Written evidence from Dr Samantha Newbery (CHIS0009)

Biography

A researcher specialising in intelligence and counter-terrorism, Dr Newbery's forthcoming book addresses the intersection of the use of informers (also known as agents and covert human intelligence sources (CHIS)) and criminality during 'the troubles' in Northern Ireland. The book's themes and cases are directly relevant to this Bill.

Dr Newbery's previous research also addressed policy-making on human rights issues. Her book *Interrogation, Intelligence and Security* (Manchester University Press, 2015) considered legal and ethical questions raised by the UK's use of controversial interrogation techniques for counter-terrorism and counter-insurgency since 1945, techniques that were found to be in breach of the European Convention on Human Rights. She is also co-author of *Why Spy? The Art of Intelligence* (Hurst, 2015) with the late Brian Stewart CMG, a former Deputy Chief of the Secret Intelligence Service.

Executive Summary

1. A statutory power to authorise criminal conduct by CHIS

- This written evidence is in favour of efforts to establish a statutory power to authorise criminal conduct by CHIS.
- It is appropriate that the Bill covers all public authorities that RIPA permits to use CHIS.
- Authorisations should only be granted after being approved by an independent review.

2. Immunity from prosecution

- The ability to prosecute current and former CHIS is essential. The fact that the Bill does not grant them immunity from prosecution should be made clearer to the public, to CHIS and to the handlers to whom CHIS report, either in the Bill itself or through associated publicity.

3. Oversight and accountability

- Oversight of the authorisation process must be in place and must be external, rather than solely conducted by the organisations granting the authorisations.
- To be able to influence future actions, the oversight body must be respected and have the appropriate powers.
- Oversight can only be fully effective if full records are made and kept. The oversight body must have the necessary powers to compel effective record-keeping.

4. The threshold tests for making criminal conduct authorisations

- Threshold tests should be in place to dictate in what circumstances criminal conduct by CHIS can be authorised. The tests contained in the Bill are appropriate, as far as is possible.

- It is highly unlikely that the threshold tests can be made more specific. Therefore, limits on the types of offences that can be authorised should also be brought in. Although these limits may already exist via other pieces of legislation, this ought to be reinforced in the Bill.

5. Limits on the types of offences that can be authorised

- The range of negative consequences brought about by the more harmful types of alleged or proven criminal conduct can be so severe and long-lasting that this conduct should not be authorised, even if this means that the collection of intelligence, and therefore counter-terrorism, is rendered less effective.
- The types of offences that ought never to be authorised include, but are not limited to, those that infringe on the right to life and the prohibition of torture and of inhuman or degrading treatment or punishment.

Submission

1. A statutory power to authorise criminal conduct by CHIS

1.1. The need for informers to commit crimes in order to collect intelligence has long been acknowledged. Although Baroness Nuala O'Loan argued when Police Ombudsman of Northern Ireland (2000-7) that it was wrong to continue to use an informer once it was known they were involved in criminality, this is a minority view.[1] The argument that counter-terrorism requires informers who are involved in criminality, including by being members of proscribed organisations, has been made by senior members of the Royal Ulster Constabulary (RUC, Northern Ireland's police force for much of the twentieth century),[2] the commander of the Force Research Unit (FRU, the army's informer handling unit),[3] the oversight body the Intelligence and Security Committee,[4] and Judge Desmond de Silva QC, author of the 2012 review into any involvement by Government bodies, including their informers, in the 1989 murder of Patrick Finucane in Belfast.[5]

1.2. Once it is accepted that criminal conduct is required, efforts should – and have – been made to establish effective regulation. In the UK this began with the 1969 Home Office guidelines intended to govern police use of informers throughout the UK.[6] The RUC argued these were unrealistic for counter-terrorism contexts and asked for applicable guidelines in a

[1] Police Ombudsman for Northern Ireland, Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, 22 January 2007, for example p.12, 14.

[2] NIO Note for the Record of the meeting on 13 March 1987, paragraphs 2-3, quoted in The Report of the Patrick Finucane Review by The Rt Hon Sir Desmond de Silva QC (de Silva Review), December 2012, Vol. I, HC 802-I, p.76.

[3] Colonel Gordon Kerr, Commander of the FRU (1986-9), Transcript of Regina v Brian Nelson before the Right Honourable Lord Justice Kelly on Wednesday, 29th January 1992 at Belfast Crown Court, p.6.

[4] Intelligence and Security Committee, Northern Ireland-related terrorism, 5 October 2020, HC 844, p.6.

[5] de Silva Review, Vol. I, for example p.6.

