Bar Council response to the Home Office consultation on Legislation to Counter State Threats

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation paper on Legislation to Counter State Threats (Hostile State Activity).[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

[1] https://www.gov.uk/government/consultations/legislation-to-counter-state-threats

OVERVIEW

4. The foreword by the Home Secretary to this consultation sets out the government's aim –

> "The threat from hostile activity by states is a growing, diversifying and evolving one, manifesting itself in a number of different forms: from cyber-attacks, attempts to steal intellectual property and sensitive government information, threats to critical national infrastructure, and attempts to interfere in democratic processes. We continue to face this very real and serious threat from those who seek to undermine and destabilise our country to pursue their own agendas.
>
> The UK will always defend its people and its interests, and we have a record of responding robustly to hostile activity by states alongside our international partners. Together with our allies, the UK is taking steps to safeguard our open and democratic societies and promote the international rules-based system that underpins our stability, security and prosperity."

5. Legislating against the actions of foreign states raises issues of international law as well as domestic rule of law issues. On 7 July 2021 we met with representatives from the Home Office and understood that there had been consultation with other government departments, including the FCDO. However, the consultation paper does not include any reference to the representations made by the FCDO and other relevant departments.

6. Despite aiming to combat the acts of foreign states, there is no suggested sanction against states. That would require a basis in international law. None is suggested. The proposed legislation would target individuals who act on behalf of hostile foreign states. Therein lie definition issues. In the glossary at page 5 of the consultation, this definition appears -

> **State Threats (ST) –** Is a term used to describe overt or covert action orchestrated by foreign governments which falls short of general armed conflict between states but nevertheless seeks to undermine or threaten the safety and interests of the UK, including: the integrity of its democracy, its public safety, its military advantage and its reputation or economic prosperity. While the term hostile state activity (HSA) has generally been used to describe the threat, it is often read as being activity

conducted by hostile states rather than hostile activity by states as intended. In this consultation and through to the legislation the Government is adopting new terminology to describe the threat.

No further attempt is made to define the terms which will be critical ingredients of any criminal or civil sanction against the individuals suspected of hostile activity on behalf of a foreign state.

7. The remainder of the consultation document focuses on proposals to restrict and to criminalise the activities of individuals. In part, this involves amendments to the Official Secrets Acts. In May 2017 we responded in detail to the Law Commission's Consultation on the Protection of Official Data, which centred on proposed reform of the Official Secrets Acts.[2] There is nothing in the government's proposals which causes us to modify that response. In particular we emphasise (a) our view that objective harm (or intended or recklessly risked harm) should be at the heart of any offence in this area and (b) our support for an independent judicial figure to deal with whistleblowing and public interest justification.

8. Much of the harmful activity which has an impact on national security is already contained within the numerous counter-terrorism statutes.

9. The consultation fails to address the following fundamental problems of implementing its stated objective of combatting hostile state activity –

- Within the jurisdiction, those acting on behalf of a foreign state will often have diplomatic immunity. This precludes the use of any of the preventive measures proposed. The recent decision of the High Court in *Fernando v Sathananthan* [2021] EWHC 652 (Admin) provides what is in effect total procedural impunity for illegal activity by those covered by diplomatic immunity on behalf of their state. This will be a serious shortcoming. Failure to address it in the consultation is bewildering.

- Hostile activity, such as cyber-attacks, take place from outside the jurisdiction. Again, no mention is made of jurisdictional problems. How are these measures to be effective in the absence of international treaty arrangements?

[2] Bar Council response

10. The Bar Council's response is by way of narrative comment on the issues raised under various headings in the consultation, rather than specific answers to individual questions.

OFFICIAL SECRETS ACT REFORM (Questions 1-19)

11. We adopt the responses set out in the Bar Council's response to the Law Commission's Consultation on the Protection of Official Data, which is appended to this document. We have no further submissions to make.

