

COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL

Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee

Introduction

1. This memorandum has been prepared by the Home Office for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Covert Human Intelligence Sources (Criminal Conduct) Bill (“the Bill”).
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation or that modify existing powers to make delegated legislation. It explains in each case why the power has been taken or modified and explains the nature of, and the reason for, the procedure selected. This memorandum reflects the Bill as introduced in the House of Commons on 24 September.

Purpose of the Bill

3. Part 2 of the Regulation of Investigatory Powers Act 2000 (“RIPA”) provides inter alia for the authorisation of the conduct and use of covert human intelligence sources (“CHIS”). A CHIS is a person who covertly establishes or maintains a relationship in order to obtain or disclose information. The power to grant authorisations for the conduct or for the use of CHIS is provided for in section 29 of RIPA. Such authorisations will be referred to in this memorandum as “section 29 authorisations”.
4. The use of CHIS is vital to the work of the intelligence agencies and law enforcement. Given the covert nature of CHIS, and the sorts of persons with whom they are required to develop and maintain relationships, CHIS must behave in certain ways and participate in certain activities, in particular, to maintain their cover or obtain intelligence. It may therefore be necessary for a CHIS to participate in conduct that would constitute a criminal offence.
5. The purpose of the Covert Human Intelligence Sources (Criminal Conduct) Bill (“the Bill”) is to provide an express power for persons within certain public authorities to authorise CHIS to undertake conduct which may, but for the authorisation, constitute a criminal offence. The effect of

a valid authorisation (“a criminal conduct authorisation”) is that the conduct is rendered lawful for all purposes.

6. Some CHIS activity taking place in Scotland is authorised under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). The Bill also amends RIP(S)A, so that the regimes in RIPA and RIP(S)A remain broadly consistent.

Clause 1(5): power to impose requirements in respect of arrangements which must exist for authorisations to be granted, and power to prohibit the authorisation of conduct or impose additional requirements in respect of the authorisation of conduct

Powers conferred on: *The Secretary of State*

Powers exercisable by: *Order*

Parliamentary procedure: *Negative*

Context and purpose

7. Clause 1(5) inserts new section 29B into RIPA, which provides for the granting of criminal conduct authorisations.
8. The order making powers in Clause 1(5) allow the Secretary of State to impose additional safeguards. New section 29B(4)(c) provides that a person may not grant an authorisation unless the person believes that arrangements exist that satisfy such requirements as the Secretary of State may impose. New section 29B(10) confers on the Secretary of State the power to prohibit the authorisation of certain conduct, or impose additional requirements that must be satisfied before an authorisation is granted.
9. The requirements that may be imposed are additional to those already imposed by new section 29B(4) and (5), including that an authorisation may be granted by a person only where the person believes the authorisation is necessary for one of three available grounds and that the authorised conduct is proportionate to what is sought to be achieved.
10. The powers in section 29B(4) and section 29B(10) perform different functions; although there is some overlap. Section 29B(4) is directed at arrangements that need to be put in place generally while section 29B(10) enables the Secretary of State to impose additional requirements that must be satisfied before conduct of that nature can be authorised.

11. The structure of section 29B closely resembles that of section 29, and the powers conferred by section 29B(4)(c) and (10) correspond to those found in section 29(2)(c) and (7) respectively.

Justification for taking these powers

12. These powers allow for additional requirements to be imposed before a criminal conduct authorisation may be issued, 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 and/or to restrict the circumstances in which a criminal conduct authorisation may be granted.
13. The requirements that can be imposed under these powers concern practical, detailed measures. It is therefore appropriate for these requirements to be contained in secondary legislation. Furthermore, the powers enable the Secretary of State to impose additional safeguards on the use of the section 29B power if it should become apparent that such safeguards are appropriate.
14. Section 29(2)(c) and section 29(7) of RIPA are equivalent powers in respect of section 29 authorisations. Taking similar powers in respect of criminal conduct authorisations to those already contained in section 29 will allow the Secretary of State to make equivalent provision for section 29 authorisations and criminal conduct authorisations, where appropriate, so similar arrangements will be required for both; there is a high degree of interrelationship between the two provisions.
15. An example of the past use of the section 29 powers is the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 [SI 2010/123](#), which imposes specific requirements that must be met in relation to the authorisation of a CHIS in connection with material that is subject to legal professional privilege.

