



## **Bar Council response to the Home Office consultation on the Investigatory Powers Tribunal Rules 2017**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation on the Investigatory Powers Tribunal Rules 2017<sup>1</sup>.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Our response**

4. These new Rules will supersede the Investigatory Powers Tribunal Rules 2000, which were made under the Regulation of Investigatory Powers Act 2000 ("RIPA"). The new Rules include some welcome additions which reflect procedural changes in hearings in security cases since 2000. Like the 2000 Rules, these new Rules are made under the provisions of s.69 of RIPA.
5. By way of background, the Tribunal has jurisdiction to hear complaints brought under s.7 of the Human Rights Act 1998 concerning a violation of a Convention right alleged to have been or proposed to be committed by the security services or any person acting on behalf of the security services, or of a violation by way of interception of the complainant's communications or entry on or interference with property or any interference with wireless telephony [s.65 of RIPA]. It should be noted that under s.7 Human Rights Act a person may only bring proceedings before the Tribunal (or by way of judicial review) if that person is a victim of the unlawful act, or would be if the proposed act were performed. This restricts the value of the Tribunal in two ways – (a) the complainant must be in possession of sufficient

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<sup>1</sup> Home Office (2017) Investigatory Powers Tribunal: updated rules

material to demonstrate a violation, which is in practice difficult given the inherently and necessarily covert nature of the conduct involved, and (b) it precludes public interest actions by NGOs and other persons interested in maintaining democratic accountability but who do not qualify as “victims” for the purposes of s.7 of the Human Rights Act. However, whether Parliament will be willing to extend the jurisdiction of the Tribunal to others with an “interest” (to be defined) is speculative. In the light of the important rule of law issues raised in the UNISON case in the Supreme Court ([2017] UKSC @ [68]) this restriction does require reconsideration.

6. Those alleged to be responsible for the violation (and any other witness except the complainant) can be required to attend the Tribunal and give evidence on oath [Rule 13(2)]. A complainant is not compellable [Rule 13(3)] but the Tribunal does have the power to strike out an application for non-compliance with a direction [Rule 6(l) & (m)], including a failure to provide further information [Rule 9(4)].

7. There are four novel provisions compared with the 2000 Rules –

8. Disclosure – the Tribunal can order the respondent to disclose to the complainant documents or information provided to the Tribunal by the respondent, or in appropriate case provide a gist or summary of such material [Rule 7(6)].

9. Hearings in the absence of one party – either complainant or respondent [Rule 10(1)]. Subject to that possibility, hearings must be in public and in the presence of the complainant [Rule 10(4)].

10. Counsel to the Tribunal - the Tribunal can appoint Counsel to the Tribunal to represent the interests of a complainant who is not legally represented or for that part of the proceedings when the complainant is excluded [Rule 12]. Counsel’s duty will be to assist the Tribunal by identifying material to be disclosed to the complainant and making representations of fact and law on the complainant’s behalf. Where Counsel identifies any arguable error of law by the Tribunal (which might be confined to what the Tribunal acknowledges to be an arguable error) Counsel must request that the Tribunal notifies the complainant of that error. Nothing is set out in the Rules as to the necessary qualifications for Counsel to the Tribunal, nor whether the complainant will have any choice over the appointment of Counsel. It is to be hoped that Counsel will be appointed from the ranks of Special Advocates, and those who are security cleared to act in Closed proceedings would be eligible to appear in cases where the complainant is excluded from the hearing and to determine disclosure of material the security services assert is too sensitive to disclose. It would be better if the qualifications necessary to be appointed as Counsel to the Tribunal were specified.

11. Appeal – Part 3 of the Rules sets out a procedure for applications for leave to appeal. These provisions implement a new s.67A of RIPA inserted by s.242 of the Investigatory Powers Act 2016. Appeal in England and Wales is to the Court of Appeal. An appeal will only be heard with leave of the tribunal from which the appeal is brought or of the Court of Appeal [s.67a(6)]. The Tribunal will determine in the first place whether leave to appeal should be granted [Rule 16]. In doing so, it must only grant leave if it considers that (a) the appeal would raise an important point of principle or practice, or (b) there is another compelling reason for granting leave [s.67A(7)].

12. These innovations are all welcome. The Tribunal will also have the benefit of decisions of judicial commissioners in many cases likely to be brought under the powers conferred by the Investigatory Powers Act 2016. Fifteen Judicial Commissioners have been appointed to fulfil their functions under the Investigatory Powers Act. It is desirable that they give at least brief reasons for whatever decisions they make on the warrants which require their endorsement. In that way the Commissioners and the Tribunal can develop a body of law on the application of the powers in RIPA and the Investigatory Powers Act which have given rise to some anxiety among civil society.

13. There remains one matter of concern. Rule 13(1) states that "The Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law." This is copied from the 2000 Rules where it appeared as Rule 11(1). Since then we have had the decision of the House of Lords in *A (FC) v Home Secretary* [2005] UKHL 71. In that case the then Home Secretary argued that evidence obtained by torture is admissible in court as a matter of law, in that case in SIAC (see at paragraph [1]), even though as a matter of policy it would not be relied on where the torture was committed by or with the complicity of the British authorities or when it was known or believed to have been obtained by torture by a foreign state. Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) Rule 44(3) provided that SIAC "may receive evidence that would not be admissible in a court of law", i.e. identical to the wording in Rule 13(1) of these new draft Investigatory Powers Commission Rules (see *A (FC) v Home Secretary* at paragraph [7]). The House of Lords disagreed and held that the prohibition of the use of evidence obtained by torture is absolute. At paragraph [12] Lord Bingham described the prohibition on torture as "more aptly categorised as a constitutional principle than as a rule of evidence." Later, in his book *The Rule of Law*<sup>2</sup> he said of the government's argument that it was "a contention which the House of Lords unanimously and strongly rejected."

14. It is essential that it is understood that Rule 13(1) does not permit evidence which has or might have been obtained in contravention of Art.3 of the ECHR to be considered by the Tribunal, unless it forms part of the complaint. It is to be hoped and expected that the Government will not try to resurrect the argument it lost in *A (FC) v Home Secretary*. In order to make these Rules Convention-compliant a statement accepting the decision in *A (FC) v Home Secretary* should be included in the Explanatory Note attached to, but not part of, the Rules.

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<sup>2</sup> (2010) Penguin, p.154