



Covert Human Intelligence Sources (Criminal Conduct) Bill 2019-2021

Briefing

Background

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

Our Criminal Law Committee has considered the Covert Human Intelligence Sources (Criminal Conduct) Bill 2019-2021 (the Bill) which was introduced to Parliament on 23 September 2020.

The Legislative Consent Motion to the Bill is due to be debated at the Justice Committee on Tuesday 19 January 2021.. (The Bill is due its third reading at the House of Lords on 21 January 2021.)

The Scotland Act 1998 Schedule 5 Section B8 reserves national security to the UK Parliament.

Purpose of the Bill

The purpose of the Bill is to provide powers for the security and intelligence agencies, law enforcement agencies and a limited number of other public authorities to authorise Covert Human Intelligence Sources (CHIS)¹ to participate in criminal conduct for certain purposes where it is necessary and proportionate. The Bill amends Part II of the Regulation of Investigatory Powers Act 2000 (RIPA).

In Scotland, the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S) A applies to authorise CHIS. In order to achieve “operational parity across the UK”, the Bill makes similar amendments to RIP(S)A which are included under clause 3 and Schedule 1 of the Bill.²

The Bill has been introduced in response to the “Third Direction” judgment from the Investigatory Powers Tribunal.³ That case raised, as does this Bill, “one of the most profound issues which can face a democratic society governed by the rule of law.”⁴

The policy of authorising the commission of criminal offences by MI5 officials and agents was challenged as being unlawful in domestic public law and was said to be non-compliant with the rights in the European Convention on Human Rights. Though the Tribunal’s decision upheld the Government, it was a majority decision which remains under appeal. We understand that the appeal decision may be due at the earliest in February.

Certainly, the introduction of the Bill is an attempt at “providing certainty to public authorities utilising such powers.”⁵

We understand and recognise the need for clarification which the Bill attempts to bring. It seeks to address challenges that contribute to a gap of “uncertainty between formal, public, national security law and the way that such law operates in practice.”⁶ This discordance within the current system is undermining both the accountability of the UK Government for its national security activity.

¹ Security and intelligence agencies, law enforcement agencies and a limited number of other public authorities

² Paragraph 15 of the Bill’s Explanatory Notes

³ <https://www.ipt-uk.com/judgments.asp?id=53>

⁴ <https://www.ipt-uk.com/judgments.asp?id=53>

⁵ The Bill’s Explanatory Notes paragraph 10

⁶ <https://ukconstitutionallaw.org/2020/07/07/daniella-lock-the-third-direction-case-part-one-miller-nos-1-and-2-in-the-national-security-context/>



The Bill seeks as its justification the impact of “events of recent years, for example in Manchester and London in 2017” that serve to “underline the need for such intelligence gathering and other activities in order to protect the public from serious terrorist threats.”⁷

However, our concerns with the Bill focus on the nature of the powers, the role of national security policy and for those responsible for oversight of the use of such powers as “potentially on the basis that there are no limits on the types of criminal conduct that could be permitted under this authorisation, which raises the obvious concerns about the potential use of murder, torture and sexual violence.”⁸

What the Bill does

The Bill applies to CHIS and not to any other forms of surveillance under RIP(S)A.

Under the Bill⁹, authorisation for participation in criminal conduct may only be granted where necessary (i) in the interests of national security, (ii) for the purpose of preventing or detecting crime or of preventing disorder, or (iii) in the interests of the economic well-being of the United Kingdom.

Authorisation of criminal conduct in the Bill means in the “course of, or otherwise in connection with, the conduct of a covert human intelligence source are references to any conduct that (a) disregarding this Act, would constitute crime, and (b) consists of, is in the course of, or is otherwise in connection with, the conduct of a covert human intelligence source.”¹⁰ What the effect of a criminal conduct authorisation issued under the Bill regime will be is to render the authorised conduct “lawful for all purposes.”

The test for a relevant criminal conduct authorisation to be granted is that the person is satisfied that: (a) that the authorisation is necessary for the purpose of preventing or detecting crime or of preventing disorder (b) that the authorised conduct is proportionate to what is sought to be achieved by that conduct and (c) that arrangements exist that satisfy such requirements as may be imposed by order made by the Scottish Ministers.

The public authorities that will have power to authorise involvement in criminal conduct are extensive under schedule 1 of the Bill including any police force (which includes Police Scotland), the NCA, the SFO, any of the intelligence services, any of HM forces, HM Revenue and Customs, the Department of Health and Social Care, the Home Office, the Ministry of Justice, the CMA, the Environment Agency, the FCA, the Food Standards Agency and the Gambling Commission.

Issues to raise

Scope of the Bill:

There is no clear-cut way in which to respond to national security-related threats.

What has been proposed does not provide that necessary clarity. It seems to increase uncertainty between national security law and the way that criminal law operates in practice and seeks to undermine the rule of law in respect that powers should be exercised according to the well-established rules and in accordance with legal principles.

⁷ <https://www.ipt-uk.com/judgments.asp?id=53>

⁸ House of Commons 5 October 2020 [https://hansard.parliament.uk/Commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/Commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources(CriminalConduct)Bill)

⁹ Paragraph 2(2) of Schedule 1 amends section 1 of RIP(S)A

¹⁰ Paragraph 2(3) of Schedule 1 amends section 1 of the RIP(S) A



The Bill authorises persons within the relevant organisations to act with impunity where authorised by indicating that the criminal law will not apply to them in undertaking acts which would otherwise result in prosecution and conviction.

