CBA Response
to 'RIPA 2000: revised interception of communications code of practice' Consultation 2010

Preamble - Purpose of the Consultation

On 12th March 2010, the Home Office published a consultation document entitled 'Regulation of Investigatory Powers Act 2000: revised interception of communications code of practice - a consultation.' It states that:

'The main purpose of RIPA is to ensure that the various investigatory techniques covered by the Act are exercised lawfully and compatibly with the European Convention on Human Rights. The Interception Code of Practice provides guidance on the interception of communications under chapter I of part I of RIPA.

Changes have recently been made to the statutory codes of practice for covert surveillance and covert human intelligence sources (which came into force on 6 April 2010)[1] We need to make some minor consequential changes to ensure the interception code of practice remains consistent with the new part II codes and to update the list of public authorities who may apply for an interception warrant to reflect organisational name changes. We are also taking the opportunity to amend chapter 5 (Interception warrants (section 8(4))) and chapter 6 (Safeguards) to provide additional clarity in relation to the procedures for

[1] In July 2009, the Criminal Bar Association provided a detailed response to the substantive Home Office Consultation on changes to RIPA, entitled 'Response of the Criminal Bar Association to the Home Office Consultation on Changes to the Present Regime governing Communications Data under RIPA 2000'.

selecting and examining material intercepted under the authority of a section 8(4) warrant.'

INTRODUCTION

1. The Criminal Bar Association welcomes the opportunity to respond to the Interception of Communications Draft Code of Practice pursuant to section 71 of the Regulation of Investigatory Powers Act 2000. In setting out this response, it should be noted that the Criminal Bar Association represents some 3,600 employed and self-employed members of the Criminal Bar, many of whom both prosecute and defend in the most serious criminal cases throughout England and Wales.

LEGISLATIVE FRAMEWORK

2. The Regulation of Investigatory Powers Act 2000 is:

> 'An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed; to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters, to entries on and interferences with property or with wireless

telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters; and for connected purposes.'

3. The Code of Practice provides guidance on the procedures that must be followed before interception of communications can take place under those provisions.

RESPONSE TO PROPOSED REVISIONS

Secretary of State to believe that the conduct is proportionate [para 2.3]

4. The clarification of the requirement for the Secretary of State to believe that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct is welcomed. It is likely that this is the case under the current Code of Practice but the amendment in the Draft Revised Code makes the position clearer.

Internal review of application by more than one official prior to submission [para 4.2]

5. Similarly, the safeguard added by the Draft Revised Code which provides that prior to submission each application for a s.8(1) warrant shall be subject to an internal review involving scrutiny of purpose, necessity and proportionality by more than one official is an important and necessary

amendment. The same addition is made to the application process in relation to s.8(4) warrant.

Safeguards [para 6]

6. The Draft Revised Code provides further safeguards in relation to who can have access to material gathered under a s.8(4) warrant (i.e. confining the conduct to conduct consisting in the interception of external communications in the course of their transmission by means of a telecommunications system where the Secretary of State has certified the descriptions of intercepted material the examination of which he considers necessary and that he considers the examination of material of those descriptions necessary for one of the 3 specified interest and purposes).

7. Such additional safeguards are welcomed. They address some of the concerns of the ECtHR in its judgment in the case of *Liberty and Others v. the United Kingdom (application no. 582443/00)* which, while dealing with a complaint under the previous regime (the Interception of Communications Act 1985) went on to make robust comments about the safeguards provided under RIPA 2000 and the Code of Practice. Section 8(4) warrants permit conduct which results in data being captured indiscriminately. The additional safeguards help to put the position on a more similar footing as s.8(1) and (2) warrants (the interception of internal communications).

8. However, it is to be noted that the Draft Revised Code does not go so far as to publish in detail the arrangements made by the Secretary of State for the examination, use, storage, communication, and destruction of intercepted material no doubt on the grounds that it may damage the efficacy of the intelligence-gathering system. In contrast, the German authorities have considered it safe to include in the G10 Act express provisions about the treatment of material derived from strategic interception as applied to non-German telephone connections. In particular the G10 Act makes detailed provision for the use of search terms, storage, transmission, retention, use and destruction of such material, well beyond that which is set out in the Draft Revised Code. It is submitted that it would be in the interest of justice for the revised Code to go further and provide for such detailed arrangements.

Disclosure to a Judge [para 7.12]

9. One of the difficulties that is foreseeable in practice is the nature of information that can be provided to the judge as part of his decision-making pursuant to s.18(8) (disclosure of information) of the Act without him being aware of the information. In our view, where the circumstances are such that the judge would be unable to decide whether or not the exceptional circumstances of the case make the disclosure essential in the interests of justice without the disclosure being made, it should be a decision which a prosecutor should be able to make as well as a judge. The current position encourages breaches of s.17(1) of RIPA 2000.

10. It is submitted that the Code of Practice should give guidance as to where the circumstances of a case might qualify as exceptional and thus necessitate a disclosure to the judge. The reality is that the only circumstances that can amount to exceptional requiring a disclosure to the judge are where there is a risk of prejudice to the defendant or where there is material which might either undermine the Crown's case or assist the defendant's case.

11. It is submitted that the prosecutor should be able to make the decision that the exceptional circumstances of the case make a disclosure to a judge essential. There appears to be no significant harm that could flow from this approach being adopted. It is appreciated that this would necessitate a change in the primary legislation but it is submitted the purpose of this consultation provides for such responses to be made.

CONCLUSION

12. The proposed revisions to the Code as far as they go are welcomed. However, while the Draft Revised Code goes some way in dealing with concerns as to safeguards that remain following the repeal of IOCA 1985 by the implementation of RIPA 2000, consideration should be given to setting out as much of the detail as possible of the arrangements made by the Secretary of State for the examination, use, storage, communication, and destruction of intercepted material. Furthermore, consideration needs to be given to providing detailed guidance to prosecutors

and judges regarding disclosure under section 18 (8) of the Act.

Sean Larkin QC

David Hewitt

Edmund Vickers

Helen Lyle

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