[6] Ibid., p.71.

meeting with Northern Ireland Office (NIO) officials in March 1987.[7] By May the following year the Security Service (MI5) had also asked the government for guidelines.[8] The NIO-led working group on agent handling that was subsequently established drafted a set of guidelines concerning criminal conduct by informers.[9]

1.3. The arrest of long-serving informer Brian Nelson in Northern Ireland in January 1990 for offences such as conspiracy to murder focused the Government's attention on informers, leading Attorney General Sir Patrick Mayhew QC to argue that 'the work of informers and their handling needs to be reviewed very carefully.'[10] Instead of considering the draft 1989 NIO guidelines, Sir John Blelloch, a former Permanent Secretary at the NIO, was commissioned to write a review of informer handling.[11] Sir John concluded in 1992 that the 1969 Home Office guidelines were not appropriate for counter-terrorism.[12] He was also of the opinion that legislation on informers was politically unobtainable at that time.[13] Another working group, this time under John Chilcot, the Northern Ireland Permanent Secretary, argued that statutory regulation was needed,[14] but Prime Minister John Major, Foreign Secretary Douglas Hurd, Home Secretary Michael Howard and Chancellor Kenneth Clarke opposed pursuing statutory regulation because it would mean opening a sensitive area up to Parliament when the Government's slender majority could not guarantee the desired outcome.[15] When statutory guidance on agent handling was eventually established with the Regulation of Investigatory Powers Act (RIPA) 2000, the Government 'absolutely refused' to include a section on how to authorise CHIS to be involved in criminality.[16]

1.4. The current Bill is not only the logical next step in this process of obtaining statutory regulation of CHIS involvement in criminal offences, but is supported on the basis that it helps to address the need for limits, transparency, oversight and accountability for this activity. If there is political will to adopt such legislation at this time, it should be pursued enthusiastically.

1.5. It is appropriate that the Bill covers all public authorities that RIPA permits to use CHIS. The Committee's argument that authorisations should be subject to prior independent review, rather than granted solely by the organisation responsible for the CHIS concerned, is

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[7] NIO Note for the Record of the meeting on 13 March 1987, paragraphs 2-3, quoted in de Silva Review, Vol. I, p.76.
[8] de Silva Review, Vol. I, p.79.
[9] Ibid., p.80.
[10] Attorney General Sir Patrick Mayhew QC to Defence Secretary Tom King, 11 March 1991, de Silva Review, Vol. II, HC 802-II, p.240.
[11] de Silva Review, Vol. I, p.83.
[12] Minute, Security Service Legal Adviser, 25 March 1992, quoted in de Silva Review, Vol. I, p.83.
[13] Ibid.
[14] Submission of John Chilcot to the Secretary of State, 14 July 1993, quoted in de Silva Review, Vol. I, p.86.
[15] Briefing note on Agent-Handling, 1 September 1994, quoted in de Silva Review, Vol. I, p.87.
[16] Sam Kinkaid (formerly of the RUC and Police Service of Northern Ireland, retired in 2006 as Assistant Chief Constable in charge of crime operations), transcript of evidence to Rosemary Nelson Inquiry, day 105 of hearings, 11 February 2009, p.74.

supported.[17] Prior independent review of authorisations for criminal conduct by CHIS ought to be established in a way that is in keeping with RIPA's provisions for authorisations of actions that infringe on rights.

2. Immunity from prosecution

2.1. News media coverage of this Bill reveals a limited understanding of the distinction between authorising criminal conduct and protecting CHIS from prosecution. The Security Service guidelines on the use of agents who participate in criminality, still current as of December 2019 at least,[18] stipulate:

> An authorisation of the use of a participating agent has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution.[19]

Communities' faith in the state's dedication to upholding the law is paramount. As a result, the fact that the Bill does not grant immunity from prosecution should be made clearer to the public, to CHIS and to CHIS handlers, either in the Bill itself or through associated publicity.

2.2. In practice, CHIS will not always be prosecuted for offences they are suspected of having committed. A CHIS committed to prison has less access to intelligence, and prosecuting them can deter other potential CHIS from coming forward. For example, amongst the many reasons the Defence Secretary, Tom King, put forward against prosecuting Brian Nelson included that it would damage agent recruitment and morale, and that evidence Nelson might reveal in court could damage the FRU.[20] At the same time, a member of a proscribed organisation who is known by their fellow members to be heavily involved in crime and is prosecuted less often or less vigorously than their counterparts will come under suspicion of being an informer, and this can put their life in danger. This was the case with 'Informant 1', a member of the Ulster Volunteer Force (UVF, a proscribed organisation) in North Belfast who worked as an informer from 1991-2003.[21] Decisions on whether to prosecute are therefore far from straightforward, but the ability to prosecute CHIS is essential. It must be possible to hold them accountable for their actions regardless of whether those actions were authorised, and for the public to know that this is the case.

