

Research Briefing
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Counter state threats legislation

Summary

The Government's counter state threats legislation proposals

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

The Government said the main elements of the bill would:

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

This proposal followed an announcement of the introduction of ‘espionage legislation’, to provide the security services and law enforcement agencies with the tools they need to disrupt ‘hostile state activity’. No such legislation was introduced during the 2019-2021 parliamentary session.

Government consultation

Following the Queen’s Speech, the Home Office published a consultation paper on ‘[Legislation to Counter State Threats \(Hostile State Activity\)](#)’. The consultation ran from 13 May to 22 July 2021 and sought views on three main proposals:

- OSAs reform, including:
 - reform of the OSAs 1911-1939 to provide for a new offence of “acts preparatory to hostile activity by states”;
 - reform of the OSA 1989 to alter the definition of, and increase the maximum sentence for, existing offences relating to the disclosure of official information; and
 - Strengthening the OSAs regime by creating new offences aimed at addressing additional harms relating to hostile activity by states, including sabotage, economic espionage, and foreign interference.
- The introduction of a Foreign Influence Registration (“FIR”) scheme. This would be a government managed register of declared activities that are undertaken for or on behalf of a foreign state. It would include activities that are directly commissioned by a foreign state, such as espionage, as well as those that have been commissioned by an individual or entity that is subject to foreign state influence or control.
- The introduction of a civil orders regime that could be imposed on individuals thought to be engaged in hostile activity, if a prosecution could not be brought. It would include a range of restrictive and preventative measures aimed at mitigating the risk posed by such people.

The consultation also asked whether there are any additional measures or existing legislation which could be updated to help address the threat from this kind of activity. It provided the example of reform of the law of treason.

Background

The proposals relating to reform of the OSAs are the Government’s response to a review by the Law Commission into the [Protection of Official Data](#). The review made extensive recommendations for reform of the regime contained in the OSAs 1911, 1920, 1939, and 1989.

Wider proposals to introduce new powers to deal with hostile state threats were announced following the nerve agent attack in Salisbury in 2018. The Intelligence and Security Committee of Parliament recommended that the Government bring forward legislation in its [2020 report on Russia](#).

The Government's [Integrated Review of Security, Defence, Development and Foreign Policy](#), published in March 2021, announced its intention to introduce legislation to counter state threats when parliamentary time allowed.

In July 2021, the Director General of MI5, Ken McCallum, suggested that their aim over time was to build the same [public awareness and resilience to state threats](#) as had been done over the years on terrorism. He described 'state threats legislation' as an important step towards boosting UK resilience, stating: "To tackle modern interference, we need modern powers".

Reaction from the press

Given the long-standing calls for reform in this area and the careful consideration of the issue by the Law Commission, the proposed legislation is likely to be well received by many. However, one issue that has caused some concern relates to the freedom of the press, and freedom of expression more generally.

In the consultation paper, the Government said that it was not inclined to accept the Law Commission's recommendation that there should be a 'public interest defence' for anyone charged with making an unauthorised disclosure under the OSA 1989. It also rejected the recommendation that there should be a statutory commissioner to whom allegations of criminality or wrongdoing could be reported.

These recommendations from the Law Commission reflected concerns that the current regime may not be compatible with the right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights. The Government's response states that it believes that existing offences are compatible with Article 10, and that these proposals could in fact undermine efforts to prevent damaging disclosures.

Another Government proposal, to increase the maximum sentence for secondary disclosures (where information is disclosed by members of the public) to bring them in line with the maximum available for primary disclosures (from members of the security and intelligence agencies and other public servants) has also caused concern.

An [article in the Press Gazette](#) suggested that the proposals amounted to treating journalists like spies for reporting on matters of public interest and said it had "caused alarm at a time when press freedom is seen as being under attack in the UK".

A Times editorial described the proposals as “[the greatest threat to public interest journalism in a generation](#)” and called for the consultation to be abandoned.

The Government has not yet published the outcome of its consultation, which ended when Parliament went into recess on 22 July. Given the inclusion of the legislation in the Queen’s Speech, a bill is anticipated in the coming months.

