

# COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### MEMORANDUM BY THE HOME OFFICE

#### Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Covert Human Intelligence Sources (Criminal Conduct) Bill. This memorandum has been prepared by the Home Office. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon Priti Patel MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

#### Summary

2. The Bill will provide for an express power to authorise covert human intelligence sources (CHIS) to undertake conduct which would otherwise constitute a criminal offence. This will put the legal basis for criminal conduct by a CHIS on a clear statutory footing and ensure that all relevant public authorities are able to continue to use this critical capability.
3. The Bill provides this new power by amending the Regulation of Investigatory Powers Act 2000 (RIPA) to insert a new section 29B. Section 29B creates a new “criminal conduct authorisation” which certain public authorities can use to authorise criminal conduct by a CHIS. A criminal conduct authorisation may also authorise conduct by someone else “in relation to” a CHIS. The effect of a section 29B authorisation is that no offence is committed as a result of any authorised conduct.
4. The power to authorise criminal conduct is circumscribed. A criminal conduct authorisation may only be granted where that conduct is believed to be necessary and proportionate in the interests of national security, for the purpose of preventing or detecting crime or disorder, or in the interests of the economic well-being of the UK for certain statutory purposes and where it is proportionate to what is sought to be achieved by that conduct. Those limits appropriately reflect the parameters of Convention-compliant conduct, taking into account the matters set out below. These mirror the regime in place in the *Third Direction* challenge (in which the relevant policy applied a necessity and proportionality test), in respect of which the Investigatory Powers Tribunal concluded that “*there is nothing inherent in the policy which creates a significant risk of a breach of Article 3 or indeed any other Convention right*”.

5. The Bill strengthens the current legal position by putting the power to authorise criminal conduct by a CHIS on an explicit statutory footing. Section 6 of the Human Rights Act 1998 means that those authorising the use of CHIS must ensure they are acting compatibly with Convention rights. Section 6 of the Human Rights Act 1998 makes it unlawful for public authorities to act in a way which is incompatible with Convention rights and this position is not altered by the provisions of the Bill. Authorisations will also be time-limited, subject to external oversight by independent judges and challengeable in the Investigatory Powers Tribunal.

## Safeguards

6. Section 6 of the Human Rights Act 1998 makes it unlawful for public authorities to act in a way which is incompatible with Convention rights. Nothing in this Bill detracts from that fundamental position. Authorising authorities are not permitted by this Bill to authorise conduct which would constitute or entail a breach of those rights.
7. The statutory framework will provide for effective measures to ensure that criminal conduct authorisations do not in fact breach Convention rights and to guard against the risk of abuse of a discretionary power. The totality of interlocking safeguards contained in the Bill are considered to be compatible with the ECHR. The principal basis for this is the judgment of the Investigatory Powers Tribunal in the *Third Direction* case.<sup>1</sup> In the directly comparable context of authorisations to participate in criminality issued by MI5, the Tribunal rejected the contention that judicial authorisation was necessary and confirmed that oversight by the Investigatory Powers Commissioner (and the Tribunal) provided sufficient safeguards against the risk of abuse of a discretionary power.<sup>2</sup> The same applies here.
8. Oversight of Part 2 of RIPA is provided for in Part 8 of the Investigatory Powers Act 2016. Section 229(3)(e) of the Investigatory Powers Act 2016 provides that the Investigatory Powers Commissioner must keep under review (including by way of audit, inspection and investigation) the exercise of functions under Part 2 of RIPA. The Investigatory Powers Commissioner must also inform a person of errors made public by authorities, where the error is serious, and a public interest test is met.<sup>3</sup> The Investigatory Powers Commissioner must make an annual report and may report on an ad hoc basis.<sup>4</sup> Annual reports are published and laid before parliament, subject to a power conferred on the Prime Minister to redact.<sup>5</sup> Persons holding offices in public authorities are under a duty to provide the Investigatory Powers Commissioner with assistance, and to

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<sup>1</sup> *Privacy International & Others v Secretary of State for Foreign and Commonwealth Affairs & Others*, IPT/17/86/CH, IPT/17/87/CH.