Justification for the procedure

16. Parliament will, by enacting clause 1, be determining that it is appropriate to confer on designated persons the power to grant criminal conduct authorisations; where specified conditions are met. This power would only allow the Secretary of State to impose additional requirements that must be met before an authorisation may be granted and/or to restrict the circumstances in which an authorisation may be granted. It does not allow

the scope of the power to authorise conduct to be increased or for the requirements imposed by Parliament to be removed.

17. There is a precedent for such powers to be subject to the negative procedure. The powers in section 29(2)(c) and section 29(7) of RIPA, the equivalent powers in respect of section 29 authorisations, are both subject to the negative procedure.

Clause 2(3) and (5): power to designate persons who are able to grant authorisations under section 29B

Power conferred on: *The Secretary of State*

Power exercisable by: *Order*

Parliamentary procedure: *Negative*

Context and purpose

18. Clauses 2(3) and (5) confer powers on the Secretary of State to make provision for safeguards in terms of who is able to grant criminal conduct authorisations.
19. Clause 2(3) has the effect of conferring a power on the Secretary of State to designate the ranks, officials or positions within public authorities who are able to grant criminal conduct authorisations. This power is created by modifying an existing power; a power already exists under section 30(1) of RIPA, and clause 2(3) brings criminal conduct authorisations within its scope.
20. Clause 2(5) has the effect of conferring on the Secretary of State the power to impose additional restrictions on criminal conduct authorisations that may be granted by ranks, officials or positions within public authorities. The power further enables the Secretary of State to impose restrictions on the circumstances in which, or the purposes for which, ranks, officials or positions within public authorities are able to grant criminal conduct authorisations. As with clause 2(3), this effect is achieved by bringing criminal conduct authorisations under section 29B within the scope of the existing power found in section 30(3) of RIPA.

Justification for taking the power

21. Certain public authorities will be able to issue criminal conduct authorisations; each of which have different management structures, that may be subject to change. It is appropriate for the Secretary of State to

have the power to designate officials in order to avoid the risk that definitions become inapplicable, and to ensure that the designated officials reflect the detailed practical arrangements that are in place; and ensure that the power is exercised by those with appropriate seniority.

22. These powers together also enable the Secretary of State to make provision to ensure that, where a criminal conduct authorisation is being given in particular circumstances, or for a particular purpose, it is given by an individual who holds a particular rank, office or a position with the relevant public authority. This is an important safeguard and it is appropriate that the detailed rules are dealt with by way of secondary legislation.

Justification for the procedure

23. Parliament will, by enacting clause 1, be determining that it is appropriate to confer on designated persons the power to grant criminal conduct authorisations on specified public authorities. These powers are limited to enabling the Secretary of State to specify which ranks, officials or positions are able to grant criminal conduct authorisations; or restrict the circumstances in which particular ranks, officials or positions are able to grant such authorisations. These powers allow for additional safeguards on the power that Parliament has conferred. .
24. These powers are being conferred by amending the existing powers in s.30(1) and (3) of RIPA. These existing powers are subject to the negative procedure, and therefore there is an established precedent for powers of this nature to be subject to the negative procedure.

Clause 2(7): power to amend Part A1 of Schedule 1 to RIPA

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order</i>
<i>Parliamentary procedure:</i>	<i>Affirmative where adding a public authority to Part A1 or moving a public authority from Part 1 or 2 to Part A1; otherwise negative.</i>

Context and purpose

25. This power enables the Secretary of State to add, remove or amend the name of public authorities that are able to grant criminal conduct authorisations (the list of such public authorities is specified in new Schedule A1 to RIPA).

Justification for taking the power

26. The power is most likely to be used to address changes to the list of relevant public authorities as a result of the abolition of a body, or the transfer of its functions to a successor body. However, the power may also be used to designate new bodies as relevant public authorities. This may occur when a new body is created by statute, for example, or if circumstances change over time such that an existing body may be able to present a compelling operational case for the use of criminal conduct authorisations. The power will ensure that public authorities who need to authorise criminal participation by a CHIS are able to do so, in accordance with a statutory framework which provides the safeguards considered necessary by Parliament.

Justification for the procedure

27. The addition of a new public authority to the list of authorities who can grant criminal conduct authorisations is subject to the affirmative procedure in order to enable these matters to be debated in both Houses, and to ensure that those who will be affected by the change are consulted and this matter is subject to proper oversight and control.
28. The negative procedure is appropriate in circumstances where the Secretary of State is exercising the power to remove a public authority, or to amend its name. Such a change does not involve the conferral of new powers on any public authority, and therefore does not require the same degree of oversight. The procedure also reflects the current position in s.30(7) of RIPA.

