doubt whether these provisions meet either test.

11. What is not addressed expressly is the possibility of secondary liability of any individual in the UK who is knowingly influenced by the activity which requires registration. MPs might be slightly alarmed at that prospect.

12. The detailed provisions necessary to give any legal structure to those proposals demonstrate that we were correct in our earlier concern. They exemplify the criticism made of some contemporary legislation by Lord Bingham in his book *The Rule of Law* –

> "… legislation of this kind poses real problems of assimilation and comprehension, even to senior and seasoned professionals. Part of the problem may lie in what a parliamentary committee criticised as "the tendency of all governments to rush too much weighty legislation through Parliament in too short a time". Part of the problem may also lie in the traditional practice of British parliamentary draftsmen, which depends very heavily on cross-reference between provisions in a number of different Acts and statutory instruments, making it necessary for the reader to pursue what may be a long paper-chase through a series of legislative provisions."[2]

Other provisions with Rule of Law implications

13. Schedule 14 exempts "Legal activities". These are defined in paragraph 6 as activities within s.12 of the Legal Services Act 2007. That should cover the activities of practising lawyers and so satisfies a concern we had earlier expressed about the lack of definition. The exemption will not apply to retired judges who may be asked to conduct an inquiry, but that is a consequence of the Legal Services Act, not this Bill. It will not encompass the broader role of lawyers within corporates, charities or NGOs, but that is a matter which it is more appropriate for the Law Society to address.

14. Clause 21 and Schedule 2 confer powers of entry, search and seizure in relation to offences under the Act. While material subject to legal professional privilege falls into the exempt category, it is subject to the exception under schedule 3 to the Counter-Terrorism and Border Security Act 2019 and ss. 23 & 27 of and schedule 3 para 12(5), (10)(b) and (11)(a) to the Investigatory Powers Act 2016. The effect is that in exceptional cases Legal Professional Privilege (LPP) material can be subject to authorised access when confirmed by the order of a Judicial Commissioner. The risk is that this inroad into the absolute protection of LPP will increasingly become a feature of future statutes creating powers of search and seizure. The powers of judicial commissioners are

[2] Tom Bingham *The Rule of Law* , Penguin 2011) p.41.

limited to applying a judicial review test to the decision of the person authorising the warrant, rather than a test of legitimate proportionality.

15. State Threat Prevention Orders (STPIMS) – Clause 37. The government's fact sheet for these measures state that *"STPIMs will provide a suite of restrictive measures which can be used, where necessary and proportionate, to prevent an individual's further involvement in state threats activity where prosecution and other disruptive actions are not possible. The STPIMs framework largely replicates that of Terrorism Prevention and Investigation Measures (TPIMs)."* The inclusion of this measure seems to be an acknowledgment by the government that the registration scheme is bound to fail. We disagreed with this proposal in the consultation paper. The safeguards provided by the special advocate scheme does not provide adequate protection. Prevention orders were introduced for cases where national security issues are involved and where prosecution or other open court process is not available due to the exceptional sensitivity of the intelligence. The risk is that these will be used in cases where there is no prosecution due to forensic rather than security reasons. A special advocate can only provide limited rule of law safeguards because of the limitation on communication with the person concerned. The effect is that the subject of the order cannot know why (s)he has been made subject to restrictions on their liberty or access to property.

The Bar Council
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