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[17] Rt Hon Harriet Harman MP, Chair, Joint Committee on Human Rights, to Rt Hon Priti Patel MP, Home Secretary, 12 October 2020.

[18] Open Judgment by the Investigatory Powers Tribunal, between Privacy International, Reprieve, Committee on the Administration of Justice and Pat Finucane Centre, and Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service and Secret Intelligence Service, 20 December 2019, IPT/17/86/CH and IPT/17/87/CH, p.5.

[19] Security Service, Guidelines on the use of Agents who participate in Criminality (Official Guidance), issued March 2011, re-issued January 2014, p.2.

[20] Defence Secretary Tom King to Attorney General Sir Patrick Mayhew QC, 19 March 1991, de Silva Review, Vol. II, pp.257-65.

[21] Police Ombudsman for Northern Ireland, Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, 22 January 2007, p.28.

3. Oversight and accountability

3.1. A formalised system for recording the decision-making process that takes place when an authorisation is considered provides a much-needed opportunity for oversight of this process. It is correct that the Bill includes this safeguard.

3.2. Oversight ought to be external, rather than solely conducted by the organisations granting the authorisations. There are challenges to achieving effective external oversight, including the need for full access to records and witnesses. Overcoming these challenges requires trust and cooperation between the oversight body and the organisations being reviewed. Oversight can only be fully effective if complete records are kept, which was found not to be the case with some of the Security Service's authorisations of CHIS participation in criminality.[22] A limitation to oversight is that, in contrast to authorisations, it is backward-looking, though it is possible to have the power to influence future actions on the basis of its examinations of the past. To have this influence, the oversight body must be respected and have the appropriate powers.

3.3. A further point about record-keeping ought to be made. CHIS do not or cannot always tell their handlers everything in advance. Further, they do not always obey their handlers, as demonstrated by Brian Nelson's 'repeated unwillingness or inability to inform his handlers of the names of those individuals whose details had been disseminated [to the Ulster Defence Association and UVF]', acts of dissemination which 'increased the targeting capacity' of these organisations.[23] It is essential, therefore, that full records are kept of what was authorised and what was not, so as to facilitate accountability when offences are committed by CHIS. Consideration should therefore be given to whether the existing requirements in RIPA Section 29 for record-keeping are sufficient and whether the external oversight body will have the necessary powers to compel effective record-keeping.

4. The threshold tests for making criminal conduct authorisations

4.1. Threshold tests should be in place to dictate in what circumstances criminal conduct by CHIS can be authorised. Although the wording, and therefore the finer points, of the thresholds in the Bill differs from that adopted by the Security Service in 1992 and used by that organisation ever since,[24] the principles to be satisfied are essentially the same in both: proportionality; that the outcome cannot be achieved by any other means; and that it is necessary because it is likely to provide valuable intelligence. The longevity of these

[22] Investigatory Powers Commissioner's Office, Annual Report 2018, HC 67, p.36.

[23] de Silva Review, Vol. I, p.131.

[24] In 1992 the Security Service adopted the NIO's 1989 draft guidelines (de Silva Review, Vol. I, p.83); Security Service guidelines on the use of agents who participate in criminality, 26 September 2003, via https://privacyinternational.org/legal-action/third-direction-challenge; Security Service, Guidelines on the use of Agents who participate in Criminality (Official Guidance), issued March 2011, re-issued January 2014.

principles in the Security Service's non-statutory guidance suggests they believe them to be practical and appropriate.

4.2. However, there is considerable difficulty in designing thresholds. They must be sufficiently broad that they do not turn out to be impractical given the range of activities they are intended to apply to. Yet they must be sufficiently specific that they are transparent and they succeed in limiting actions.

4.3. Proportionality in particular is a principle that appears straightforward but is open to abuse unless further specifications are attached to it. Calculations as to whether a criminal conduct authorisation is proportionate will vary widely depending on whether only the immediate, short-term outcomes are considered, or whether all probable or possible long-term outcomes are also included. A further difficulty with calculating whether an authorised act will be proportionate is that such calculations involve predicting outcomes of complex situations (see Section 5).

4.4. It is highly unlikely that the thresholds given in the Bill can be much more specific without being unduly restrictive in some circumstances. Therefore, the threshold tests should be combined with limits on the types of offences that can be authorised, as examined further in Section 5. Although these limits may already be instituted through other pieces of legislation, this ought to be reinforced in the Bill.