1 Government consultation

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

The paper defines ‘State Threats’ as:

overt or covert action orchestrated by foreign governments which falls short of general armed conflict between states but nevertheless seeks to undermine or threaten the safety and interests of the UK, including: the integrity of its democracy, its public safety, its military advantage and its reputation or economic prosperity.¹

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

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

to undermine the UK’s security, prosperity, social cohesion, resilience, democracy, values, institutions and strategic advantage, as well as the rules based international system and associated organisations that underpin all of the above.²

The threat is broken down into five categories:

1. Physical threats to people, including assassination, forced repatriation and harassment;

¹ Page 5

² Page 7

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

The paper explains that the impact and cost of hostile activity by states can be difficult to measure and quantify. The US estimates that the overall cost of hostile activity by states to the US economy is likely to be hundreds of billions of dollars. No similar figure has been calculated for the UK but it is believed to be “very significant”. The impact of the public losing confidence in Parliamentary democracy or the loss of the UK’s strategic advantage is described as “priceless”.³

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

The policy proposals under consideration are split into three sections:

- **Reform of the OSAs** including responding to the Law Commission’s review, discussed in further detail below; the creation of addition offences to address harms not captured by the existing scheme, including sabotage, economic espionage, and foreign interference; and, making hostile activity by states an aggravating factor in sentencing;
- **Foreign Influence Registration Scheme** requiring individuals in scope of the requirements to register activity within the UK that is being undertaken for, or on behalf of, a foreign state. Failure to register, or registering false information would be a criminal offence, providing an alternative means to prosecute hostile actors. This would increase the risk to foreign states seeking to conduct hostile activity, according to the consultation paper, and could be used to support efforts to combat espionage, interference, and to protect research in sensitive subject areas;
- **Civil orders** to mitigate the risk posed by individuals engaged in hostile activity who cannot be prosecuted. The orders could include a range of

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restrictive and preventative measures, such as preventing the subject from associating with certain people or from visiting specified sensitive locations. The paper says that the Government's initial view is that these orders would be imposed by the executive rather than the courts.⁴

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

2 Background

2.1 The Official Secrets Acts: Law Commission review

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

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

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

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

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

The main recommendations were:

⁴ The proposals share a number of similarities with Terrorism Prevention and Investigation Measures, provided for by the Terrorism Prevention and Investigation Measures Act 2011

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

The Home Office consultation on the proposed legislation sets out the Government’s response to the Law Commission’s recommendations. It sets out its intention to:

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

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

The Government noted the recommendations in relation to the creation of a public interest defence and a statutory commissioner and stated that they would be considered in further detail. This will include reflecting on the Law Commission’s suggestions that the current scheme may be incompatible with Article 10 of the European Convention on Human Rights, which protects freedom of expression. However it indicated, on the basis of initial considerations, that the Government’s view is that the current scheme is

compatible with Article 10 and that the proposals could “undermine our efforts to prevent damaging unauthorised disclosures” contrary to the public interest. The efficacy of existing whistleblowing mechanisms and safeguards will be reviewed when considering options for reform of the OSA 1989, the Government said.

2.2 Hostile state activity

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

Salisbury poisonings

After the poisoning of Sergei and Yulia Skripal in Salisbury in March 2018, which was attributed to the Russian state, the Government took a number of steps in response, including expelling Russian diplomats that had been identified as undeclared intelligence officers. The then Prime Minister, Theresa May, stated that this would “degrade Russian intelligence capability in the UK for years to come”.⁵ She further committed to introducing legislation to “harden our defences against all forms of hostile state activity”, including a power to detain those suspected of it at the border, and consideration of the need for new counter-espionage powers “to clamp down on the full spectrum of hostile activities of foreign agents” in the country.⁶

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

Intelligence and Security Committee: Russia Report

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

⁵ [HC Deb 4 March 2018, c 856](#)

⁶ Ibid

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

Among other things, the report recommended that new legislation be brought forward to replace the OSA regime “that can be used by MI5 to defend the UK against agents of a hostile foreign power such as Russia”.⁷

Calls to reform the law of treason

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

In July 2018 Policy Exchange published a report,⁸ authored by MPs Tom Tugendhat and Khalid Mahmood among others, proposing that Parliament should enact a new offence of treason. The new offence would cover aiding a state or organisation that is attacking the UK or preparing to attack the UK or against which UK forces are engaged in armed conflict. It would apply to anyone in the UK, and to the actions of British citizens or settled non-citizens anywhere in the world.

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

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

In a debate in the House of Commons in March 2019, the then Home Secretary, Savid Javid, said in response to a question from Tom Tugendhat “I

⁷ Intelligence and Security Committee of Parliament, ‘[Russia](#)’, HC 632, 2020

⁸ [Aiding the enemy: How and why to restore the law of treason](#), Policy Exchange, 2018

agree with my right hon. Friend that it is time to look at the laws on treason, and to modernise them.”⁹

In a subsequent speech he said that he had asked officials to consider the case for updating treason laws, suggesting that it might help to counter hostile state activity.¹⁰

The Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, responded to the calls for reform of the law treason in a speech, focusing in particular on the Policy Exchange proposals.¹¹ He suggested that there may be unintended consequences of proclaiming that groups are engaged in armed conflict against the UK. Noting that members of the IRA had not been prosecuted for treason, Mr Hall speculated that the authorities would have wanted “to avoid ‘state trials’ for treason, pitting the British government against an official rebellion”. The same considerations would apply in relation to those fighting with terrorist groups overseas, he suggested, agreeing with comments from the security minister in the House of Lords, Baroness Williams, who said that such prosecutions would give their actions a glamour and political status that they do not deserve.

