

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's briefing on an amendment to require pre-judicial authorisation for long-term undercover police operations**

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## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## **Amendment**

Insert the following new clause:

( ) the Regulation of Investigatory Powers Act 2000 is amended as follows -

(a) after section 32A (Authorisations requiring judicial approval) insert—

### **“32AA Police authorisations requiring judicial approval**

(1) This section applies where a relevant person has granted an authorisation under section 29.

(2) The authorisation is not to take effect until such time (if any) as the relevant judicial authority has made an order approving the grant of the authorisation.

(3) The relevant judicial authority may give approval under this section to the granting of an authorisation under section 29 if, and only if, the relevant judicial authority is satisfied that—

(a) at the time of the grant--

(i) there were reasonable grounds for believing that the requirements of section 29(2), and any requirements imposed by virtue of section 29(7)(b) are satisfied in relation to that authorisation, and

(ii) the relevant conditions were satisfied in relation to that authorisation, and

(b) at the time when the relevant judicial authority is considering the matter, there remain reasonable grounds for believing that the requirements of section 29(2), and any requirements imposed by virtue of section 29(7)(b) are satisfied in relation to that authorisation.

(5) For the purposes of subsection (3) the relevant conditions in relation to a grant by an individual holding an office, rank or position in a relevant law enforcement agency, that--

(a) the individual was a designated person for the purposes of section 29,

(b) the grant of an authorisation was not in breach of any prohibition imposed by virtue of section 29(7)(a) or any restriction imposed by virtue of section 30(3), and

(c) any other conditions that may be provided for by the Secretary of State were satisfied.

(6) In this section—

“relevant law enforcement authority” means—

(a) a police force in the United Kingdom

(b) the National Crime Agency

“relevant judicial authority” means -

(a) in relation to England and Wales, the High Court of Justice in England and Wales,

(b) in relation to Scotland, the Sheriff Court

(c) in relation to Northern Ireland, the High Court of Justice in Northern Ireland.

“relevant person” means—

- (a) an individual holding an office, rank or position in a police force in the United Kingdom,
- (b) an individual holding an office, rank or position in the National Crime Agency.”

(b) after Section 32B insert -

**“32BB Procedure for judicial approval of police authorisations**

(1) The law enforcement authority with which the relevant person holds an office, rank or position may apply to the relevant judicial authority for an order under section 32AA approving the grant of an authorisation.

(2) The applicant is not required to give notice of the application to--

- (a) any person to whom the authorisation relates, or
- (b) such a person’s legal representatives.

(3) Where, on application under this section, the relevant judicial authority refuses to approve the grant of the authorisation concerned, the relevant judicial authority may make an order quashing the authorisation.

(4) In this section “relevant judicial authority” and “relevant person” have the same meaning as in section 32AA.”

(4A) Where information is obtained in a manner that requires authorisation under this section but no authorisation was obtained, all documents and property seized shall be returned.

(c) Section 43 is amended as follows -

- (i) in subsection 1A, after “section 32A” insert “or under section 29 to which section 32AA applies”,
- (ii) in subsection 3(b) delete “twelve” and insert “three”,
- (iii) in subsection 6A, after “32A” insert “or subsection (5) of section 32AA”,
- (iv) in subsection 9(c), after “32A” insert “, subsection (2) of 32AA”.

## **Effect**

1. This suggested amendment would ensure that all police operations requiring the use of covert human intelligence sources (CHIS) would require prior judicial approval, renewed every three months, ensuring effective, independent oversight of a branch of policing which has been seriously misused in recent times. Specifically, the proposed amendment would insert a new clause into the Anti-social Behaviour, Crime and Policing Bill, which will itself insert two new clauses into the Regulation of Investigatory Powers Act 2000 (RIPA) and amend section 43 of RIPA.
  