<sup>2</sup> Paragraphs 92 to 96.

<sup>3</sup> S.231 Investigatory Powers Act 2016.

<sup>4</sup> S.234 Investigatory Powers Act 2016.

<sup>5</sup> S.234 Investigatory Powers Act 2016.

disclose information and documents that the Investigatory Powers Commissioner may require for the carrying out of its functions. Such assistance includes providing Commissioners with access to apparatus, systems or other facilities or services as they may require.<sup>6</sup> Taken together this provides the Investigatory Powers Commissioner and his staff with a high level of access for the purposes of carrying out audits, inspections and investigations.

9. The Investigatory Powers Tribunal has jurisdiction to determine complaints against public authority use of investigatory powers, including the use of CHIS. The Investigatory Powers Tribunal has an investigative function and where complaints are made to the Tribunal in respect of the use of investigatory powers, the Tribunal has a duty to investigate whether the relevant public authority carried out the conduct complained about. In carrying out investigations, the Tribunal has the power to require the assistance of the Investigatory Powers Commissioner. The Investigatory Powers Tribunal is entirely independent from Her Majesty's Government and the public authorities who use investigatory powers.
10. The Bill will provide for further measures to ensure that criminal conduct authorisations do not in fact breach Convention rights. The authorisation itself will specify the parameters of the authorisation and will be clearly communicated to the CHIS. The authorisation regime contains provisions to ensure that criminal conduct authorisations may only be granted in situations in which it is necessary in line with one of the specified grounds and proportionate to what is sought to be achieved by that conduct (see below).
11. Further safeguards exist in practice than are set out in the Bill, including the policies and procedures within authorising authorities. Great importance is attached to providing appropriate training to all those involved with agent running and agent participation. That includes training on the Human Rights Act 1998 as well as a detailed briefing on how public authorities approach agent participation in criminality.

### **Interference with Convention rights**

12. It would be impossible to seek to identify which if any of the Convention rights may or may not be engaged by any particular authorisation of criminal conduct. The authorising public authorities have a variety of different functions and have differing legal frameworks. 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. However, to assist the Committee's consideration of the Bill we have considered below

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<sup>6</sup> S.235 Investigatory Powers Act 2016.

the Convention rights which are likely to be of the most concern to the Committee.

*Articles 2, 3 and 5*

13. The fundamental starting point is that nothing in the Bill is to detract from the obligations which bind the authorising authorities under the Human Rights Act 1998. The Bill does not alter the position that the authorising authorities are not able to authorise conduct that constitutes or entails a breach of those rights. However, due to the circumstances in which CHIS operate consideration of Articles 2, 3 and 5 is relevant. Emphasising the point made above, that it would be impossible to hypothesise about the complex factors of any particular case and the resulting legal analysis, the following three points stand to be made.
14. First, the context of much CHIS activity is such that the protective obligations of the State, or similar considerations, may be engaged. It is to be expected, and may be required by the Convention, that the State takes reasonable steps to, for example, protect its citizens from threats to their lives or safety. Indeed, one of the governing principles of the Convention is that there is a balance between the general interests of the community and the freedoms and rights enshrined therein.
15. Second, the European Court of Human Rights has recognised the importance of context (including purpose and necessity) when considering scope and extent of rights (including rights other than the expressly qualified rights in Articles 8-11). See, by way of example: *Soering v United Kingdom*;<sup>7</sup> *Bouyid v Belgium*;<sup>8</sup> *Austin v UK*<sup>9</sup> and *Ramirez Sanchez v France*.<sup>10</sup>
16. Third, it is to be expected that there would not be State responsibility under the Convention for conduct where the intention is to disrupt and prevent that conduct, or more serious conduct, rather than acquiesce in or otherwise give official approval<sup>11</sup> for such conduct, and/or where the conduct would take place in any event.
17. In addition, rigorous practices and procedures are in place to ensure that authorisations are only issued in circumstances in which the criteria set out in the Bill regime are met, and to ensure that events set in motion by the authorised conduct are properly managed. Special training is given to those who work with CHIS on how to select, train and assess CHIS to ensure that CHIS are fully aware of the strict limitations of their authorised criminal conduct

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<sup>7</sup> (1989) 11 EHRR 438, §100.

