

Covert Human Intelligence Sources (Criminal Conduct) Bill

AMENDMENTS
TO BE MOVED
ON REPORT

Clause 1

BARONESS CHAKRABARTI
BARONESS RITCHIE OF DOWNPATRICK

Page 1, leave out line 17

Member's explanatory statement

This amendment is linked to the amendment in name of Baroness Chakrabarti at page 1, line 19.

BARONESS CHAKRABARTI
BARONESS RITCHIE OF DOWNPATRICK
LORD PADDICK

Page 1, line 19, at end insert—

“(3A) In section 27(1) of that Act (lawful surveillance etc.), at the beginning insert “Save for criminal conduct authorised under section 29B,”.

(3B) After section 27(2) of that Act, insert—

“(2A) If a person acts in accordance with a criminal conduct authorisation under section 29B, the nature of that authorisation and compliance with it shall be considered and deemed relevant to—

- (a) any decision as to whether prosecution for a criminal offence by that person is in the public interest;
- (b) any potential defences to charges of such criminal conduct; and
- (c) any potential civil liability on the part of that person, and the quantum of any damages.”

Member's explanatory statement

This amendment would preserve the current legal status quo whereby those authorised to engage in criminal conduct are not rendered immune from either civil or criminal liability. Instead, compliance with an authorisation will be relevant to any public interest consideration to prosecute, any existing legal defences, and any court considerations as to civil liability and/or damages.

LORD DUBS
BARONESS MASSEY OF DARWEN

Page 1, line 19, at end insert—

- “(3A) Section 27 of that Act (lawful surveillance etc.) is amended in accordance with subsections (3B) and (3C).
- (3B) In subsection (1) after “applies” insert “, other than criminal conduct in the course of, or otherwise in connection with, the conduct of covert human intelligence sources,”.
- (3C) After subsection (2) insert—
- “(2A) Criminal conduct in the course of, or otherwise in connection with, the conduct of covert human intelligence sources is lawful for the purposes of the criminal law if—
- (a) a criminal conduct authorisation granted under section 29B confers an entitlement to engage in that criminal conduct on the person whose conduct it is; and
 - (b) his or her criminal conduct is in accordance with the authorisation.
- (2B) Where a criminal conduct authorisation is granted under section 29B, the relevant public authority must indemnify a person against civil liability (including reasonable costs) incurred by the person—
- (a) as a result of criminal conduct in which he or she was entitled to engage under the criminal conduct authorisation; or
 - (b) as a result of any conduct of his or hers that—
 - (i) is incidental to any criminal conduct authorised under the criminal conduct authorisation; and
 - (ii) is not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment and might reasonably have been expected to have been sought in the case in question.
- (2C) In this section “relevant public authority” means, in respect of a criminal conduct authorisation granted under section 29B, the public authority for whose benefit the authorised criminal conduct is to take place.””

Member’s explanatory statement

This amendment removes the immunity from civil liability for authorised criminal conduct and replaces it with a requirement to indemnify the person authorised to engage in criminal conduct against civil liability.

Page 2, line 8, at end insert—

- “(1A) Authorisations granted under this section require judicial approval in accordance with section 29C.”

Member’s explanatory statement

This amendment imposes a requirement for prior judicial approval of CCAs (with provision for urgent cases), and relates to the amendment to Clause 1, page 3, line 16 in the name of Lord Dubs.

BARONESS CHAKRABARTI
BARONESS RITCHIE OF DOWNPATRICK
LORD PADDICK

Page 3, line 2, at end insert “; and

- (d) is not carried out for the primary purpose of—
 - (i) encouraging or assisting, pursuant to sections 44 to 49 of the Serious Crime Act 2007, the commission of an offence by, or
 - (ii) otherwise seeking to discredit, the person, people or group subject to the authorised surveillance operation.”

Member’s explanatory statement

This amendment would prohibit the authorisation of criminal conduct where the covert human intelligence source acts as an agent provocateur.

LORD YOUNG OF COOKHAM
BARONESS CHAKRABARTI

Page 3, line 2, at end insert—

- “() A criminal conduct authorisation may not be granted to a covert human intelligence source under the age of 18.”

Member’s explanatory statement

This amendment would prohibit the granting of criminal conduct authorisations to children.

Page 3, line 2, at end insert—

- “(8A) A criminal conduct authorisation may not be granted in relation to a covert human intelligence source who is—
 - (a) a vulnerable individual, or
 - (b) a victim of modern slavery or trafficking.
- (8B) In subsection (8A)—
 - a “vulnerable individual” is a person who, by reason of mental disorder or vulnerability, other disability, age or illness, is or may be unable to take care of themselves, or to protect themselves against significant harm or exploitation;
 - a “victim of modern slavery or trafficking” is a person who the relevant investigating authority believes is or may be a victim of trafficking as defined by section 2 of the Modern Slavery Act 2015 (human trafficking), or exploitation as defined by section 3 of that Act (meaning of exploitation).”

Member’s explanatory statement

This amendment would prohibit the granting of criminal conduct authorisations to vulnerable individuals or victims of modern slavery or trafficking.

BARONESS MASSEY OF DARWEN
LORD DUBS

Page 3, line 2, at end insert –

“(8A) A criminal conduct authorisation may not be granted or renewed in relation to a covert human intelligence source who is under the age of 18 unless prior approval has been obtained from a Judicial Commissioner.

