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My Lords,

COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL – COMMITTEE STAGE DAY 1 AND 2

I thank all Noble Lords for their considered contributions to the debates so far in Committee for the Covert Human Intelligence Sources (CHIS) (Criminal Conduct) Bill. I am writing in response to several questions that were raised and where I undertook to write.

Rendering conduct lawful

I would like to start by reiterating that our approach here is not without precedent or in any way at odds with our commitment to the rule of law. This Bill amends a pre-existing framework for investigatory powers, which includes powers such as property interference, intrusive surveillance, equipment interference and interception where, without valid authorisations, such conduct would be unlawful. Our model replicates, and is consistent with, the existing regimes.

It is right that, where the State has asked someone to act on its behalf, in order to keep people safe, that person has confidence they will not be prosecuted for such conduct. To do otherwise is unfair. One of the aims of this Bill is to resolve the tension that has previously existed in this area.

Lord Paddick asked for statistics showing the number of intelligence-gathering opportunities lost, or where CHIS had not been recruited or retained, because insufficient reassurance could be given about prosecution. The context was his proposition that the majority of CHIS and handlers carried out their duty to date – so they cannot have felt that unfairness.

Public authorities do not gather statistics on intelligence opportunities lost but it has long been recognised that a statutory regime would be the best way to offer clarity and protection to agents and handlers.

Baroness Manningham-Buller spoke powerfully to this point. It is a great credit to the intelligence agencies, law enforcement and wider users of CHIS that they have achieved the results that they have within the current constraints. We consistently

expect, and receive, commitment and innovation from the officers and agents involved in these processes. But I reject the notion that the status quo has, or has ever had, overwhelming support among users, or that their operational successes are a sound reason not to legislate.

I have talked to the officers who train MI5 and police handlers – experienced agent handlers and controllers – and they echo Baroness Manningham-Buller's point that the current position is unsatisfactory. It is they who tell me that they have lost intelligence gathering opportunities and, on occasion, been unable to recruit CHIS, or had CHIS walk away from their role, because clear protection from prosecution had not been provided.

The relationship between CHIS and handler is built on trust; and credit must be earnt and spent in these relationships. Handlers spend a significant degree of that trust convincing CHIS it is worth taking the risk of prosecution. This affects those relationships – the spending of trust results in less effective CHIS operations, which ultimately reduces our ability to protect the public.

Lord Paddick also asked for the number of CHIS prosecuted for authorised criminal conduct. We do not collect these statistics. I understand the numbers are low but it is not unprecedented. This does not take away from my main point that it is right and fair to legislate to put the matter beyond doubt.

Redress

Turning to the debate on routes of redress, I would like to offer some further reassurance that appropriate routes remain available under the Bill.

Under the Regulation of Investigatory Powers Act 2000 (RIPA), any person or organisation is able to make a complaint to the Investigatory Powers Tribunal (IPT) with regards to investigatory powers under Part II of the Act. As the Bill will be inserting new Section 29B into Part II of RIPA, the Tribunal's jurisdiction will extend to criminal conduct authorisations (CCAs).

The Tribunal is entirely independent of government and was set up to consider complaints by any person who believes that they have been the subject of unlawful action by a public authority using investigatory powers. This includes complaints about conduct by or on behalf of the intelligence agencies or where someone believes that there has been an infringement of their human rights by those agencies. Where this has been the case the Tribunal can provide appropriate redress.

It is free to make a complaint to the Tribunal and there is no requirement for the person making the complaint to provide evidence in support of it.

There are obligations placed on the Tribunal to investigate all valid complaints. Equally, public authorities and the Investigatory Powers Commissioner's Office (IPCO) are under a statutory duty to provide the Tribunal with all necessary documents and information to assist in their investigations. They cannot hold anything back on the basis of secrecy or national security.

Whilst the Tribunal has the same powers to grant remedies as other courts, it operates in a different way and it will adopt an investigative approach in order to establish what has happened in each case. Where a complaint is upheld, the Tribunal has the power to stop activity, cancel authorisations, order the destruction of material and grant compensation as appropriate.
In addition, where a person is the victim of conduct not covered by the (tightly drawn) CCA, the authorisation would not offer protection from criminal liability. This includes any claims made under the Criminal Injuries Compensation Scheme. The Bill does not, in practice, interfere with the operation of that scheme.

Another important safeguard is the obligation on the Investigatory Powers Commissioner (IPC) to inform a person of a serious error that relates to them, where it is in the public interest to do so. In the CHIS context, a serious error could include situations where the Commissioner considers that an authorisation has caused significant prejudice or harm to the person concerned. The Commissioner must also inform the person of any rights that they have to apply to the IPT.

Interaction with the Proceeds of Crime Act 2002

Baroness Jones asked about the interaction between CCAs and the Proceeds of Crime Act 2002 (POCA), particularly whether a CCA could provide cover for a CHIS to continue to make illicit profits alongside their work as a CHIS.

Criminal conduct which takes place outside of the scope of a CCA where, as a result, a CHIS may accrue benefits (i.e. continuing to make illicit profits alongside their work as a CHIS), would still be criminal conduct for the purposes of the confiscation regime in POCA, and unlawful conduct for the purposes of the civil recovery regime in POCA, and such benefits could be liable to be recovered under either of those regimes.

