Home Office

Baroness Williams

2 Marsham Street
London SW1P 4DF
www.gov.uk/home-office

TO: ALL PEERS

8 January 2021

My Lords,

COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL – COMMITTEE STAGE DAYS 3 AND 4

I thank Noble Lords for their contributions to the debates in days three and four of Committee for the Covert Human Intelligence Sources (CHIS) (Criminal Conduct) Bill. I write in response to questions asked during those debates and to which I committed to writing on.

I have also today published factsheets which provide further detail on the authorisation process, which I hope provides reassurance to Noble Lords on the internal processes and training which underpins this regime. These can be found at https://www.gov.uk/government/publications/covert-human-intelligence-sources-draft-code-of-practice.

Serious crime threshold

The Noble Lord, Lord Paddick asked about why the statutory purposes for an authorisation are not restricted to prevention of 'serious crime'. The statutory purposes that will be available for a criminal conduct authorisation are linked to those that are available for a use and conduct authorisation under section 29 of the Regulation of Investigatory Powers Act 2000, where it is specified that an authorisation can be granted for the purposes of the prevention or detection of crime or of presenting disorder.

The Government therefore considers the definition in the Bill to be appropriate for this power. As I set out in the debate; to restrict the prevention of 'crime' to 'serious crime', would mean that public authorities are less able to investigate crimes that, while not amounting to a serious crime, have a damaging impact on the lives of their victims. Of course, any criminal conduct authorisation must be proportionate to the activity it seeks to prevent; if it is not, then that authorisation will not be granted.

Undercover policing inquiry

The Undercover Policing Inquiry was referenced by a number of Noble Lords. I would like to provide some further reassurance on the substantial changes that have been put in place in recent years to enhance the oversight and safeguards that apply to undercover work.

I have listened with interest and sympathy to the situations and experiences recounted by Noble Lords during the debates. It is clear that the most egregious examples given should not have happened, but in response it may help to emphasise the lessons already learnt which have led to extensive additional safeguards and training requirements being put in place for authorisations which happen now.

There are now much more stringent safeguards in place to guard against these mistakes being repeated. In 2014 the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013 came into force. The Order applies enhanced safeguards to section 29 (use and conduct) authorisations for Relevant Sources - undercover operatives from policing or other law enforcement agencies. This includes a higher rank of authorising officer than for other CHIS and greater oversight by the Investigatory Powers Commissioner. All of these changes were brought about to address specific concerns that were raised about law enforcement undercover deployments; they have been tested in the operational and judicial environment over the last six years and we believe them to be robust and fit for purpose.

There is also rigorous and licensed training provided by the College of Policing to all undercover officers and those managing the undercover officers. Since the 2013 order came into force it has been an operational requirement for all authorising officers to have completed and passed licensed training before granting authorities to deploy undercover officers.

I would also like to clarify what I said about this on the floor of the House. Whilst the conduct that is the subject of the inquiry was completely unacceptable and should not have taken place, let me take the opportunity to be slightly clearer in saying that whilst any *authorisation* of the conduct would have been and continues to be unlawful, it is not necessarily the case that the conduct itself was unlawful. I am however confident that the combination of new legislation, training and guidance in place for policing would act as a safeguard against this from taking place in the future.

Limits

Noble Lords raised concerns about the limits to the conduct that can be authorised under the Bill and in particular, referenced paragraphs 14-16 of the Bill's ECHR memorandum. Whilst I won't repeat what I said on the floor of the house I would like to offer some reassurance on that point in particular. This issue is also addressed in the Government's response to the Joint Committee on Human Rights report, issued on 05 January 2021.

On the issue of the extent to which the Human Rights Act applies to the conduct of CHIS: nothing in this Bill seeks to undermine the important protections in the Human Rights Act. The Government will not act in a way that is in breach of its legal obligations under the Human Rights Act, and this includes in circumstances in which the Human Rights Act applies overseas. All criminal conduct authorisations will comply with the Human Rights Act as well as with relevant domestic and international law.

The requirement on the face of the Bill that any authorisation be necessary and proportionate, together with the Human Rights Act, provide the necessary and entirely sufficient protection. For example, if, on the particular facts, an authorisation would amount to a breach of say Article 3 - the prohibition against torture - it would be unlawful.

The Human Rights Act also places protective obligations on the State. Where the State knows of the existence of a real and immediate threat to a person, the State must take reasonable measures to avoid that risk. This protective obligation is at the heart of CHIS authorisations.

However, there are significant problems with trying to provide explicit limits on the face of the Bill based on a description of conduct, which is what several amendments from Noble Lords propose. The prime consequence of such a provision will be to put CHIS and the public at risk. Providing any definition of activity which cannot be authorised will be to provide an example or a list against which suspected CHIS could be tested.

