

LEGISLATIVE CONSENT MEMORANDUM

COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL

Background

1. This memorandum has been lodged by Humza Yousaf, Cabinet Secretary for Justice, under Rule 9.B.3.1(a) of the Parliament's standing orders. The Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced in the House of Commons on 24 September and is currently at Committee Stage in the House of Lords. The Bill can be found at UK Parliamentary website <https://bills.parliament.uk/bills/2783>.

Content of the Covert Human Intelligence Sources (Criminal Conduct) Bill

2. The Bill amends the Regulation of Investigatory Powers Act 2000 ("RIPA") and the Regulation of Investigatory Powers (Scotland) Act 2000 ("RIP(S)A") in relation to the authorisation of criminal conduct by, or in relation to, a covert human intelligence source (a "CHIS"). The Annex provides further background information on what is meant by a CHIS, on RIPA and RIP(S)A and on the legal challenge which has precipitated this Bill.

3. The Bill consists of seven clauses and two schedules.

4. Clauses 1, 2 and 5 and schedule 2 amend RIPA to provide that participating criminal conduct can no longer be authorised under a CHIS authorisation. Instead, the Bill provides for a new form of authorisation, known as a "criminal conduct authorisation" ("CCA"). A CCA is an authorisation for criminal conduct in the course of, or otherwise in connection with, the conduct of a CHIS.

5. An authorisation must specify or describe the conduct being authorised, and the conduct must be by, or in relation to, a CHIS specified or described in the authorisation. The conduct must relate to an investigation or operation which is specified in the authorisation. Criminal conduct is not limited to the CHIS: a CCA may authorise conduct by someone else "in relation to a CHIS" i.e. those within the public authority who are responsible for the authorisation. A CCA may only be made where an authorisation for the conduct or the use of a CHIS is in place. If the associated CHIS authorisation is withdrawn, the CCA ceases to have effect.

6. It will be possible to grant a CCA under RIPA where it is necessary in the interests of national security, in the interests of the economic well-being of the United Kingdom or for the purpose of preventing and detecting crime or preventing disorder. The authorised conduct must be proportionate to what is sought to be achieved by the conduct. In considering necessity and proportionality, the authorising officer must take into account whether what is sought to be achieved by the authorised conduct could reasonably be achieved by other conduct which would not constitute crime. They must take into account the requirements of the Human Rights Act 1998. The Bill confers a power on the Secretary of State to make an order which could prohibit the authorisation of any conduct described in the order, or provide for additional requirements to be satisfied in relation to the authorisation of such conduct as is described in the order.

7. The Bill will limit the personnel of relevant authorities (set out in clause 2 of the Bill) able to grant a CCA under RIPA. The ranks, positions etc. of personnel in each relevant authority who will be able to grant a CCA will be set out in secondary legislation. Police Scotland will be able to grant a CCA under RIPA for a reserved purpose or in the case of activity which takes place outwith Scotland.

8. The effect of a CCA is that the conduct authorised will be lawful for all purposes. It will have the effect that any persons who authorise and task the CHIS will be protected from any liability. The CHIS, however, will still be subject to criminal liability if they carry out conduct outside of what is authorised.

9. Clause 3 and schedule 1 make corresponding amendments to RIP(S)A which generally mirror the amendments made to RIPA. This means it will not be possible to authorise criminal conduct as part of a CHIS authorisation under RIP(S)A. Instead, such conduct requires to be authorised additionally by a CCA granted under RIP(S)A. Amendments to RIP(S)A provide that a CCA may be granted for the purpose of preventing and detecting crime or of preventing disorder. Similar to the power conferred on the Secretary of State under RIPA, the Bill enables the Scottish Ministers to prohibit the authorisation of particular conduct under RIP(S)A and to place additional requirements that must be satisfied before a CCA is granted under RIP(S)A.

10. The ability to make authorisations will be limited initially to Police Scotland and the Scottish Administration. The Bill will enable the Scottish Ministers to add or remove public authorities via an order made under RIP(S)A, subject to the affirmative procedure. The ranks, positions etc. of personnel in each public authority able to authorise a CCA will be set out in secondary legislation. In terms of authorisations made by the Scottish Administration, the current intention is to prescribe personnel in the Scottish Prison Service, meaning that other parts of the Scottish Administration will not be able to grant a CCA.

11. Clause 4 of the Bill amends the Investigatory Powers Act 2016 (“the 2016 Act”) in respect of the oversight functions of the Investigatory Powers Commissioner (“the IPC”). The IPC has general oversight functions in relation to the exercise of powers under various pieces of legislation, including RIPA, RIP(S)A and the 2016 Act. The amendments will mean that, in keeping matters under review, the IPC must pay particular attention to the use of the powers to grant a CCA under RIPA and RIP(S)A. The IPC will also be required to specifically include information about the use of the powers to grant a CCA under RIPA and RIP(S)A in their annual report.