In most circumstances, what will happen is that justification of the criminal conduct will be sought after the event (our emphasis). Similar issues will arise as to whether there has been a breach of any ECHR rights.

The Bill's Human Rights Memorandum concludes that the Bill is ECHR compliant. It states that:

"The scenarios in which criminal conduct may be authorised are varied and the legal analysis will depend heavily on the facts of the particular case. It would be impossible to hypothesise as to the facts of any particular case and the legal analysis which would apply to that case."¹¹ We recognise to that extent there is a need to be non-specific affording some latitude but examples exist from Northern Ireland where the intelligence practices of security forces in facilitating and directing serious crimes by informants damaged the rule of law. Parties there acted as if the law did not apply to them. The then Prime Minister David Cameron in 2012 admitted in relation to the death of the lawyer, Pat Finucane that there were "shocking levels of state collusion."

What the Bill sanctions is for such criminal acts to be carried out within the law, instead of outside of it.

There are now limits to the types of criminal conduct to be permitted under the authorisation that includes intentionally causing death or grievous bodily harm, obstruction or perversion of the course of justice, offences under the Sexual Offences (Scotland) Act 2009, torture, inhuman or degrading treatment or punishment and deprivation of liberty.¹² This reflects concerns about the need to restrict certain categories of crimes as where criminal actions take place, they are no less serious when placed on a legal footing.¹³

Scrutiny:

Oversight of the exercise of these powers lies with the Investigatory Powers Commissioner (IPC).

The IPC requires to produce an Annual Report to the UK Parliament which will include information about any public authorities' use of these criminal conduct authorisations.¹⁴ Though paragraph 55 of the Bill's Explanatory Notes refer to that Report including information such as statistics about public authorities' use of criminal conduct authorisations¹⁵, the operation of safeguards in relation to authorisations, there is no requirement to report "errors" as is suggested.

Indeed, such reporting will be restricted to existing protections for information that relates to matters such as national security and the prevention or detection of serious crime.¹⁶ The scrutiny after the event will be limited and does not provide Parliament with the robustness that the exercise of these powers should command.

Where a public authority takes a precautionary approach, they may grant a Criminal Conduct Authorisation (CCA) in circumstances in which the public authority is uncertain whether the conduct to be authorised would amount to a criminal offence. Examining actions after the event is too late.

¹¹ Paragraph 12 [https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf)

¹² Section 1(5) of the Bill as amended https://publications.parliament.uk/pa/bills/lbill/58-01/161/5801161_en_1.html

¹³ Grainne Teggart, Amnesty International UK's Northern Ireland Campaigns Manager

¹⁴ Clause 4(3) of the Bill where it amends section 234 of Investigatory Powers Act 2016

¹⁵ Section 234 of the IPA refers to statistics on the use of the investigatory powers which are subject to review by the Investigatory Powers Commissioner (including the number of warrants or authorisations issued, given, considered or approved during the year)

¹⁶ Section 234 of the IPO information about the results of such use (including its impact), (c) information about the operation of the safeguards



Though the Government has proposed an amendment to the Bill under section 3 to allow for a CCA to be notified to Investigatory Powers Commissioner's Office (ICPO) as soon as is reasonably practicable and, in any event, within seven days, this does not provide adequate or effective scrutiny.

Given the wide scope of the Bill's provisions, further safeguards should be included. The suggestion made of prior approval by a Judicial Commissioner at IPCO before a CCA can be granted seems appropriate. Independent judicial scrutiny of an application for a CCA before any activity takes place seems very necessary.

The Bill does not provide that "rigorous framework of oversight and accountability necessary to safeguard against abuse of the power to authorise criminal conduct."¹⁷

Considering the Report issued after each inspection, and to set out the IPCO's conclusions and recommendations is much too late. Systemic review does not ensure that the CCA was granted appropriately. There is a hint too in the reference to the annual report being the culmination of a long and extensive process of scrutiny of all public authorities. (our emphasis). We also cannot agree that failing to provide a list of specific crimes, or even categories of crime that CHIS have been authorised to commit in a particular year is appropriate. While revealing sensitive operational detail about how the operation of our public authorities may be a concern, there are means by which this information can be redacted if it genuinely led to criminal groups and terrorist organisations identifying when such crimes have been committed by their members, highlighting CHIS within their ranks. A theoretical risk is not justification for ineffective scrutiny¹⁸.

Public Authorities:

Given the range of the public authorities highlighted above, there is a clear need for that they operate only for the purposes of national security, prevention or detection of crime, and the preservation of the economic wellbeing of the United Kingdom. Adding any further public authorities requires the affirmative parliamentary process which provides additional scrutiny. What seems important would be the ability to remove a public authority from the ability to grant a CCA in the event of circumstances where they had breached or exceeded the terms of the Bill.

It is essential that all public authorities receive appropriate training to ensure Authorising Officers understand what standards need to be met before authorising a CCA. The reporting function should examine this aspect as well.

¹⁷ <https://committees.parliament.uk/publications/4177/documents/41645/default/>

¹⁸ <https://committees.parliament.uk/publications/4177/documents/41645/default/>