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 Second Reading of the Bill is due in the House of Commons on 5 October 2020. The Scotland Act 1998 Schedule 5 Section B8 reserves national security to the UK Parliament.

Background to 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[2] which are included under clause 3 and Schedule 1 of the Bill.

The Bill is being 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 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 is under appeal.

Certainly, the introduction of the Bill is an attempt at "providing certainty to public authorities utilising such powers."[5] We recognise that need for clarification which the law brings and understand the justification as a result of 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."[6]

However, questions remain as to the nature of the powers being granted, the role of national security policy and the role played by those responsible for oversight of the use of such powers.

What the Bill does

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

[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] Bill's Explanatory Notes paragraph 10
[6] https://www.ipt-uk.com/judgments.asp?id=53

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Under the Bill,[7] 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.

References to criminal conduct in the Bill are "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."[8] 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 is being proposed does not provide that clarity but seems to increase uncertainty between national security law and the way that criminal law operates in practice and undermines the rule of law.

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 and similar issues will arise as to whether there has been a breach of any ECHR rights. The Bill's Human Rights Memorandum in concluding the Bill is ECHR complaint, 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."[9]

There have been examples such as in Northern Ireland where the intelligence practices of security forces in facilitating and directing serious crimes by informants damaged the rule of law with parties were acting as if the law did not apply to them. The then Prime Minister David Cameron in 2012 admitted in the death of the lawyer Pat Finucane 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.

[7] Paragraph 2(2) of Schedule 1 amends section 1 of RIP(S)A
[8] Paragraph 2(3) amends section 1 of RIP(S)A
[9] Paragraph 12 https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf

There are no limits on the types of criminal conduct that could be permitted under the authorisation. Consideration could be given to restrict certain categories of crimes which should not be permitted such as torture or sexual offences.

We echo the concerns that where criminal actions take place, they are no less serious when placed on a legal footing.[10]There are safeguards within other law enforcement agencies such as the Canada's intelligence service, CSIS[11] where reference can be made.

Where a public authority takes a precautionary approach, they may grant a criminal conduct authorisation in circumstances in which the public authority is uncertain whether the conduct to be authorised would amount to a criminal offence. Examining after the event that the criminal conduct authorisation will only have effect to the extent that the authorised conduct would constitute crime is too late when someone has been killed or tortured.

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.[12] 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 authorisations,[13] the operation of safeguards in relation to authorisations,[14] 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. The scrutiny after the event will be limited and may not provide Parliament with the robustness that the exercise of these powers should command.

In conclusion, given the nature of the policy there needs to be checks and balances to ensure the effective operation of these organisations to ensure that there is public confidence in the use of these powers by providing limited on their use and adequate scrutiny.

[10] Grainne Teggart, Amnesty International UK's Northern Ireland Campaigns Manager
[11] https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont
[12] Clause 4(3) of the Bill where it amends section 234 of Investigatory Powers Act 2016
[13] 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)

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