

Written Evidence to the Joint Committee on the Draft Investigatory Powers Bill (December 2015) (S449)

The Bill and the Northern Ireland peace settlement: should the legislation deal with CHIS and undercover officer conduct too?

Committee on the Administration of Justice ('CAJ')

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. CAJ welcomes the opportunity to provide Written Evidence to the Joint Committee on the Draft Investigatory Powers Bill. The bill provides a new framework for the use of investigatory powers, with a focus on surveillance. Outside of the issues with the current bill **CAJ wishes to draw attention to other areas of covert policing where there is currently inadequate regulation** under the Regulation of Investigatory Powers Act 2000 (RIPA), **namely regulation of the permitted behaviour of informants (Covert Human Intelligence Sources- CHIS) and undercover officers.**
3. The purpose of our submission is to seek to promote debate around the potential to legislate in this area to remedy deficiencies in RIPA and implement unmet commitments in the Northern Ireland peace settlement. These issues are found in outstanding recommendations from the Independent Commission on Policing in Northern Ireland (the Patten Report),¹ the Police Ombudsman's Operation Ballast Report² and the Desmond de Silva Review into the death of Pat Finucane.³
4. Whilst RIPA does introduce an authorisation system for CHIS it does not adequately provide for regulating the conduct of CHIS and in particular the extent to which CHIS are permitted to be involved in crime. Our view is that the law should codify and prohibit CHIS and undercover officer involvement in human rights violations. The de Silva review concludes that such a system is not in place under RIPA stating:

¹ 'A New Beginning: Policing in Northern Ireland'. The Report of the Independent Commission on Policing in Northern Ireland' (Patten Report) September 1999,

² 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007

³ The Report of the Patrick Finucane Review, The Rt Hon Sir Desmond de Silva QC, December 2012, HC 802-I.

...it is doubtful whether RIPA and its associated Code of Practice provides a real resolution to these difficult issues given that it provides little guidance as to the limits of the activities of covert human intelligence sources (para.4.88).

5. The Cabinet Office response to the de Silva Review sets out:

De Silva acknowledges the improvements made as a result of RIPA and its Code of Practice. However, he argues that these do not provide adequate guidance as to the limits of the activities of CHIS in criminality. Since he wrote his report, additional CHIS oversight has been put in place, including reinforcement of the RIPA framework. Where, in exceptional circumstances, it proves necessary for CHIS to participate in criminal acts in order to fulfil their authorised conduct, agencies giving such tasking will only carry out such operations subject to the most stringent processes and safeguards.⁴

6. The Police Ombudsman's 2007 Operation Ballast Report, which uncovered practices of collusion with loyalist paramilitaries, enumerates a number of safeguards introduced in the Police Service of Northern Ireland (PSNI) since the initiation of the Ballast investigation itself. The PSNI instigated a 'major review' (the CRAG Review) of informants in 2003 which resulted in around a quarter of all informants being let go; half of them as they were deemed "too deeply involved in criminal activity".⁵ The Report states the review directed that "all criminal activity by paramilitary informants has to be strictly documented and controlled" and that "The CRAG review established that involvement in any criminal offence, other than membership or support of a proscribed organisation, had to be the subject of an application to the ACC of Crime Operations, who would approve or refuse the request. ..." There is now therefore a system of covert deployment authorisations, whereby the ACC must authorise the involvement of an informant in any criminal offence over and above membership or support of a paramilitary organisation.⁶ There was also the adoption of a Manual for the Management of CHIS and other safeguards. **However, at present all these developments and the framework they provide are not reflected in RIPA or its associated codes of practice.**

⁴ Lessons learnt by government departments from Sir Desmond de Silva's Report of the Patrick Finucane Review A report by the Cabinet Secretary, the Secretary of State for Defence and the Secretary of State for Northern Ireland (Cabinet Office, 2015), paragraph 10.

⁵ Operation Ballast Report, Appendix A, paras 8-10.

⁶ Operation Ballast Report, Appendix A, paras 14-15.

7. It has never been made public if equivalent measures to those adopted by the PSNI were also introduced for the Security Service MI5 when it took over primacy for 'national security' covert policing in Northern Ireland in 2007.⁷ CAJ was recently told by Lord Carlile, non-statutory Reviewer of the National Security Arrangements in Northern Ireland, that the Security Service has introduced a policy framework for CHIS handling over and above the provisions of RIPA. Lord Carlile also stated that the system would not authorise CHIS involvement in actions which would violate ECHR Article 3, such as 'punishment beatings'. Given the stated existence of such policy we cannot see any reason why such a policy framework precluding CHIS and undercover officers from engaging in acts which would constitute human rights violations not be explicitly placed on a statutory footing and hence put in the public domain.
8. There are other areas whereby accountability for this area of covert policing falls short of what was committed to under the peace settlement. The **Patten Report** stated that Police Codes of Practice should be publicly available⁸ and that Codes of Practice on all aspects of policing, **including covert law enforcement techniques**, should be in strict accordance with the ECHR.⁹ In relation to police Codes of Practice being publicly available Patten stated:

...this does not mean, for example, that all details of police operational techniques should be released – they clearly should not – but the principles, and legal and ethical guidelines governing all aspects of police work should be, including such covert aspects as surveillance and the handling of informants...**The presumption should be that everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back...**Transparency is not a discrete issue but part and parcel of a more accountable, more community-based and more rights-based approach to policing (emphasis in original).¹⁰

⁷ For detailed account of the transfer see CAJ 'The Policing You Don't See' December 2012.

⁸ Patten Report, paragraph 6.38.

⁹ Patten Report, paragraph 4.8.

¹⁰ Patten Report, paragraph 6.38.

9. To date no document setting out the ethical boundaries of informant conduct has been provided for in legislation or otherwise published. Patten also recommended *A Commissioner for Covert Law Enforcement in Northern Ireland*.¹¹ This Commissioner was also never introduced.¹² Potentially such an office could consolidate and replace the array of existing Commissioners overseeing such work with more limited powers.
10. In summary CAJ wishes to draw attention to other areas of covert policing that are in urgent need of legislative reform to ensure they are being undertaken in a human rights compliant manner. We would like to see provisions in legislation which explicitly prevent the authorisation of CHIS or undercover officer participation in activities which would constitute, as agents of the state, human rights violations.

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¹¹ Namely: "...a senior judicial figure, based in Northern Ireland, whose remit should include surveillance, use of informants and undercover operations... [with] powers to inspect the police (and other agencies acting in support of the police) and to require documents or information to be produced, either in response to representations received, directly or through the Police Ombudsman, the Policing Board or others, or on his or her own initiative. The commissioner should ... conduct sufficient inquiries to ascertain whether covert policing techniques are being used: with due regard for the law; only when there is a justification for them; and when conventional policing techniques could not reasonably be expected to achieve the objective. The commissioner should check that justifications for continuing specific covert operations are regularly reviewed, and that records of operations are maintained accurately and securely, with adequate safeguards against unauthorised disclosure." (Patten Report, paragraph 6.44).

¹² S61 of RIPA 2000 introduced an Investigatory Powers Commissioner for Northern Ireland, but this is not the role envisaged by Patten and instead relates to non-police powers. Furthermore, we were previously informed nobody has actually been appointed to this office.