Clause 6(2): power to appoint days for commencement

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations*

Parliamentary procedure: *None*

Context and purpose

29. Clause 6(2) confers a standard power to bring provisions of the Bill into force by commencement regulations.

Justification for taking the power

30. Allowing provisions of the Bill to be brought into force by regulations allows them to be brought into force at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as appropriate.

Justification for the procedure

31. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Clause 6(3): power to make transitional or saving provision

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations*

Parliamentary procedure: *None*

Context and purpose

32. Clause 6(3) confers a power on the Secretary of State to make transitional and saving provision in connection with the coming into force of the provisions in the Bill.

Justification for taking the power

33. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner.
34. Transitional arrangements may be required because, prior to the introduction of the Bill, some criminal conduct by a CHIS may be authorised under s.29 of RIPA. The effect of the Bill will be that section 29 is no longer capable of authorising any criminal conduct and all criminal activity must be authorised under new s.29B. Depending on the authorisations that are in existence at the relevant time, and the nature of such authorisations, it may be necessary to make transitional provision.

Justification for the procedure

35. The power to make transitional and saving provisions is often included as part of the power to make commencement regulations and, as such, is not subject to any Parliamentary procedure on the grounds that Parliament

has already approved the principle of the provisions in the Bill by enacting them; and the power simply enables the Secretary of State to make provision to manage the transition to the new regime. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not made subject to any parliamentary procedure.

Paragraph 4 of Schedule 1: power to impose requirements in respect of arrangements which must exist for authorisations to be granted and power to prohibit the authorisation of conduct or impose additional requirements in respect of the authorisation of conduct

Powers conferred on: *The Scottish Ministers*

Powers exercisable by: *Order*

Parliamentary procedure: *Negative*

Context and purpose

36. Paragraph 4 inserts new section 7A into RIP(S)A, which provides for the granting of criminal conduct authorisations. New section 7A is the corresponding provision to new section 29B of RIPA and is drafted in substantially similar terms.
37. The order-making powers contained in section 7A enable the Scottish Ministers to impose additional safeguards. New section 7A(4)(c) will provide that a person may not grant an authorisation unless the person is satisfied that arrangements exist that satisfy such requirements as the Scottish Ministers may impose. New section 7A(7) confers on the Scottish Ministers the power to prohibit the authorisation of certain conduct, or impose additional requirements that must be satisfied before an authorisation is granted.
38. The requirements that may be imposed are additional to those already imposed by new section 7A(4)(a) and (b), including that an authorisation may be granted by a person only where the person believes the authorisation is necessary for the purpose of preventing or detecting crime or of preventing disorder and that the authorised conduct is proportionate to what is sought to be achieved by that conduct.
39. The powers in section 7A(4)(c) and section 7A(7) perform different functions. Section 7A(4)(c) is directed at arrangements that need to be put in place generally while section 7A(7) enables the Scottish Ministers to describe particular conduct and then say that certain additional

requirements apply when that particular conduct is being authorised. Furthermore, the existence of these two separate powers reflects and is consistent with section 7 of RIP(S)A.

Justification for taking the powers

40. These powers allow for additional requirements to be imposed before a criminal conduct authorisation may be issued, 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 and/or to restrict the circumstances in which a criminal conduct authorisation may be granted.
41. The requirements that can be imposed under these powers concern practical, detailed measures. It is therefore appropriate for these requirements to be contained in secondary legislation.
42. Section 7(2)(c) of RIP(S)A and section 7(4) are equivalent powers in respect of section 7 authorisations. Taking similar powers in respect of criminal conduct authorisations to those already contained in section 7 of RIP(S)A will allow the Scottish Ministers to make equivalent provision for section 7 authorisations and criminal conduct authorisations, where appropriate, so similar arrangements will be required for both.

Justification for the procedure

43. Parliament will, by enacting Schedule 1, be determining that it is appropriate to confer on designated persons the power to grant criminal conduct authorisations. These powers would only allow the Scottish Ministers to impose additional requirements that must be met before an authorisation may be granted. They do not allow the scope of the power to authorise conduct to be increased or for the requirements imposed by parliament to be removed.
44. There is a precedent for such powers to be subject to the negative procedure. The powers in section 7(2)(c) and section 7(4) of RIP(S)A, the equivalent powers in respect of section 7 authorisations, are subject to the negative procedure.