SEARCH WARRANTS (Question 22)

12. It is correctly pointed out that satisfying the criteria for search warrants under PACE will be impracticable in cases of espionage and similar activity. The government's proposal is –

> The existing section 9 [sc. of the Official Secrets Act 1911] search power therefore enables the police to effectively respond to the threat and disrupt, investigate and obtain evidence of hostile activity by states, when required. This comes with the safeguard of the Court needing to be persuaded in each case to issue a warrant. Accordingly, we seek to carry over the section 9 provision into reformed legislation. In addition, we will also consider whether there is a need for other enhanced investigative tools to support the new offences and powers in the legislation.
>
> We consider that this power should be subject to the authorisation of a Senior Circuit Judge or High Court Judge. A record would be made of the proceedings (including any "closed" part of the proceedings) so that they could be subject, if necessary, to appellate or other subsequent review.

13. We recognise that this consultation is not intended to set out detailed legislative provisions. However, the government should make clear that, as with PACE, any application for a search warrant should exclude material subject to legal professional privilege. This would not hamper an investigation because any communication with a lawyer, which is intended to further criminal activity, is excluded from privilege.

14. As to the proposal that lawyers engaged in litigation in this field be vetted in some way (page 21), we neither agree with the principle nor consider that it is necessary. If there are sufficient grounds to suspect a lawyer as being complicit in an offence, legal professional privilege would cease to protect communications between them and the client. If so, the communications would become susceptible to the same test for investigatory access as any other communications in sensitive circumstances. But access requires a firm "reasonable grounds" basis and independent judicial determination.

SENTENCING (page 30 - no Question asked)

15. The government proposes that involvement in hostile state activity should be treated as an aggravating feature when sentencing for any offence not included specifically in the proposed new legislation. The proposal is –

> The measure would mean that if a hostile actor is prosecuted and found guilty of an offence outside of our proposed legislation, but a connection to hostile activity by states can be proven, the court must take into account this connection when determining the offender's penalty. We consider that such an aggravating factor should apply to all offences in UK legislation, outside of this legislation, to accommodate the broad and evolving threat, which is likely to change and advance rapidly over the coming years. Reflecting this threat in UK criminal law in this way will additionally send a strong message to other states that the UK will not tolerate hostile activity by states.

16. Whilst the Bar Council does not comment directly on sentencing policy, this proposal raises the same problems of definition as mentioned earlier. The final sentence of this extract is worthy of King Lear – "I will do such things …" and inferentially recognises the impotence of domestic legislation to deal with serious international issues.

FOREIGN INFLUENCE REGISTRATION SCHEME ("FIRS") (Questions 23-37)

17. There are two noteworthy features of the consultation questions relating to FIRS. First, they tend towards the granular, for example whether registration on paper forms ought to be possible in addition to the option of online registration. Secondly – and this is perhaps what has led to such questions – they appear to be predicated on the assumption that the FIRS scheme will be introduced in some shape or form.

18. Given the relative novelty of FIRS (worldwide there appear to be very few comparable schemes), it is somewhat surprising that no question is directed towards whether such a scheme ought to be introduced at all.

19. For reasons which we set out below, but which are founded in rule of law considerations, we do not consider that the justification for such a scheme has been made out. In the circumstances, we take the view that the way in which we can best assist with the consultative process is through a narrative response, rather than by way of specific answers to the questions asked. Our concerns fall into 5 categories:

Necessity

20. There is plainly scope for considerable overlap between the proposed FIRS scheme and any number of existing controls on activity directed by foreign states. By way of non-exhaustive list, we would flag (i) the registration requirement for Parliamentary lobbyists, (ii) the new Nationality Security and Investment Act 2021 ("NSIA"), and (iii) existing criminal offences covering espionage and computer misuse. It is striking that neither the lobbyists' register nor the NSIA merit a mention in the consultation paper.