12. The Bill does not specify explicit limits on the types of offences (and the UK Government has indicated it would not be appropriate to do so owing to the nature of the investigations in which CHIS are deployed). There are in built limits in that a CCA can only be granted where it is necessary for a specified purpose and the conduct specified in a CCA must be proportionate to what is sought to be achieved by the conduct. Any public authority authorising a CCA is obliged to act compatibly with Convention rights by virtue of the Human Rights Act 1998, meaning that personnel of the authority cannot grant a CCA if the effect of that CCA would be to violate a person’s Convention rights.

Provisions relating to Scotland

13. The provisions amending RIPA relate to Scotland in so far as it will be possible for a CCA to be granted where it is necessary for reserved purposes (e.g. in the interests of national security). It will also be possible, in certain circumstances, for a CCA to be granted in relation to conduct taking place in Scotland for the purpose of preventing or detecting crime or of preventing disorder. This occurs where the authorising body is one of the authorities listed in section 46(3) of RIPA which provides for bodies that operate on a UK-wide basis (e.g. the National Crime Agency and HMRC).

14. The provisions which amend RIP(S)A relate to Scotland in that it will be possible for a CCA to be granted under RIP(S)A by specified Scottish public authorities where it is necessary for the purpose of preventing or detecting crime or of preventing disorder. Additionally, the Bill confers powers on the Scottish Ministers to make secondary legislation under RIP(S)A in respect of the grant of a CCA.

15. The provisions of the Bill which amend the 2016 Act relate to Scotland in so far as those amendments concern the oversight arrangements for the use of investigatory powers which are capable of being exercised in Scotland.

Requirement for legislative consent

16. The Bill makes provision for matters which are within the legislative competence of the Scottish Parliament and which alter the executive competence of the Scottish Ministers. As such, it is a relevant Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently one requiring the consent of the Scottish Parliament.

17. As explained above, one effect of the Bill is that certain UK public authorities will be able to grant a CCA under RIPA where it is necessary for the purpose of preventing and detecting crime and of preventing disorder in Scotland. It is this aspect of the RIPA amendments that triggers the requirement for legislative consent.

18. The Bill provisions which amend RIP(S)A are within the legislative competence of the Scottish Parliament and require the consent of the Scottish Parliament. Additionally, the Bill amends RIP(S)A to confer powers on the Scottish Ministers to make secondary legislation in respect of the grant of a CCA, meaning that the Bill alters the executive competence of the Scottish Ministers.

19. The Bill provisions which amend the 2016 Act require the consent of the Scottish Parliament in so far as those amendments concern the oversight arrangements for the provisions described above.

20. RIPA and RIP(S)A are closely aligned and changes made to both Acts will help to maintain a unified operating model for law enforcement throughout the UK. Ideally the Scottish Ministers would like to continue with a consistent approach across the UK jurisdictions. Any delay incurs a risk, in the event that a forthcoming Court of Appeal judgment rules the current practice cannot be maintained, of denying an important investigative tool to Police Scotland for a period of time (further detail about the Court

of Appeal case is attached in the Annex). That may create an inconsistent approach across the United Kingdom. If consent of the Scottish Parliament is not provided it would mean no public bodies are able to grant a CCA in Scotland for the devolved purpose of preventing or detecting crime or preventing disorder. Provisions made under RIPA, however, would enable certain public authorities to authorise CCAs in Scotland for the reserved purposes of national security and the economic wellbeing of the UK. If required, the Scottish Government will consider alternatives including legislation in the Scottish Parliament.

Consultation

21. The Bill was drafted and introduced by Home Office. The Scottish Government consultation has been limited to Police Scotland and the Crown Office and Procurator Fiscal Service on the provisions relating to Scotland and discussions with the Investigatory Powers Commissioner and the Human Rights group Reprieve. The conclusion from those discussions is set out in paragraph 24.

Financial implications

22. There are no additional financial implications as a result of these new procedures for law enforcement and no costs for the Scottish Government.

Draft Legislative Consent Motion

23. Under Rule 9B.3.3 (d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraph 24 below sets out the Scottish Government's reasons for not including a draft motion in this Memorandum for the purposes of that rule.