In some cases, the threat will be wider, and whatever crime we specify will be used as an initiation test for all new members of a group – as a proof of commitment and trustworthiness. Whilst a CHIS would be unable to carry out this activity, a person who is not a CHIS, but is asked to prove themselves, may commit these serious crimes. This serves only to increase the threat to the public who will be the victims of these tests, whilst making it harder to infiltrate CHIS into these groups, and to frustrate them and bring them to justice.

This does not mean that if a CHIS were asked to commit any crime now as part of an initiation then they could do so – the Human Rights Act and necessity and proportionality test already provide limits – but at present, the specific limits of conduct which can be authorised are not set out in the form of a list for criminal groups to utilise.

Who an authorisation covers

I would also like to offer further clarity on who can be authorised under the Bill and to whom the legal protections can apply. Noble Lords were concerned that the wording in the Bill was too broad and that it is not clear who could be covered. The wording “in connection with” and “in relation to” is consistent with the drafting of section 29 of the Regulation of Investigatory Powers Act 2000 (RIPA) which provides for the authorisation of the use and conduct of CHIS. During Committee debates my Noble friend, Lord Stewart, spoke in detail about how the new Section 29B needs to be consistent with the existing statutory framework, and in particular, the existing CHIS framework under Section 29 of RIPA.

A criminal conduct authorisation can cover a CHIS handler, authorising officer and the CHIS themselves, provided that their activity is in relation to or in connection with the conduct of the specified CHIS, and of course meets the necessity and proportionality and HRA requirements. Further restrictions also apply; the authorisation must be for a purpose connected to the underlying point of the section 29 CHIS authorisation and must relate to the conduct of that particular CHIS, on that specific operation or investigation.

It would not be possible to grant an authorisation for criminal conduct which was not by the CHIS for a specific, identified purpose, or which involved members of the public authority making, or giving effect to, the authorisation

I should also be clear that an authorising officer can never authorise their own activity; the role of handler and the role of authorising officer must be separate people. Section 6.12 of the CHIS Code of Practice says, 'as for use and conduct authorisations (see 5.8) an authorising officer must not authorise their own activities, including criminal conduct'.

CHIS going beyond their authorisation

The Noble Lord, Lord Morris, asked for information on the number of times a CHIS has exceeded their authorisation in the past. Similarly to the questions put forward asking how many times CHIS have been prosecuted in the past, this information is not centrally held and it would also not be possible to provide such sensitive information publicly.

However, where a CHIS exceeds their authorisation, whether because they felt it was necessary in the live operational environment, or whether it was intentional, it would be a decision for prosecutors as to whether it was in the public interest to bring forward a prosecution. The legal protections within the Bill can only cover the very specific activity that had been contained in the tightly bound authorisation.

Delegated powers

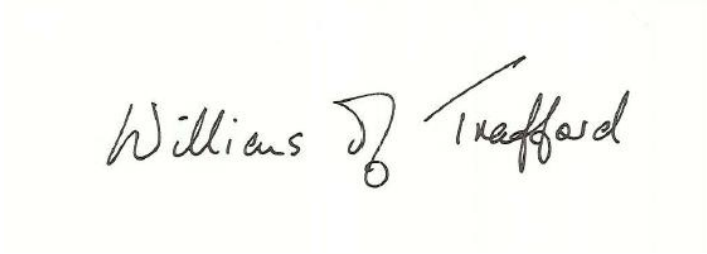
Noble Lords also sought clarification on what the delegated powers in clause 1(5) of the Bill could or would be used for. Clause 1 (5) inserts s29B(4)(c) and (10) which allow for additional requirements to be imposed before a criminal conduct authorisation may be granted, or for the authorisation of certain conduct to be prohibited. They can only be used to further strengthen the safeguards that are attached to the use of criminal conduct authorisations. They could not be used to remove any of the existing safeguards.

These powers will be used to make consequential amendments to the existing requirements that apply to s29 authorisations for CHIS so that certain of those requirements also apply to criminal conduct authorisations under 29B. It may be the case that additional safeguards and requirements arise in the future that will need to be legislated for under these powers.

An example of the past use of the section 29 powers is the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013, which I referenced above and which imposes specific additional requirements that must be met in relation to the authorisation of Relevant Sources (undercover officers). This provides greater oversight of undercover deployments by the Investigatory Powers Commissioner's Office.

The Noble Lord, Lord Hodgson also asked specifically about whether the statutory purposes for which an authorisation could be granted can be amended through secondary legislation. I can confirm that they cannot.

I hope that the above is helpful. As I said during the debates, I am very happy to discuss this in further detail with any Noble Lord if they would find that useful.



Baroness Williams