

## Introduction

1. KRW LAW LLP (KRW) is one of the largest legal aid practices in Northern Ireland. Our main areas of work include criminal defence, public law, clinical negligence, information rights, reputation management, prison law and actions arising out of the Conflict in Northern Ireland. KRW works across the community.

## Summary

2. Our practice has a substantial Legacy-litigation portfolio and includes clients who have been affected by the British Security Forces use of agents and informers throughout the period of the Conflict in Northern Ireland. Many lost loved ones because of the use of agents and informers by the RUC, the British Army and MI5.
3. Collusion between paramilitary groups (both Loyalist and Republican) and state agencies and agents was systemic throughout the Conflict. The exposure of collusion has always been resisted by the British government. Further, the infiltration of paramilitary groups by state agents lead directly to criminal acts including murder.
4. The proposals in this Bill in effect enable agents and informers to act with impunity in committing criminal offences. The Bill places no express limits on the types of crimes which can be authorised. There is no express prohibition on authorising crimes that would constitute human rights violations, including murder, torture (e.g. punishment shootings), kidnap, or sexual offences, or on conduct that would interfere with the course of justice.
5. We note the analysis of the claimants in 'The Third Direction' litigation case which has challenged the lawfulness of the previously secret MI5 Guidelines that authorise MI5 informants to commit unspecified criminal offences:
6. "The particular experience of the consequences of using paramilitary informants outside of the law during the Northern Ireland conflict becomes relevant here. Security force intelligence practices of tolerating, facilitating and even directing serious crimes by informants fuelled the conflict, damaged the rule of law and have left a poisoned Legacy to this day." [Third Direction](#) (last accessed 07 10 2020)

## Submissions (1) Core Problems with the Bill

7. The intent of this Bill is to regulate the actions of Covert Human Intelligence Sources (CHIS) by establishing a legislative framework.
8. The Bill places no express limits on the forms of criminal activity by a CHIS which can be authorised, including murder and rape.
9. The Bill relies upon the Human Rights Act 1998 as a safeguard. However, the government's commitment to the Human Rights Act 1998 is questionable and will be subject to review.
10. Specifically, the Bill permits authorised criminal acts by a CHIS if rendered 'awful for all purposes'. This would remove the public interest test applied by prosecutor.
11. The authorisation regime envisaged by the Bill is weaker than for other investigatory powers, such as interception, despite potentially involving more harmful conduct. Independent judicial approval is required for interception and other powers governed by the IPA, whereas criminal conduct would be authorised internally under the provisions of the Bill.
12. Even though the Human Rights Act 1998 applies to public authorities, the government has stated that it does not apply to authorised criminal acts (including torture) committed by its covert agents. This is because the government is of the belief that it cannot be responsible for the acts of its covert agents:
13. "the state, in tasking the CHIS...is not the instigator of that activity and cannot be treated as somehow responsible for it...it would be unreal to hold the state responsible." (As stated by government at the public hearings in the 'Third Direction' case before the Investigatory Powers Tribunals 5 - 6 November 2019) [Third Direction](#) (footnote 11) (last accessed 07 10 2020)
14. The Bill also removes any possibility for survivors of authorised CHIS criminal activity from seeking judicial redress by removing civil liability for a CHIS in perpetuity.
15. Finally, the Bill represents a significant expansion of the existing policy, by making authorised criminal conduct 'lawful for all purposes'. This would bypass prosecutors, thus eroding the separation of powers and removing the ability of independent prosecutors to bring prosecutions where it is in the public interest.

### **Submissions (2): The Toxic Legacy of the Conflict in Northern Ireland**

16. MPs and NGOs in response to the Bill have both relied upon examples from Northern Ireland as to why CHIS criminality must be subject to both independent scrutiny and in accordance with the ECHR, specifically Article 2 (the right to life) and Article 3 (freedom from torture – an absolute

prohibition) and in accordance with the UN Convention Against Torture (UNCAT).

17.KRW represents clients who lost loved ones due to the activities of the known informers/agents who were able to act with impunity during the Conflict.

18.We point to the sources following agents/informers and the consequences of their activities either explicitly or implicitly sanctioned by the state:

The Report of the Patrick Finucane Review (De Silva) (2012) Chapters 6 - 8 and Chapters 21 - 22

The Operation Kenova investigation into a range of activities surrounding an alleged individual codenamed Stakeknife

The Statutory Report Public Statement by the Police Ombudsman in accordance with Section 62 of the Police (Northern Ireland) Act 1998. Relating to a complaint by the Victims and Survivors of the Murders at the Heights Bar, Loughinisland, 18 June 1994 paragraph 9.9

### **Conclusion**

19.KRW support the amendments proposed by the NGOs in the Third Direction case:

20.“In summary, we would urge significant amendments are made to the Bill:  
1. Introduce clear limits on the face of the legislation preventing the authorisation of crimes such as murder, torture, and sexual violence; 2. Create real-time, effective authorisation and oversight mechanisms to ensure that authorisations to commit crimes have at least as robust authorisation and oversight as search warrants or phone tapping and effective arrangements for post-operational accountability; 3. Ensure the UK’s prosecuting authorities can independently review crimes committed by CHIS, and remove the power for MI5 and other public authorities to brand crime ‘lawful for all purposes’.” [Third Direction](#) (last accessed 09 10 2020)

**29/10/2020**