Conclusion and Scottish Government position

24. At this time, the Scottish Ministers cannot recommend to the Scottish Parliament to give its consent to the Bill. The Scottish Government supports relevant authorities having the necessary powers they require in order to keep our communities safe. These, however, must be balanced by protection of civil liberties. The Scottish Government has been insistent with the UK Government in requiring enhanced independent oversight by the Investigatory Powers Commissioner's Office at an early stage in the authorisation process to be included in the Bill. The Scottish Government's position, which has been explained to the UK Government, is that the Scottish Government requires satisfactory amendments to be made to the Bill to achieve the above in order for the Scottish Government to recommend that the Scottish Parliament consents to the relevant provisions in the Bill. The Scottish Government has engaged with the Home Office and the Crown Office and Procurator Fiscal Service to ensure additional safeguards and processes are clearly set out in associated guidance, including relevant Codes of Practice. The Scottish Government expected the inclusion of suitable amendments about additional oversight during the House of Commons stages of the Bill, but no such amendments were brought forward by the UK Government, or non-Government amendments approved by the UK Parliament. The Scottish Government awaits developments during consideration by the House of

Lords, but the Bill will require to be substantially changed with far greater independent oversight and additional safeguards, in order for the Scottish Government to reconsider its position and recommend that the Scottish Parliament consent to the Bill.

25. If during the remaining stages of the Bill's progression, appropriate amendments are provided which address our concerns, a supplementary memorandum with a final position on consent will be lodged. At present the Scottish Ministers cannot recommend to the Scottish Parliament to give its consent.

SCOTTISH GOVERNMENT
December 2020

Further background material

Background on the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000

1. The Bill relates to the conduct and the use of a CHIS. A CHIS is a covert source. A CHIS could be a member of the public or could be a member of law enforcement e.g. an undercover police officer. The authorisation of the conduct and the use of a CHIS is governed by Part II of RIPA and by RIP(S)A.
2. Part II of RIPA and RIP(S)A regulate the use of directed surveillance, intrusive surveillance and the conduct and the use of a CHIS. Of these, only the conduct and the use of a CHIS is relevant for the purposes of this Bill.
3. RIP(S)A applies to the authorisation of the conduct and the use of a CHIS in Scotland by Police Scotland and certain other Scottish public authorities. Specified public authorities can grant an authorisation where it is necessary for the purposes of the prevention and detection of crime, prevention of disorder, in the interests of public safety or for the purpose of protecting public health.
4. Only conduct which is proportionate to what is sought to be achieved can be authorised. The conduct that can be authorised is conduct that is comprised in any such activities involving the conduct of a CHIS or the use of a CHIS. The “conduct of a CHIS” is conduct falling within the following paragraphs, or anything incidental to the following:
 - a) establishing or maintaining a personal or other relationship with another person for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c),
 - b) covertly using such a relationship to obtain information or to provide access to any information to another person, or
 - c) covertly disclosing information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.
5. The “use of a CHIS” refers to inducing, asking, or assisting a person to engage in the conduct of a CHIS, or to obtain information by means of the conduct of a CHIS.
6. A Scottish Government Code of Practice and a Police Scotland Standard Operating Procedure manual exist to ensure compliance with the legislation.
7. Part II of RIPA applies throughout the United Kingdom for authorisations for reserved purposes, such as national security. In certain circumstances, RIPA is the relevant legislation for authorisations in Scotland for a devolved purpose. This is where the UK public authority is one of those listed in section 46(3) of RIPA (or is treated as so listed by order made under section 46(4) of RIPA). These are bodies which operate on a UK-wide basis, such as the National Crime Agency and HMRC. A UK Government Code of Practice applies to authorisations made under RIPA.

8. In order to investigate crime it may be necessary for a public authority to task a CHIS to engage in a course of action which involves the commission of an offence. This may include participation in criminality to maintain the CHIS's credibility or to gain trust of those under investigation.

The Legal Challenge

9. In November 2019 the Investigatory Powers Tribunal ("IPT") considered a legal challenge brought by Privacy International, Reprieve and others against the Secretaries of State for the Home Department and the Foreign and Commonwealth Office, GCHQ and the Security Services. The case concerned criminal conduct carried out in the UK by CHIS recruited by the Security Service, and the challenge concerned the Security Service's policy regarding the use of CHIS who participate in crime.

10. One of the grounds of challenge was that such authorisation of criminal conduct would require express statutory provision and, in the absence of such provision, that the Security Service's policy in this area lacked a legal basis.

11. The IPT published its judgment on 20 December. It found by a majority of three to two that the Security Service has an implied power under the Security Service Act 1989 to authorise agents to participate in unlawful conduct. The claimants have since lodged an appeal to the Court of Appeal.

12. The UK Government response to the IPT judgment and forthcoming appeal judgement was to introduce the Covert Human Intelligence Sources (Criminal Conduct) Bill. The purpose of the Bill is to provide an express statutory power for certain public authorities to authorise a CHIS to participate in criminal conduct where it is necessary and proportionate to do so. The Explanatory Notes accompanying the Bill state that: "This is not new activity. It puts existing practice on a clear and consistent statutory footing".

This Legislative Consent Memorandum relates to the Covert Human Intelligence Sources (Criminal Conduct) Bill (UK legislation) and was lodged with the Scottish Parliament on 4 December 2020

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