



## Covert Human Intelligence Sources (Criminal Conduct) Bill Briefing for Peers

### About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

### Summary

The Bar Council supports this Bill in so far as it further regulates, and extends oversight of, the criminal conduct of undercover agents of the State, but has reservations: first, as to the range of public authorities to which it applies and, secondly, as to the criteria which have to be satisfied before such conduct is authorised.

### Background

The statutory scheme regulating the authorisation and conduct of covert human intelligence sources ('CHIS') enacted in Part II of the Regulation of Investigatory Powers Act 2000 ('RIPA') is currently silent as to the legality of criminal conduct undertaken by CHIS. Whilst Section 27 provides that the activities of CHIS "shall be lawful for all purposes", those activities are prescribed by Section 26(7) and (8) and are restricted to the obtaining and disclosure of information derived from the relationship established by the CHIS, and any incidental conduct. These provisions may therefore serve to sanction some minor offending, but do not cover acts such as unlawful violence, fraud, membership of proscribed organisations and connected inchoate offences.

A recent majority ruling of the Investigatory Powers Tribunal<sup>1</sup> (which is subject to appeal) nevertheless found that by necessary implication the *power* of the MI5 operatives (including those acting as CHIS) to engage in criminal activity was to be found in Sections 1 and 2 of the Security Service Act 1989 and that the *authorisation* to do so was to be found in the relevant Directions issued by the Prime Minister of the day and the application of the relevant Guidance issued by the Director-General of the Security Service. The fact of the existence of the power and the authorisation did not however found a legal defence to a criminal charge or any immunity from prosecution. A similar statutory power does not currently exist for undercover operatives of other domestic law enforcement agencies, such as police officers<sup>2</sup>.

### The Bill

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<sup>1</sup> *Privacy International and others v SoS for Foreign and Commonwealth Affairs and others* [2019] UKIPTrib IPT 17 186 CH

<sup>2</sup> The Explanatory Notes to the Bill state that (paragraph 8): "The activity that will be authorised under the Bill is not new activity. It is a continuation of existing practice that is currently authorised using a variety of legal bases". Other than a reference to the *Privacy International* case and the existing practice of the security services engaging in criminal conduct, the Notes do not explain what 'legal bases' currently entitle any other public bodies to expressly permit otherwise lawfully authorised CHIS to commit crime beyond the ambit of Section 27. There is currently no provision in the CHIS Code of Practice 2018, issued pursuant to RIPA, which addresses such activity.

The Bill provides for an express power to authorise CHIS to engage in criminal conduct “in the course of, or otherwise in connection with, the conduct of covert human intelligence sources”, as an addition to the established authorisation process under Section 26(1) and (8) RIPA. It requires a separate specific authorisation for such conduct which cannot be included or implied in a general CHIS authorisation.

A new proposed Section 29B RIPA provides that the authorisation can only be granted if it is necessary and proportionate (a) in the interests of national security; (b) for the purpose of preventing or detecting crime or of preventing disorder; or (c) in the interests of the economic well-being of the United Kingdom – these are criteria familiar within the framework of RIPA and its Codes of Practice. As the Bar Council has advocated in response to previous consultations concerning RIPA, in particular concerning Section 27 and the breach of legal professional privilege in respect of state surveillance, there is a concern that a test of detecting or preventing *any* crime or disorder, regardless of its severity, is too low a bar.

By an amendment to Section 229 of the Investigatory Powers Act 2019, the Bill proposes that, as part of the general duty to oversee, the Investigatory Powers Commissioner shall keep under review by way of audit, inspection and investigation, the exercise of the power to grant criminal conduct authorisations. There is no provision in the Bill which extends the scope of judicial approval of CHIS authorisations granted under Section 29 to the criminal conduct authorisations granted under the proposed Section 29B.

In respect of criminal conduct of the security and intelligence services this Bill is a welcome regularisation of activity which was previously lawful, but for which the power and mode of authorisation was opaque and outside the system of (quasi-) judicial scrutiny which otherwise oversees all intelligence and surveillance activities of agents of the State. It serves to reinforce the rule of law.

The power to authorise such conduct is proposed to be extended to a number of other organisations directly involved in law enforcement, additional to the intelligence services, including any police force, the National Crime Agency, the Armed Forces and several Government departments.

It is widely recognised that in order to combat the threat of terrorism and serious crime, there may be a need for State agents to participate in criminality<sup>3</sup>. However, the list of organisations which it is proposed should have the new power to authorise criminal conduct by CHIS also includes the Competition and Markets Authority, the Environment Agency, the Financial Conduct Authority, the Food Standards Agency and the Gambling Commission<sup>4</sup>. The Bar Council queries whether there is proper justification for the inclusion of these bodies in a regime which authorises the commission of crime by agents of the State. If there is, then a more robust regime, including the requirement for prior or contemporaneous judicial approval, should be considered. The Undercover Policing Enquiry, which is starting to hear Tranche 1 evidence in November 2020, is a stark reminder of the potential consequences of insufficiently regulated activities of CHIS.

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<sup>3</sup> See for example the Report of the Patrick Finucane Review by The Rt Hon Sir Desmond de Silva QC and published in December 2012 as cited in the *Privacy International* judgment

<sup>4</sup> Other bodies, such as local authorities, are currently empowered to authorise CHIS but will not be entitled pursuant to the Bill to authorise criminal conduct by the CHIS