Paragraph 5 of Schedule 1: power to designate persons for the purpose of section 7A

Power conferred on: *The Scottish Ministers*

Power exercisable by: *Order*

Parliamentary procedure: *Negative*

Context and purpose

45. This power enables the Scottish Ministers to designate which ranks, officials or positions within public authorities are able to grant criminal conduct authorisations. This power is created by modifying an existing power: a power already exists under section 8 of RIP(S)A for the Scottish Ministers to designate which ranks, officials or positions within public authorities are able to grant section 7 authorisations. The Bill amends the power in section 8 so that it also applies to section 7A authorisations.

Justification for taking the power

46. The public authorities who are able to issue criminal conduct authorisations have different management structures, which may be subject to change. It is appropriate for the Scottish Ministers to have the power to designate officials in order to avoid the risk that definitions become inapplicable, and to ensure that the designated officials reflect the detailed practical arrangements that are in place.

Justification for the procedure

47. Parliament will, by enacting Schedule 1, be determining that it is appropriate to confer on designated persons the power to grant criminal conduct authorisations. This power would only allow the Scottish Ministers to specify who those individuals are. It does not allow the scope of the power to authorise conduct to be increased.
48. This power is being conferred by amending an existing power in section 8 of RIP(S)A. The power in section 8 is subject to the negative procedure, and therefore there is a clear precedent for a power of this nature to be subject to the negative procedure.

Paragraph 5 of Schedule 1: power to amend section 8(3A) of RIP(S)A

Power conferred on: *The Scottish Ministers*

Power exercisable by: *Order*

Parliamentary procedure: *Affirmative where adding a public authority to section 8(3A); otherwise negative.*

Context and purpose

49. This power enables the Scottish Ministers to add, remove or amend the name of public authorities that are able to grant criminal conduct authorisations under RIP(S)A.

Justification for taking the power

50. The power is most likely to be used to address changes to the list of relevant public authorities as a result of the abolition of a body, or the transfer of its functions to a successor body. However, the power may also be used to designate new bodies as relevant public authorities. This may occur when a new body is created by statute, for example, or if circumstances change over time such that an existing body may be able to present a compelling operational case for the use of criminal conduct authorisations. The power will ensure that public authorities who need to authorise criminal participation by a CHIS are able to do so, in accordance with a statutory framework which provides the safeguards considered necessary by Parliament.

Justification for the procedure

51. The addition of a new public authority to the list of authorities who can grant criminal conduct authorisations is subject to the affirmative procedure in order to enable these matters to be debated by the Scottish Parliament, and to ensure that those who will be affected by the change are consulted and this matter is subject to proper oversight and control.

Paragraph 7 of Schedule 1: power to specify that certain authorisations cease to have effect after a shorter period than that provided for by section s.19(3) of RIP(S)A

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: Negative

Context and purpose

52. Paragraph 7 of Schedule 1 amends s.19(3) of RIP(S)A to extend the scope of the order making power in s.19(8) of RIP(S)A so that it applies to criminal conduct authorisations. This power enables the Scottish Ministers to specify that certain authorisations have effect for a shorter period than that specified in s.19(3).

Justification for taking the power

53. The power acts as an additional safeguard by providing the Scottish Ministers with the ability to further limit the duration of a criminal conduct authorisation. The power can only be used to impose further limits on criminal conduct authorisations.

Justification for the procedure

54. The negative procedure is appropriate because this power can only be used to impose limits on criminal conduct authorisations. These powers are being conferred by amending the existing power in s.19(8) of RIP(S)A. These existing powers are subject to the negative procedure, and therefore there is an established precedent for powers of this nature to be subject to the negative procedure.

Paragraph 8 of Schedule 1: power to provide for a person to be able to cancel an authorisation in certain circumstances

Power conferred on: *Scottish Ministers*

Power exercisable by: *Regulations*

Parliamentary procedure: *Negative*

Context and purpose

55. Paragraph 8 of Schedule 1 amends s.20(1) of RIP(S)A to extend the scope of the order making power in s.20(4) so that it applies to criminal conduct authorisations. This power enables the Scottish Ministers to provide that a person other than the person specified in s.20 can cancel an authorisation, in circumstances where the duty would otherwise fall on a person who is no longer available to perform it.

Justification for taking the power

56. The power acts as an additional safeguard by providing a way for criminal conduct authorisations to be cancelled if the person who is usually required to do this is not available. It limits the use of criminal conduct authorisations by providing an additional way of cancelling authorisations,