(8B) A Judicial Commissioner may only provide approval under subsection (8A) if he or she is satisfied –

(a) that the grant or renewal of a criminal conduct authorisation in relation to a source who is under the age of 18 is necessary for an investigation or operation, specified in the authorisation, which is being conducted for the purpose of saving lives or preventing serious physical or mental harm;

(b) that the public authority granting the criminal conduct authorisation has made and, in the case of a renewal, updated a risk assessment sufficient to demonstrate that –

(i) the nature and magnitude of any risk of physical injury to the source arising in the course of, or as a result of, carrying out the criminal conduct described in the authorisation have been identified and evaluated; and

(ii) the nature and magnitude of any risk of psychological distress to the source arising in the course of, or as a result of, carrying out the criminal conduct described in the authorisation have been identified and evaluated;

(c) that at the time of granting or renewing the authorisation the person granting or renewing the authorisation –

(i) had considered the risk assessment and satisfied him or herself that any risks identified in it are justified and, if they are, that they have been properly explained to and understood by the source;

(ii) knew whether the relationship to which the conduct or use would relate is between the source and a relative, guardian or person who has for the time being assumed responsibility for the source's welfare, and, if it is, had given particular consideration to whether the authorisation is justified in the light of that fact; and

(d) that the nature and magnitude of any risk of physical injury or psychological distress to the source arising in the course of, or as a result of, carrying out the criminal conduct described in the authorisation are –

(i) proportionate to the purpose and likely outcome of the investigation or operation specified in the authorisation;

(ii) consistent with the Convention rights of the source; and

(iii) justified when taking into account the best interests of the source as a primary consideration.

(8C) In subsection (8B) –

“Convention rights” has the meaning given in section 1(1) of the Human Rights Act 1998;

“Judicial Commissioner” has the meaning given in section 227 of the Investigatory Powers Act 2016;

Clause 1 - continued

“source” means covert human intelligence source.”

Member’s explanatory statement

This amendment prohibits the authorisation of criminal conduct by children without specific prior judicial approval.

Page 3, line 2, at end insert –

- “(8A) A criminal conduct authorisation may not authorise any criminal conduct –
- (a) intentionally causing death or grievous bodily harm to an individual or being reckless as to whether such harm is caused;
 - (b) involving an attempt in any manner to obstruct or pervert the course of justice;
 - (c) amounting to an offence under the Sexual Offences Act 2003, the Sexual Offences (Scotland) Act 2009 or any offence listed in Schedule 3 to the Sexual Offences Act 2003;
 - (d) subjecting an individual to torture or to inhuman or degrading treatment or punishment, within the meaning of Article 3 of Part 1 of Schedule 1 to the Human Rights Act 1998; or
 - (e) depriving a person of their liberty, within the meaning of Article 5 of Part 1 of Schedule 1 to the Human Rights Act 1998.”

Member’s explanatory statement

This amendment establishes a prohibition on the authorisation of serious criminal offences, in similar terms to that appearing in the Canadian Security Intelligence Service Act 1985.

LORD DUBS

BARONESS MASSEY OF DARWEN

Page 3, line 16, at end insert –

“29C Approval for criminal conduct authorisations

- (1) This section applies where an authorisation has been granted under section 29B.
- (2) Unless the authorisation is an urgent authorisation, the authorisation has no effect until such time (if any) as a Judicial Commissioner has approved the grant of the authorisation.
- (3) If the authorisation is an urgent authorisation –
 - (a) it is effective when granted; but
 - (b) the authorisation ceases to have effect if it is not approved by a Judicial Commissioner in accordance with this section within 48 hours of being granted.
- (4) A Judicial Commissioner may give approval under this section to the granting of an authorisation under section 29B if, and only if, the Judicial Commissioner is satisfied that –
 - (a) at the time of the grant the person granting the authorisation had reasonable grounds to believe that the requirements of section 29B(4), and any requirements imposed by virtue of section 29B(10), were satisfied in relation to the authorisation;

Clause 1 - continued

- (b) at the time when the Judicial Commissioner is considering the matter, there remain reasonable grounds for believing that the requirements of section 29B(4), and any requirements imposed by virtue of section 29B(10), are satisfied in relation to the authorisation; and
 - (c) the authorisation granted does not authorise conduct that is incompatible with any Convention rights.
- (5) A Judicial Commissioner may only give approval to the granting of an urgent authorisation if the Judicial Commissioner is also satisfied that at the time of the grant the person granting the authorisation had reasonable grounds to believe the authorisation must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised.
- (6) In this section –
- “Convention rights” has the meaning given in section 1(1) of the Human Rights Act 1998;
 - “Judicial Commissioner” has the meaning given in section 227 of the Investigatory Powers Act 2016; and
 - “urgent authorisation” means an authorisation under section 29B that the person granting it believes must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised (unless the need for the authorisation to be granted immediately has arisen as a result of fault by the authorising public authority).”

Clause 2

BARONESS MASSEY OF DARWEN
LORD DUBS

Page 4, leave out lines 10 to 23

Member’s explanatory statement

This amendment would restrict the authorities that can grant criminal conduct authorisations to police forces, the National Crime Agency, the Serious Fraud Office and the intelligence services.

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11 December 2020