5. Limits on the types of offences that can be authorised

5.1. To better protect human rights the Bill ought to limit the types of offences that can be authorised. The example of Agent Stakeknife illustrates this argument.

5.2. Agent Stakeknife worked as an informer within the IRA for more than a decade. His access to information in the late 1970s and through the 1980s stemmed from his position in the IRA's Internal Security Unit (ISU). His FRU handlers ought to have been aware that to maintain that access, he had to maintain his position in the ISU, and that this position may have involved interrogating, torturing and murdering people who, like himself, were suspected of informing on the IRA.

5.3. Rightly, little is publicly known about intelligence provided by Stakeknife other than that he was described as the army's 'golden egg'.[25] Estimates of proportionality, whether made at the time or after the fact, are complicated by the observation that once collected, intelligence is not necessarily always used successfully. Further, there will be variations in how much weight individuals assign to each of the factors they choose to include in their

[25] General Sir John Wilsey, Army commander in Northern Ireland (1990-3), quoted in Henry McDonald, 'British spy in IRA and 20 others could be charged with Troubles-era crimes', *The Guardian*, 2 October 2019, accessed 29 October 2020, https://www.theguardian.com/uk-news/2019/oct/02/ira-spy-and-20-others-could-be-prosecuted-for-troubles-era-crimes.

calculations.[26] What can be asserted is that negative outcomes beyond the suffering of victims and their families resulting from the Agent Stakeknife example have been substantial and long-lasting.

5.4. Most notable here is Operation Kenova (2016-19), which investigated whether there was evidence of criminal offences having been committed by Agent Stakeknife or any other individual, including state employees, in connection with his work.[27] Led by Jon Boutcher, Chief Constable of Bedfordshire Police, the investigative team 'of more than 60 police and civilian personnel' obtained more than one million pages of documents and exhibits.[28] They investigated more than fifty murders.[29] The Kenova team concluded by recommending that more than twenty people, including military commanders, be considered for prosecution.[30] This investigation illustrates that when CHIS are suspected of having committed offences such as murder the push for truth, justice, or both by victims' communities can be long-term. There is also a risk of severe damage to communities' faith in the state, its institutions and its employees if there is a belief that CHIS have engaged in criminal conduct, especially if it is believed that there was foreknowledge of that conduct or that insufficient action was taken to address it after the fact.

5.5. When these kinds of consequences are not foreseen they cannot be included in the calculation of whether an authorised offence is likely to be proportionate. The threshold tests are therefore insufficient. This can be mitigated by incorporating a limit on the types of offences that can be authorised into the Bill. The negative consequences of alleged or proven criminal conduct that causes severe harm beyond that felt by the immediate victims can be so substantial that this conduct should not be permitted, even if this means that the collection of intelligence, and therefore counter-terrorism, is rendered less effective. The types of offences that ought never to be authorised include, but are not limited to, those that infringe on the right to life and the prohibition of torture and of inhuman or degrading treatment or punishment.

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[26] Samantha Newbery, *Interrogation, intelligence and Security: Controversial British Techniques* (Manchester: Manchester University Press, 2015), pp.114-31.

[27] Operation Kenova – Terms of Reference, no date, accessed 15 October 2020, https://www.opkenova.co.uk/operation-kenova-terms-of-reference/.

[28] *Irish News*, 'Stakeknife investigation "has uncovered evidence of crimes by IRA and security force members"', 6 March 2019, accessed 29 October 2020, http://www.irishnews.com/news/northernirelandnews/2019/03/07/news/stakeknife-investigation-has-uncovered-evidence-of-criminal-wrongdoing-within-both-ira-and-security-forces--1566659/.

[29] Gillian Halliday, 'Stakeknife: Four avoid prosecution in investigation into alleged state involvement in kidnap, torture and murder in Northern Ireland', *Belfast Telegraph*, 29 October 2020, accessed 29 October 2020, https://www.belfasttelegraph.co.uk/news/northern-ireland/stakeknife-four-avoid-prosecution-in-investigation-into-alleged-state-involvement-in-kidnap-torture-and-murder-in-northern-ireland-39681953.html.

[30] Henry McDonald, 'British spy in IRA and 20 others could be charged with Troubles-era crimes', *The Guardian*, 2 October 2019, accessed 15 October 2020, https://www.theguardian.com/uk-news/2019/oct/02/ira-spy-and-20-others-could-be-prosecuted-for-troubles-era-crimes.