2. Proposed new section 32AA to be inserted into RIPA, would create a requirement that the High Court approve any use of a CHIS by a police force or the National Crime Agency (when that body replaces the Serious Organised Crime Agency in December 2013) before an internal authorisation issued under section 29 of RIPA can come into effect. Before the High Court can approve an authorisation, it must be satisfied that both at the time the internal authorisation was granted and at the time the matter comes before a judge, reasonable grounds existed and exist for believing that requirements as to proportionality and necessity set out in section 29 are met. A judge must further be satisfied that the original authorisation was carried out by a properly designated individual.
  
3. Proposed new section 32BB to be inserted into RIPA, would make provision for the procedure under which judicial approval under section 32AA would be granted. New section 32BB would further provide for a judge to quash an authorisation where approval is not granted.
  
4. New subsection 4A of clause 32AA RIPA would provide that, if police used covert human intelligence sources without prior judicial authorisation, any information gathered would have to be returned to the individual in question. This disincentive against unlawful surveillance is required to encourage police to follow the authorisation process laid out in the amendment.
  
5. Suggested amendments to section 43 of RIPA would require authorisations for use of a CHIS by any public authority be renewed every three months, replacing the current requirement of annual renewal. Wherever a renewal is required judicial approval would need to be sought.

## **Briefing**

6. The Anti-social Behaviour, Crime and Policing Bill already makes welcome provision to increase police accountability by strengthening IPCC powers. In the light of recent claims that undercover police operations targeted the family of Stephen Lawrence, and revelations about the long-running infiltration of peaceful protesters in the environmental movement by Mark Kennedy and others, Liberty is proposing that parliamentarians introduce new provision to require prior judicial authorisation for the use by police of covert human intelligence source powers.

7. Following a recent amendment to RIPA in the Protection of Freedoms Act 2012, local authorities must obtain authorisation from a magistrate before covert human intelligence sources can be used. However, for other public bodies, including police forces, an internal authorising officer can authorise the use of these powers under section 29 of RIPA without any external oversight. In response to the recent disturbing revelations about deeply inappropriate police use of CHIS, the Government has announced proposals for the Office of Surveillance Commissioners to be notified at the start of any deployment, and to approve any authorisation exceeding 12 months. This does not provide “enhanced judicial oversight,” as claimed by the Government, but instead continues a system where prior external oversight is *not* required and applications for deployment and renewals may *never be seen by a serving judge*.

8. To prevent further abuses of power in the future, Liberty is calling for an amendment to this Bill to require prior judicial approval of police infiltration via the use of covert human intelligence sources, where that undercover source is an employee of a police force. This would mirror the safeguard currently in place for use of CHIS by local authorities and replicate the kind of check and balance that is for example required before property can be searched. Police forces that wish to deploy CHIS operatives will be required to satisfy a judge that the deployment is necessary and proportionate to the end sought before approval will be granted. On-going review of CHIS operations every 3 months will ensure that the actions of undercover operatives are not exceeding the bounds of their initial authorisation, and allow a sitting judge to monitor their actions to ensure that they do not, either individually or cumulatively, disproportionately infringe on the Article 8 rights of the individuals targeted by the operation. Judicial pre-authorisation would therefore introduce a long

overdue safeguard against abuse of undercover policing powers, without compromising the ability of the police to carry out undercover operations.

9. Obtaining judicial authorisation need not be a lengthy process. Under current law, before searching premises, police must obtain a search warrant, which is also issued by a judge.<sup>1</sup> Arguably speed and urgency are more likely to be factors in a premises search (where material can be destroyed) than for the authorisation of a CHIS. Search warrants are obtained frequently and routinely, and it is accepted that police investigations can function successfully and efficiently, even with this prior requirement. What more, the circumstances where this safeguard is most needed will be for longer term well-planned surveillance operations where there will be sufficient time, as part of the planning process, to make an application to the High Court. However, in urgent cases judges can be contacted out of hours and the police would not be limited to court working hours.

10. The amendment above ensures that CHIS operations will have to be re-authorised every 3 months, providing necessary continuing judicial oversight to ensure that the police actions remain proportionate; are not unduly interfering with the rights of individuals involved; and that the operation is remaining within the parameters of the authorisation.