<sup>8</sup> App No 23380/09, §§86 and 111.

<sup>9</sup> (2012) 55 EHRR 14, §§58-59.

<sup>10</sup> (2007) EHRR 49, §150.

<sup>11</sup> See e.g. *Burlya v Ukraine* App No 3289/10 §§119 and 129-136; and similarly, a “climate of impunity” in *Begheluri v Georgia* 28490/02, §§100-146. See also *Reira Blume v Spain* App No 37680/97, in which a test of a decisive causal link was applied (§§32 and 35).

and the consequences of engaging in criminality that is not authorised. Ultimately, a CHIS stands to be prosecuted for his or her participation in crime where this goes beyond what is authorised.

#### *Article 6*

18. It could be argued by a defendant in a criminal case that the use of a CHIS who has participated in criminality connected to that defendant has participated in entrapment, and undermines that defendant's right to an unfair trial. The Bill does not create a risk of unfair trial as a result of entrapment and does not breach Article 6. The leading cases establish that the "authorisation" of agent participation in criminality does not in itself give rise to a risk of unfair trial.<sup>12</sup> The use of a CHIS may breach Article 6 if and to the extent that the conduct of any agent authorised to participate in crime by the law enforcement agencies was "so seriously improper as to bring the administration of justice into disrepute"<sup>13</sup> or is an "affront to the public conscience".<sup>14</sup> Those involved in these activities are trained to understand these distinctions and the rules on entrapment. Further, once a prosecution is underway in a case involving a CHIS, the full rigours of disclosure apply, as per the Criminal Procedures and Investigators Act 1996 in England and Wales and Northern Ireland and the Criminal Justice and Licensing (Scotland) Act 2010 in Scotland. Guidance is in place to ensure that these disclosure obligations are understood and complied with by public authorities who authorise and task CHIS. Information about the involvement of CHIS in a particular case can be and is shared with prosecutorial authorities. The CPS has very detailed guidance on the approach to be taken in cases where a CHIS is involved. In addition, any risk of unfairness can ultimately be prevented by the Judge refusing to admit certain evidence or staying the proceedings.

#### *Article 8*

19. An argument might be made that there is interference with Article 8 as a result of criminal conduct carried out pursuant to the criminal conduct authorisation. There is authority that the concept of private life can cover a person's physical and moral integrity,<sup>15</sup> and so authorising a person to commit a crime might be considered to be an interference with the CHIS's moral integrity, as well as that of other members of the group the CHIS is infiltrating. Some crimes may also be considered to be an interference with the victim's physical integrity.

#### *Article 1 Protocol 1*

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<sup>12</sup> *Teixeira de Castro v Portugal*, (1999) 28 EHRR 101 and *R v Looseley*, Attorney-General Reference (No.3 of 2000) [2001] 1 WLR 2060.

<sup>13</sup> *R v Looseley*, paragraph 25.

<sup>14</sup> *R v Latif*, [1996] 1 WLR 104, per Lord Steyn at paragraph 112.

<sup>15</sup> *X and Y v the Netherlands*, (App. No 8978/80).

20. Criminal activity carried out by a CHIS might adversely affect an individual's peaceful enjoyment of their possessions and engage Article 1 of the first Protocol to the Convention ("A1P1").

## **Justification**

21. Article 8 and A1P1 are qualified rights, which means that interference with the rights may be permissible. Furthermore, Article 8 requires that any interference is necessary in a democratic society and a proportionate means of achieving a legitimate aim, while A1P1 requires that any deprivation of possessions serves a legitimate aim in the public interest and is proportionate.