Reasonable belief

Lord Anderson asked whether both the CHIS Code of Practice and the Bill could be amended to reflect that the belief of the authorising officer should be a reasonable one. The Advocate General for Scotland explained in the debate why the Government has not included the word ‘reasonable’ on the face of the Bill - it is to ensure consistency with the pre-existing statutory framework in RIPA. Including "reasonable belief” for CCAs, but not other powers under RIPA, would create inconsistency and could cast doubt on the test to be applied for other authorisations. This would, in particular, create what would appear to be a different test for the section 29 CHIS use and conduct authorisation, and the related CCA.

However, I am happy to update the Code of Practice to make clearer that it is expected that the belief of the authorising officer should be a reasonable one.

Journalistic material and sources

I committed to writing to Baroness Whitaker to provide more detail on the protections that apply to confidential journalistic material. As Chapter 9 of the updated CHIS Code of Practice sets out, there is a strong public interest in protecting a free press and freedom of expression in a democratic society, including the willingness of sources to provide information to journalists anonymously.

The Code sets out the safeguards that apply when confidential journalistic material is likely to be acquired. When a public authority applies for an authorisation where the purpose, or one of the purposes, of the CHIS authorisation or CCA is to identify or confirm a source of journalistic information, the application must contain a statement confirming that this is the purpose (or one of the purposes) of the application. The authorising officer may only grant the authorisation if they consider that appropriate safeguards relating to the handling, retention, use and disclosure of the material are in place.

There is also a requirement for authorisation at a more senior level than that required for other CHIS activity, reflecting the sensitive nature of such information. In addition, confidential journalistic material, or that which identifies a source of journalistic information, must also be reported to the IPC, as soon as reasonably practicable, if it has been obtained or retained other than for purposes of destruction.

Authorisations granted in error

Noble Lords have queried what would happen to a CCA that had been granted in error. I thought it might be helpful to provide some more detail on that issue ahead of tomorrow's debate.

First, let me reassure Noble Lords that there are robust internal processes in place that seek to minimise the risk of errors taking place within the public authorities. CHIS handlers and authorising officers are experienced, trained and have clear and detailed guidance that they must follow in deciding whether to grant a CCA. This training includes instruction and testing on the application of all relevant legislation, including the Human Rights Act; the ability to interpret those obligations into clear, lawful and effective tasking for CHIS; the skill to gauge the CHIS' own aptitude and ability, so that they are given tasking they can understand and follow; and the ability to identify and mitigate legal risks in dynamic as well as pre-planned circumstances.

Every authorisation undergoes a robust internal scrutiny process and, as part of this, is considered by multiple people within the organisation. RIPA requires there to be both a handler and senior authorising officer for every authorisation and an authorising officer cannot authorise their own activities. This separation in responsibilities also reduces the risk of errors. This, of course, also means that were an officer to be corrupt, it would not be possible for them to legally authorise conduct without oversight by other members of the public authority.

Each public authority must also have internal governance processes to deal with any errors. These processes are subject to review by the IPC. The processes will, of course, depend on the specific error, but could for example include training for handlers and authorising officers and disciplinary proceedings, where appropriate.

These internal checks and balances are enhanced with independent oversight. The Investigatory Powers Act 2016 (IPA) already provides a mechanism for the IPC to identify and report errors for all investigatory powers, which will include CCAs. Public authorities must proactively report errors and take action in response to matters identified by the IPC. This would include situations where CHIS activity has taken

place without lawful authorisation or there has been a failure to adhere to the necessary safeguards. Where it amounts to a serious error, the IPC must inform the person of an error relating to them where it is in the public interest to do so.

I should note that an error will not necessarily mean that any criminal conduct has occurred. There are a range of possible errors which have no bearing on the conduct of the CHIS; for instance, where a CHIS section 29 authorisation has been discontinued, and the public body has ceased all engagement with the former CHIS, but has neglected to cancel the CCA.

The IPC is entirely independent of Government and the public authorities that he oversees. He has wide-ranging powers to carry out his oversight functions, as set out in the IPA. This includes a power for Judicial Commissioners “to provide advice or information to any public authority or other person in relation to matters for which a Judicial Commissioner is responsible” (section 232(2) IPA), subject to consultation with the Secretary of State.

Where an error has occurred, and the activity remains potentially criminal, the primary responsibility for reporting such crime falls on the public authority, who have their own specific policies to deal with this. However, IPCO could advise the public authority that it ought to refer criminal conduct to the appropriate authorities or, ultimately, report it themselves subject to the considerations set out above. The regime is comprehensive and works well – errors are rare.

I hope this letter is helpful and provides reassurance on some of the issues raised in the debate so far. I welcome the opportunity to speak to any Noble Lords with concerns before Report Stage and I am willing to explore whether there is greater detail we might be able to offer in private discussion, balancing the need to ensure Noble Lords are suitably informed in this area with the operational sensitivities of this activity.

BARONESS WILLIAMS OF TRAFFORD