21. We have seen nothing thus far to suggest that FIRS would cover any conduct that the controls listed above would not capture. No case studies have been brought to our attention.

Proportionality

22. The Consultation introduction explains that part of the rationale for the introduction of FIRS is that it will increase the cost to states of conducting hostile activity (page 11). However, as already observed, the scheme as envisaged proposes levying penalties against individuals rather than their state sponsors.

23. We would be interested to find out – in practical terms – what studies or research inform the view of the Home Office that these proposed tools and powers will increase the cost to states of conducting hostile activity. The current consultation does not yet demonstrate this, but it is plainly an essential first step in evaluating the proportionality of a potentially intrusive new requirement.

24. Whatever the costs to foreign states may or may not be, it is clear that a FIRS scheme has the potential to have a real impact on business in a globalised economy such as that of the UK. Others will be better placed to opine and indeed provide evidence of the possible risks in the fields of e.g. business and travel, as well as friendly international relations. Suffice it to say that any such impact would clearly need to be

factored into any proportionality exercise, particularly given the potential for the FIRS to have a discriminatory impact on foreign individuals, who are axiomatically more likely to be "directed by" foreign powers.

25. It appears that an investigation of the impact of such a regime is one of the functions of this consultation. (See for example Questions 23, 28, 34 & 37.) If that is right, then the unwritten assumption referred to in §17 above - that a FIRS will be introduced – is all the more surprising.

Practicality

26. The FIRS purports to help address the following threats: espionage, interference and transfer of data. Plainly, nobody involved in these activities would register, and the Government appears to accept this: (page 33)

> "*It is anticipated that many of the individuals engaged in hostile activity or interference on behalf of a foreign state would not declare this by registering with the scheme or would register false or misleading information. If they sought to engage in this activity without properly registering, they would be liable to prosecution*"

27. Whilst such individuals may well be *"liable to prosecution"* under FIRS, insofar as they are engaged in espionage or offences of interference with computers or other electronic systems, they already are liable to prosecution.

28. The fundamental problems of seeking to deal with such covert activity through the criminal justice system have always been twofold: identifying the individuals engaged in such conduct, and balancing the need to produce enough admissible evidence to secure a conviction without betraying investigative techniques.

29. FIRS would not of course help with the first of these issues. The practical problem that FIRS is ostensibly intended to assist with is that of proving hostile activity without blowing cover:

> "*a UK scheme would allow for the prosecution of individuals engaged in hostile activity <u>based on a failure to register</u> when conducting certain activities, rather than for committing the hostile act*" (page 34)

30. But we are unconvinced that a prosecution under a FIRS scheme (however designed) would be capable of achieving this. Even on a "failure to register" offence, the prosecution would still need to prove that the individual was being <u>directed by</u> a

foreign state or state-related actor (page 37) as that is intended to be one of the triggers for registration. And it is likely to be that direction (presumably coupled with a failure to register in circumstances where the individual can be shown to have been aware of the obligation) that would be relied upon to make good the offence.

31. In such a case it might be said that proof of some sort of nefarious aim could be inferred, such that a separate element of "hostile intent" would not be required in order to provide such an offence with a degree of legitimacy. But the practical problem that would arise then would be how to prove both "direction" and "carrying out a registrable activity" using only admissible evidence? And it seems to us that, once these elements were made out, the overlap with – for example – existing espionage or computer misuse offences would likely be near complete.

"Non-intentional compliance"

32. We are concerned with the suggestion, implicit in Question 36, that a non-intentional failure to register could amount to a criminal offence. That proposition would be difficult to reconcile with the suggested gravamen of the conduct that is intended to be captured by the FIRS scheme.

Immunity and exemption from immigration control

33. Given the very purpose of these proposals and who they are likely to target, we consider that thought ought to be given to diplomatic (embassy) and functional (international organisations) immunity. There is no mention of this in the consultation paper.

34. The consultation document is light on detail as to the how the proposals fit into the scheme of immigration control, including, in particular as regards issues of immunity/exemption from immigration control.