### *In accordance with law*

22. For an interference with an ECHR right to be in accordance with the law there must be a lawful domestic basis for it, this law must be adequately accessible to the public, and its operation must be sufficiently foreseeable, so that people who are subject to it can regulate their conduct. The quality of law test is also relevant to whether the Bill is compatible with the Convention rights generally, including the unqualified rights.
23. It may be helpful to consider how the requirement of "foreseeability" has been interpreted in the national security context. In *S and Marper v United Kingdom*, the ECtHR found that the level of precision required depends heavily on the context and cannot, in any case, cover every eventuality. The law does not need to set out each and every way that the powers in the Bill may be used. It is also not necessary that a target of covert techniques should be able to foresee when powers are likely to be deployed against them, so that they may adapt their conduct accordingly.
24. The scheme provided for by the Bill will be clearly prescribed in primary legislation, ensuring it is accessible and foreseeable and improving the current position. The scheme will also be supported by an updated statutory Code of Practice, further enhancing foreseeability.

### *Necessary means of achieving a legitimate aim*

25. It is impossible for certain public authorities to fulfil their functions effectively without CHIS and for those CHIS, on occasion, to commit crimes. CHIS participation in criminality is an unavoidable part of their maintaining cover and acquiring vital intelligence. The Bill provides that a criminal conduct authorisation can only be issued to certain public authorities in relation to which we have identified a clear operational need. The Bill also provides that criminal conduct authorisation can only be issued where it is believed necessary for the following prescribed purposes, which correspond to the legitimate aims set out

in Article 8 and are encompassed in A1P1 and limit this intrusive tactic to only the most serious investigations:

- (i) in the interests of national security;
- (ii) for the purpose of preventing or detecting crime or preventing disorder;  
or
- (iii) in the interests of the economic wellbeing of the UK

*Interference with Convention rights is proportionate*

- 26. The objective of criminal conduct authorisations – to enable public authorities to use CHIS in the interests of national security, for the prevention or detection of crime or disorder, or in the interests of the economic wellbeing of the UK - is sufficiently important to justify interference with these fundamental rights.
- 27. The new provisions are rationally connected to the objective since CHIS are vital to the work of certain public authorities, and it is not possible for CHIS to operate without participating in criminal conduct to some extent.
- 28. The proportionality of authorising the criminal conduct will need to be assessed in each individual case but the following safeguards contained in the regime provided for by the Bill ensure that interferences with convention rights are no more than necessary to accomplish that objective.
  - The use of CHIS is, by its very nature, highly targeted and characterised by a close nexus with high value intelligence.
  - Only certain public authorities can authorise CHIS and these public authorities all have significant experience (authorisation structures, technical expertise, etc.) in the use of CHIS and are subject to section 6 of the Human Rights Act 1998.
  - A criminal conduct authorisation will expire at the same time as the corresponding section 29 authorisation and can only last a maximum of 12 months. It will also, along with the section 29 authorisation, be subject to regular review to ensure that the continued activity is necessary and proportionate. This will safeguard against the continued use of the power when circumstances have changed.
  - Only certain senior officials will be able to authorise criminal conduct by a CHIS.
  - The individuals who are most likely to be affected by the criminal conduct of a CHIS are those with whom the agent is engaging in order to thwart the criminality. This context is relevant to striking the balance between the rights of the individuals whose rights are interfered with by CHIS and the interests of the community.

- Part 8 of the Investigatory Powers Act 2016 contains a statutory regime which provides for comprehensive and independent oversight of the use of CHIS - see above.

29. Having regard to these matters, a fair balance has been struck between the rights of the individual and the interests of the community. The gravity of the operations that CHIS are tasked to help with and the fact that it is vital to use CHIS and that CHIS can participate in crime means that interference with Article 8 and A1P1 rights so that CHIS can participate in criminal conduct is justified.