11. Liberty urges parliamentarians to take the opportunity offered by this Bill to introduce long-overdue statutory safeguards on the use of these highly intrusive police powers.

*'CHIS' defined*

12. Under current law, A CHIS is defined as someone who -

(a) establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) covertly uses such a relationship to obtain information or to provide access to any information to another person; or

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<sup>1</sup> Police and Criminal Evidence Act 1984, s8.

(c) covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.<sup>2</sup>

13. This is a relatively open-ended definition and primary legislation therefore draws no distinction between undercover operatives who undertake long-term missions where they assume new identities and are embedded deep within target communities (such as Mark Kennedy) and plainclothes officers that pose as non-police individuals for short term operations, such as making a purchase of illegal drugs.

14. The broad term “covert human intelligence source” therefore covers a wide variety of operations, despite the fact that these different types of undercover operations can have radically different implications for the human rights of their targets: the impact on the Article 8 (respect for private life) rights of an individual who unknowingly sells drugs to an undercover officer would be considerably less than in the case of a woman who, for example, unknowingly engaged in a long-term sexual relationship with an officer embedded in her environmental campaigning group. Liberty understands that the Metropolitan Police Service currently makes a distinction in their internal authorisation processes so that a more senior officer is required to authorise longer term more intrusive operations. Liberty does not seek to suggest that a High Court authorisation should be required for lower-level operations that do not present a significant interference with Article 8 rights. Therefore in addition to adopting the amendment proposed above, Liberty urges the Government to consider a further amendment that distinguishes between the different levels of intrusion based on the amount of time spent in the covert relationship. This would mean that High Court judicial authorisation would not be required for simpler operations of a duration that falls well short of three months. In these cases a Magistrates authorisation could be sought instead. High Court approval would then be sought for operations where medium and long term relationships are intended.

#### *Accompanying Guidance*

15. Liberty also suggests that this amendment should be accompanied by revised Codes of Practice on Covert Human Intelligence Sources<sup>3</sup> to ensure effective

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<sup>2</sup> Section 26(8) Regulation of Investigatory Powers Act 2000.

oversight and on-going review of long term operations. Specifically, the Code of Practice should make clear what information will be required to be placed before an authorising judge. This should – at least – include a detailed description and plan of the proposed CHIS operation, its methods and proposed course of action; an assessment of the impact on the human rights of any targets or persons likely to come into contact with the CHIS; and a proportionality assessment, detailing the projected outcome of the operation, the intelligence or policing goal pursued, how the CHIS operation contributes to that goal, and the other, less intrusive courses of action which were considered. The Code of Practice should also require that a record be kept of the work of the CHIS in order to allow this to be put before a judge on subsequent applications for CHIS authorisation involving the same operative or persons.

16. As a corollary of this, the decision given by the judge should contain a full and reasoned analysis of the impact of the proposed operation on the human rights of the target, and of any other individuals with whom the CHIS is likely to have contact. This should focus, in particular, on their rights under Articles 6 and 8 of the ECHR.

## **Conclusion**

17. The flaws in the regulation of the use of CHIS are representative of the weaknesses that permeate the whole structure of RIPA. The Act was necessary to impose some sort of statutory oversight on these most intrusive police powers. However, as drafted, the safeguards in the Act are inadequate to ensure that the human rights of those subject to investigatory powers are protected. This Bill provides a timely opportunity to rectify one RIPA power which, recent revelations have shown, has been abused in a particularly egregious manner. The outcry following the revelations that the Lawrence family were spied on by undercover officers demonstrates the level of public concern about this issue. The Anti-social Behaviour, Crime and Policing Bill will reach Report stage in the Commons when Parliament returns, and will be the first opportunity for the whole House to propose changes to the Bill. We urge MPs to table this amendment, and so take a practical step to help ensure that these sorts of abuses of power cannot occur in the future.

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<sup>3</sup> See the existing Code of Practice on Covert Human Intelligence Sources available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97958/code-practice-human-intel.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97958/code-practice-human-intel.pdf)