



The Bar Council

## **Bar Council response to the Home Office consultation on Revised Covert Human Intelligence Source (CHIS) code of practice**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation paper on Revised Covert Human Intelligence Source (CHIS) code of practice.<sup>1</sup>
2. The Bar Council represents approximately 17,000 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 (BSB).
4. The revised and updated CHIS Code of Practice provides a thorough and welcome oversight of the prescribed circumstances in which undercover State agents may be authorised to engage in criminal conduct. The Bar Council maintains its reservations expressed in the Bar Council's response (December 2020) to the Covert Human Intelligence Sources (Criminal Conduct) Bill<sup>2</sup> as to the number of authorities which can issue criminal conduct authorisations (now Part A1 of Schedule 1 to RIPA 2000) and test to be applied for authorising the breach of legal professional privilege ('LPP'). As to the latter, Section 27(1)

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<sup>1</sup> <https://www.gov.uk/government/consultations/revised-covert-human-intelligence-source-chis-code-of-practice>

<sup>2</sup> <https://www.barcouncil.org.uk/uploads/assets/35d03488-943b-4609-b8b1243edb7bb016/Bar-Councils-Briefing-for-Peers-CHIS-Criminal-Conduct-Bill.pdf>

RIPA 2000, which provides that any conduct authorised by an authorisation will be lawful for all purposes, applies equally to criminal conduct authorisations; the test to be applied for a deliberate breach of LPP in the CHIS CoP remains that set out in paragraph 9.56, namely there must exceptional and compelling circumstances which includes a threat to 'life and limb'. That test remains ill-defined and insufficiently robust.

5. The Bar Council makes the following observations in relation to those parts of the CoP which have been revised to take account of the 2021 Act.

## Chapter 6

§6.6 The wording of this paragraph could lead to confusion over the test to be applied. Since the power to issue criminal conduct authorisations has been extended to such diverse organisations as the Gambling Commission and the Department of Health and Social Care, which cannot be expected to be staffed by officers with expertise and experience in the field of covert surveillance comparable to, say, police officers or members of the intelligence services, the CoP must avoid any hint of ambiguity.

In particular, a statement to the effect that authorisation is strongly advised where criminal conduct is expected, may suggest that the test for authorisation is 'expectation' rather than 'necessity'. Also it is not clear why the requirement is advisory, as opposed to mandatory. The following alternate wording is suggested:

**"Where a public authority expects that the activity of a CHIS might lead to their engaging in criminal activity, consideration must, in every case, be given as to whether such conduct is necessary and proportionate. Where there is any doubt or ambiguity around whether the proposed conduct or use of the CHIS would, or would not, involve a crime, Authorising Officers should consider whether a Criminal Conduct Authorisation is appropriate."**

§6.7 For the same reasons, it is suggested that this paragraph should be more explicit:

**"A Criminal Conduct Authorisation cannot be lawfully authorised in circumstances where the Authorising Officer does not consider that the conduct would be criminal, because the necessity test would not be satisfied. In order for a Criminal Conduct Authority to be granted, the Authorising Officer must believe, on reasonable grounds, both that there is a risk that the conduct to be authorised amounts to a criminal offence and that the authorisation is necessary and proportionate."**

§6.8 All of the authorities with the power to make criminal conduct authorisations will have internal legal departments or ready access to legal advice. It is suggested that that resource should be used where there is genuine uncertainty as to whether the conduct at issue will amount to a criminal conduct, in the following terms:

**“Where there is genuine uncertainty, it is strongly advised that the authorising authority seek legal advice as to whether the conduct at issue will amount to criminal conduct. However, where such advice is not reasonably available, or where, having taken advice, there is still uncertainty, an authorisation may be granted (providing it is necessary and proportionate) - for example, where facts could materialise which mean that the conduct is not in fact criminal. The Criminal Conduct Authority will have effect to the extent that the authorised conduct would constitute crime. The grant of a Criminal Conduct Authorisation does not indicate that the authorised conduct would otherwise constitute crime.”**

§6.14 In addition, another reason why circumstances should not be categorised as “urgent”, and so enabling the relevant authority to bypass the requirement for a written authorisation, is that the relevant authority has not put in place adequate procedures. It is suggested the paragraph should read:

**“A case is not normally to be regarded as urgent unless the time that would elapse before the Authorising Officer was available to grant the authorisation would, in the judgement of the person giving the authorisation, be likely to endanger life or jeopardise the investigation or operation for which the authorisation was being granted. An authorisation is not to be regarded as urgent where the need for an authorisation has been neglected or the urgency is of the applicant’s or Authorising Officer’s own making, or the public authority has failed to put in place procedures sufficient to enable the authorisation to be sought or authorised before the point at which it became urgent.”**

§6.20 Although there is no requirement for the relevant authority to wait for comments from the Judicial Commissioner before the activity is commenced, it would surely be best practice to do so. In cases where it is anticipated that legally privileged material may be obtained or seen, advance approval from a Judicial Commissioner should be required unless the matter is urgent. Such

guidance would help prevent unintended acquisition of privileged material which then must be dealt with in accordance with §9.68 - §9.71 and §9.74 which require reference to a Judicial Commissioner whenever lawyers' material has been accessed by a CHIS. The unjustified access to and knowledge of legally privileged material will cause problems in any prosecution which results from the CHIS' activity and may result in the avoidable failure of a prosecution of a target criminal, which would be contrary to the public interest.