35. As regards those employed by foreign powers in embassies, etc: some are diplomats exempt from immigration control under s 8(3) of the Immigration Act 1971. Others, consular officers, have like immunity under Orders made under s 8(2) of the same Act. Orders made under the latter also confer like, functional exemption from immigration control on persons working for international organisations, etc, such as EBRD and IBRD. That exemption from immigration control sits alongside various levels of immunity from criminal and civil jurisdiction, see for example Vienna Convention on Diplomatic Relations, see also for example Art 15 of EBRD Headquarters Agreement.

36. The consultation does not set out how the proposals for FIRS and Civil Orders apply in the context of (i) immunities, and (ii) exemption from immigration control in particular. The general powers in the Immigration Rules (executive policy of the

Home Secretary as to when she will grant permission to enter and reside under UK law) that enable leave to remain to be curtailed and enable deportation to follow, do not apply to those exempt from immigration control. There is no detail in the consultation as to what is proposed in respect of the withdrawal of immunity and exemption from immigration control. Further, immunities and exemptions from immigration control vary in scope, for example, diplomatic agents and EBRD staff have different applicable protection. It follows that no account is taken of such variation in the consultation.

37. Some persons within the scope of the proposals will not have immunity (ordinary embassy staff, those employed in the private sector, etc.). They may have domestic permission to reside in the UK under s 3 of the Immigration Act 1971. Such persons could in theory be controlled and be required to leave the UK but the consultation lacks any detail covering how such immigration powers are proposed to be exercised.

38. Equally, there is no reference in the consultation to those with other forms of right to reside (ie. those who are not exempt from control, are not British citizens, and do not have leave to enter or remain under UK law) such as those with EU Withdrawal Agreement Rights to Reside or Irish Citizens with a Common Area Exemption from immigration control. Each of these may represent only a relatively small number of individuals, but that does not explain why no consideration is given to such issues in the consultation paper.

CIVIL ORDERS (Question 38)

39. Again, we do not consider the question asked in the consultation paper on this topic to be particularly conducive to receiving constructive feedback. Although this is a question of policy, and therefore outwith our core remit, it is probably uncontroversial that *"preventative and restrictive measures are a desirable way of addressing the threat posed by those engaged in hostile activity where prosecution isn't viable"*.

40. However, as with FIRS, we are unclear what need – unmet by existing regimes – any new civil orders would satisfy. The single-page discussion of this topic, which includes wording such as "restrictive and preventative measures" and a proposal to prohibit association with identified individuals, evokes the TPIM regime. But the consultation paper contains nothing that suggests that TPIMs would not cover the conduct that is of concern. Bearing in mind the broad definition of "terrorism related activity" in the TPIMA and TACT, it is likely that much of the "hostile activity" that might trigger a new civil order could be brought within existing powers.

41. It seems as though the idea is to mirror the TPIM regime, including in respect of the imposition of civil orders by the executive. In that regard it is worth flagging the court-based review mechanism that presently operates in respect of such orders. If there is indeed a need for a sub-TPIM regime (conduct that cannot be prosecuted for evidential reasons would fall outside the TPIM regime, but nevertheless requires some response) then the checks and balances should mirror those available for TPIMs. These would include a disclosure regime which is compatible with Article 6 and *AF no.3* [2009] UKHL 28 at §116. Such a regime would require that a gist of the allegation to be provided to the individual whose conduct is under scrutiny. It is unclear whether this feature – which would restrict the ability of the state to keep the grounds of suspicion secret – has been considered by the authors of the consultation.

42. In any event, we have seen nothing to explain what types of conduct are considered to fall outside the TPIM regime and yet require executive action in the manner proposed. And accordingly we are unpersuaded that there is a need for a further executive power.

Bar Council[3]

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[3] Prepared for the Bar Council by the Law Reform Committee and the International Committee