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

Integrated Review

The Government’s Integrated Review of Security, Defence, Development and Foreign Policy, published in March 2021, said that with respect to strengthening security and defence, the Government’s first goal is to “counter state threats at home and overseas” by improving “our ability – and that of our allies and partners – to detect, understand, attribute and act in response to the spectrum of state threats we face ... building our collective capacity to counter state threats in the physical world and in cyberspace”.¹²

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

⁹ [HC Deb 11 March 2019, c51](#)

¹⁰ [Home Secretary Speech on keeping our country safe](#), 20 May 2019

¹¹ Jonathan Hall QC, [Changing Times, Changing Treason](#), 9 September 2019

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

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

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

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

To bolster our cross-government approach to countering state threats. We will reform laws, policies and practices to remove impediments to the protection of national security, ensuring that the security and intelligence agencies and police have appropriate powers to combat all the threats we now face while appropriately protecting the legal rights of individuals. We will introduce Counter-State Threats legislation when parliamentary time allows. This will revise existing offences - to deal more effectively with the espionage threat - and create new offences, to criminalise other harmful activity conducted by, and on behalf of, states. The legislation will also introduce a form of foreign agent registration scheme.¹³

Current threat picture

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

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

¹³ Ibid

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

very serious consequences, for example where healthcare service are affected.

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

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

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

3 Reaction from the press

Whilst many have welcomed the prospect of counter state threats legislation as noted above, concerns have been expressed about the implications of certain proposals for journalists and freedom of expression.

A Press Gazette article said that the proposals amounted to treating journalists like spies, and had “caused alarm at a time when press freedom is seen as being under attack”.¹⁵ It cited in particular the proposal to increase sentences for secondary disclosures under the OSA 1989 to bring them into line with primary disclosure, and the suggestion that unauthorised disclosure was not necessarily less serious than espionage. The indication in the consultation paper that the Government would not take forward the Law Commission recommendation that there should be a public interest defence in relation to the unauthorised disclosure offences was also a cause for concern.

The article cited various journalists, lawyers and campaigners’ objections to the bill, including the National Union of Journalists (NUJ), who said:

We remain fundamentally opposed to any moves by the state that would make it harder to report on national security or poses harsher penalties for journalists, their sources and whistleblowers

The Home Office responded with a statement that “It is wrong to claim the proposals will put journalists at risk of being treated like spies and they will, rightly, remain free to hold the government to account”. It said the new

¹⁵ [UK journalists could be jailed like spies under proposed Official Secrets Act changes](#), Press Gazette, 20 July 2021

legislation would be balanced “to protect press freedom and the ability for whistleblowers to hold organisations to account when there are serious allegations of wrongdoing”.

The Prime Minister was asked about the proposals in an interview with LBC radio and said “I’m full of admiration for the way journalists generally conduct themselves. Whatever this thing is, I don’t for one minute think it is going to interrupt the normal process”.¹⁶

However, a subsequent editorial in the Times was critical of this response describing it as “simply untrue” and suggesting that “The proposals contained in the present consultation are the greatest threat to public interest journalism in a generation and Mr Johnson’s assurances count for naught unless it is abandoned”.¹⁷ It went on to suggest that the Prime Minister had betrayed his “true leanings” when he said that some important public interest stories came from “tainted sources”. The article concluded that the Prime Minister should demonstrate his commitment to media freedom by “ripping up this consultation”.

A petition organised by the campaign group 38 Degrees which opposes the proposal for increased sentences has received over 100,000 signatures.¹⁸

4 Next steps

The outcome of the consultation, which closed on 22 July, has not yet been published. Legislation in this area has been anticipated for some time and has now been included in the Queen’s Speech on consecutive occasions. A bill therefore seems likely in the coming months.

¹⁶ [Journalists won’t be treated like spies in Official Secrets Act overhaul, insists Boris Johnson](#), The Times, 28 July 2021

¹⁷ [The Times view on Boris Johnson and public interest journalism: Secrets and Lies](#), The Times, 30 July 2021

¹⁸ [Embarrassing the government should not be a crime](#), 38degrees.org.uk

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