It is suggested that the paragraph should read:

**"In respect of the grant of an authorisation, the conduct that has been authorised can begin as soon as the authorisation has been granted by the Authorising Officer; there is no requirement to wait for comments from a Judicial Commissioner before commencing the activity. However it is strongly advised that commencement should await such comments, other than in cases of real urgency. Where it is anticipated that legally privileged material may be obtained (howsoever), advance approval from a Judicial Commissioner should be obtained, other than in cases of real urgency."**

§6.22

If legal advice has been sought in respect of obtaining legally privileged material, that fact should be recorded in the application. It is suggested that the following bullet point should added:

- **"date and content of any legal advice sought in respect material subject to legal privilege;"**

In the light of §6.26, the application should also record what information has been sought and obtained which weakens the case for the authorisation. It is suggested that the following bullet point should added:

- **"the steps taken to identify information which weakens the case for the authorisation and the detail of any information so obtained;"**

§6.26

As part of the duty to make reasonable efforts to take account of material of information which weakens the case for the authorisation, the applicant should record those efforts and the information so identified. It is suggested the paragraph should read:

**"When completing an application, the applicant must ensure that the case for the authorisation is presented in the application in a fair and balanced way. In**

particular, all reasonable efforts should be made to take account of information which weakens the case for the authorisation. **The steps taken and the information obtained should be recorded**"

§6.28 For clarity, the paragraph should include the relevant shorter periods for the duration of an authorisation. It is suggested the paragraph should read:

"A written authorisation will, unless renewed or cancelled, cease to have effect at the end of a period of twelve months beginning with the day on which it took effect, except in the case of juvenile CHIS (**4 months**) or where it is intended to obtain, provide access to or disclose knowledge of matters subject to legal privilege (**6 or 3 months – see paragraph 5.17 above**)."

§6.31 There should be constant monitoring of the authorised conduct in order to establish whether the criminal conduct has taken place shortly after the authorisation, in order to determine whether either the provisions of §6.31 or §6.32 apply. It is suggested the paragraph should read:

"Criminal conduct will often take place and be completed shortly after the conduct has been authorised. In such circumstances the authorisation is no longer needed, and the authorisation must be cancelled and there would be no need to conduct a review. **The conduct should be continually monitored to determine whether the criminal conduct has taken place.**"

§6.36 It is also important that that the Authorising Officer should consider whether any significant and substantive changes to the nature of the conduct during the course of the authorisation may result in the obtaining of legally privileged material, when none had been previously been considered to be an intended or likely result of the conduct. It is suggested the paragraph should read:

"Any proposed changes to the nature of the criminal participation should be brought to the attention of the Authorising Officer who should consider whether the proposed changes are within the scope of the existing Criminal Conduct Authorisation and whether they remain necessary and proportionate, before approving or rejecting them by way of a review. **In addition the authorising Officer should consider whether any change to the nature of the criminal conduct may result in the obtaining (howsoever) of legally privileged material.**"

§6.40 For the same reason as §6.36 above, it is suggested the paragraph should read:

“If, before an authorisation would cease to have effect, the Authorising Officer considers it necessary for the authorisation to continue for the purpose for which it was granted, they may renew it in writing for a further period of twelve months. Renewals may also be granted orally in urgent cases and will last for a period of seventy-two hours. **The Authorising Officer should consider whether the continued conduct may result in the obtaining (howsoever) of legally privileged material.**”

§6.40 For the same reasons as §6.22 above, it is suggested the following bullet points should be added:

- **“date and content of any legal advice sought in respect material subject to legal privilege;”**
- **“the steps taken to identify information which weakens the case for the authorisation and the detail of any information so obtained;”**

§6.49 This section of the CoP, dedicated to Criminal Conduct Authorisations, should expressly repeat the obligation to report to the Investigatory Powers Commissioner where a CHIS has engaged, whether tasked to do so or not, in unauthorised criminal conduct. It is suggested the paragraph should read:

“In addition to any report to an appropriate authority that may be made, the relevant public authority must report relevant errors (for example where a CHIS is tasked to engage in criminal conduct without a Criminal Conduct Authorisation in place) to the Investigatory Powers Commissioner (see paragraphs 8.8 to 8.18). **This duty to report includes where a covert human intelligence source has engaged in criminal activity without lawful authorisation (see paragraph 8.12 above).**”

§9.29 The section, which deals with confidential and privileged material, treats material subject to legal privilege similar to other confidential material. It should be made clear here that privileged material has a special enhanced status which requires enhanced consideration before authorisation is given which will or may give access to it. §9.53 to §9.84 provide useful guidance on the necessity for a detailed assessment of purpose, necessity and risk when there is a foreseeable possibility that privileged material will be encountered.

§9.53 This paragraph states -

*As discussed in further detail below, special safeguards apply to matters subject to legal privilege. Section 98 of the Police Act 1997 defines those matters that are subject to legal privilege.*

The footnote advises “Also see definition in Paragraph 2 of the 2010 Legal Privilege Order for matters to which the Order applies.” It would be much more helpful to include the definition in the text of §9.53, especially as those using this Code will often be working under pressure of time and circumstances .

**Bar Council**<sup>3</sup>

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<sup>3</sup> Prepared by the Law Reform Committee