



Rt Hon Lord Wallace of Tankerness QC
House of Lords
London
SW1A 0PW

DECS Reference: MIN/0127785/21

26 January 2021

Dear Jim,

Thank you for your letter of 10 January to the Home Secretary regarding the Covert Human Intelligence Sources (Criminal Conduct) Bill, specifically the issue of whether there should be explicit limits on the face of the Bill. Your letter has been passed to me for reply as the Security Minister has taken a temporary leave of absence for curative surgery.

I am pleased we agree that there are rare occasions where it may be necessary and proportionate for Covert Human Intelligence Sources (CHIS) to undertake strictly controlled criminal conduct. I am also pleased that you strongly support the need to place this vital tactic on a statutory footing. This is not a new technique; public authorities already have the ability to authorise CHIS to undertake criminal conduct that is judged to be necessary and proportionate to the criminal or terrorist activity they are seeking to undermine or disrupt. However, this Bill provides a clear and consistent statutory basis for this activity.

Your letter queries why the Bill does not place express limits on the criminal conduct that can be authorised on the face of the Bill. This decision is a result of detailed consultation with operational partners in ensuring how best to safeguard the public and protect the safety of CHIS. Operational partners have advised that an explicit list of crimes on the face of the Bill could be used by terrorist and criminal groups to root out CHIS in their ranks. Explicit limits on the face of the Bill would therefore render this tactic operationally unworkable, placing both the public and CHIS at risk.

However, let me assure you that in no way does this Bill pave the way for CHIS to be authorised by public bodies to commit crimes such as murder, torture and rape. This was never the intention of this legislation. To knowingly allow public bodies to authorise such crimes would contravene the absolute and unqualified rights enshrined in the European Convention on Human Rights (ECHR). All the public authorities named in this Bill are bound by the Human Rights Act (1998) to operate in a way that is compatible with the Convention rights protected by the Human Rights Act. These rights include the right to life (Article 2), and the prohibition of torture or subjecting

someone to inhuman or degrading treatment or punishment (Article 3). Any criminal conduct authorisation (CCA) that is not compliant with the Human Rights Act would be unlawful and the CHIS would be liable for prosecution as a result. All CCAs must also meet strict necessity and proportionality thresholds, and authorising officers must ensure that the level of criminality authorised is at the lowest level of intrusion possible to achieve the aims of the operation.

As such, the Human Rights Act, together with the necessity and proportionality test, provides the limits to the criminal conduct that can be authorised under this Bill. This would be the case even if the Human Rights Act was not explicitly named on the face of the Bill. However, the Government has chosen to explicitly reference the Act in order to emphasise the need for human rights' considerations to be at the forefront of the mind of every authorising officer in every public authority named in this Bill when they are authorising a CHIS to undertake criminal activity.

On the issue of the extent to which the Human Rights Act applies to the conduct of CHIS, I would like to draw your attention to the Government's response to the Joint Committee on Human Rights (JCHR) who also raised this point. As the Government stated in its response, "nothing in this Bill seeks to undermine the important protections in the Human Rights Act. It is neither necessary, nor appropriate, nor possible to seek to devise legislative controls based on a description of conduct, such as the amendments that have been proposed containing explicit limits, because the facts of each individual case will demand close attention and scrutiny. 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. The Government will not act in a way that is in breach of its legal obligations under the Human Rights Act, and this includes circumstances in which the Human Rights Act applies overseas. All CCAs will comply with the Human Rights Act as well as with relevant domestic and international law."

The Human Rights Act is one of the many safeguards that govern the use and conduct of CHIS in the UK. There is clear and detailed guidance and training provided to officers of all public authorities on the parameters of the crime that they can, and crucially cannot authorise. They are also aware of the need to clearly explain these parameters to their CHIS when discussing criminal conduct. Handlers, controllers and authorising officers receive appropriate training on their responsibilities to uphold human rights, together with the duty of care they have under the Regulation of Investigatory Powers Act (2000) to protect their CHIS and ensure their safety through the course of their covert role with the public authority. No public authority would wish to place their CHIS at any greater risk of harm, and the Government does not wish to do anything with this Bill that could inadvertently jeopardise a public authority's ability to uphold this legal duty of care.

You refer to the "loyalty test" in your letter and other jurisdictions' approach to legislation similar to this Bill. It is unhelpful to compare different countries' approaches to apparently similar legislation. While other Five Eyes countries very successfully run CHIS and on occasion authorise them to undertake criminal conduct, they do so under different legal systems, in different jurisdictions, and within vastly different threat pictures. The approach taken by other countries does not work for the UK, in part due

to the unique challenges faced in Northern Ireland. While I fully acknowledge that the threat and challenges faced in Northern Ireland have evolved, we must sadly acknowledge that it has not gone away completely. We know that CHIS testing is a real occurrence in the UK and as such the Government does not want to provide terrorists and criminals with the means to test for CHIS.

Equally, we know that some organised criminal groups (OCG) or gangs force new members to undertake initiation tests. The Government does not want to present these gangs with an explicit list of crimes that they could use to test whether a new recruit was actually a CHIS trying to infiltrate their ranks. If the new member was not a CHIS, we run the risk of increasing the likelihood of serious crimes, such as rape, being committed by individuals wishing to prove their loyalty to a gang. If a CHIS found themselves in the position of being asked to undertake an initiation test that breached the Human Rights Act, of course they would never be authorised to do so.

It is true that should a criminal or terrorist group wish to test for CHIS in their ranks, they could consult the Human Rights Act and develop their own checklist of crimes they believe a CHIS could never undertake. I do not doubt that some of the terrorist and criminal groups that would wish to do us harm in the UK are sophisticated enough to do this on their own. However, there would still remain uncertainty over some specific crimes that a CHIS may or may not be able to undertake. Equally, for less sophisticated criminal and terrorist groups, we do not wish to interpret existing legislation for them by providing a ready-made list of crimes on the face of this Bill they could use to check for CHIS within their group or organisation.

The Government narrowly lost the vote in the House of Lords placing Canadian-style limits on the face of the Bill; we will be seeking to overturn this amendment during Commons Consideration of Lords Amendments. Leaving limits on the face of the Bill increases the risks to CHIS and public safety, and will severely hamper public authorities in their efforts to disrupt and undermine criminal and terrorist groups that would seek to do us all harm. I am confident that the robust oversight regime the Government has put in place for this Bill, including the new judicial notification system which will provide close to real-time oversight of all CCAs, will ensure that the powers provided for by this Bill will not be open to abuse.

I trust you will share my response with the co-signatories of your letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Susan', written in a cursive style.

Baroness Williams of Trafford