



Home Office

Rt Hon James Brokenshire MP
Minister of State for Security

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Dear Harriet

Thank you for your letter of Monday 12 October on behalf of the Joint Committee on Human Rights. I am responding on behalf of the Home Secretary.

I welcome the Committee's support for putting this existing activity on a statutory footing. This is a long-standing and critical tactic that has repeatedly kept the British public safe from those who would seek to do us harm. I am grateful for the opportunity to answer the Committee's questions.

Let me first reassure the Committee that a Covert Human Intelligence Source (CHIS) will never be authorised to commit "crimes with impunity". Under no circumstances will CHIS be given unlimited authority to commit any or all crimes. Criminal Conduct Authorisations (CCAs) will specify the conduct that can be carried out, will be tightly bound, and will only be granted by an experienced and highly trained officer who has judged that the specified conduct is both necessary and proportionate to what is sought to be achieved.

Public authorities with power to grant a CCA

Schedule 1 of the Regulation of Investigatory Powers Act (RIPA) sets out those public bodies who are able to authorise CHIS. In terms of granting a CCA, we have drawn from Schedule 1, but significantly narrowed it based on operational need. All public authorities included in the Bill have provided operational justifications for why they require the power to grant a CCA. Alongside law enforcement and the intelligence services, these wider public authorities have important responsibilities for preventing and investigating criminal activity. They play an important role in keeping the public safe. We expect these wider public authorities to be low users of this power. However, there will be occasions where CHIS play a critical role in providing the intelligence needed to identify and prevent criminality, and as Organised Crime Groups (OCGs) expand increasingly into areas overseen by these public authorities, the need for robust investigative tools is more important than ever.

The Environment Agency, for example, is responsible for investigating and prosecuting offences which create serious risks of harm to people and the environment, such as illegal landfills, misdescription of hazardous waste and illegal waste exports. Serious and organised waste crime has been estimated to cost the UK economy up to £1 billion a year and an independent review in 2018 found that perpetrators are often involved in other serious criminal activity, including large scale fraud and in some cases modern slavery.

If you were to look at the Food Standards Agency as another example, there is a specialist Food Crime Unit - a law enforcement capability within the Agency. The Unit was established in 2015 following a review of the 2013 horse meat scandal and it is responsible for protecting consumers and the food industry from food unfit for human consumption. In this context, a CCA might be granted so a CHIS can engage in the production of food which is known to have been fraudulently labelled or produced, in order to maintain their cover and to gather the evidence needed to prosecute those responsible.

Juvenile CHIS

I fully understand the concerns that have been raised in relation to juveniles as CHIS. Juveniles are only used as CHIS in extremely rare and exceptional circumstances. In the four years between January 2015 and December 2018, only 17 juveniles were authorised to act as a juvenile CHIS. Of these, 16 were aged 16 or 17 and one was aged 15.

Juvenile CHIS participation in criminal conduct is rarer still, but there may be exceptional occasions when this is authorised. Such authorisations are very carefully considered, and are subject to rigorous risk assessments, and extensive safeguards.

This includes an enhanced authorisation regime, with an in-depth assessment of the risks of both physical and psychological harm to the juvenile. All public authorities must have regard to their safety, welfare and wellbeing as required under section 10 and section 11 of the Children Act 2004 and the United Nations Convention on the Rights of the Child. There are also strengthened protections around who can act as an appropriate adult when accompanying those under 16 to any meetings with their handlers. This is to ensure the role is undertaken by a person fully qualified to provide the appropriate support to the juvenile CHIS.

Regrettably, young people under the age of 18 are sometimes drawn in to crime, including as victims of crime. One notable example is that of the 'county lines' phenomenon which, along with the associated violence, drug dealing and exploitation, has a devastating impact on young people, vulnerable adults and local communities. In some circumstances, a young person may have unique access to information or intelligence that could play a vital part in shutting down the criminality, prosecuting offenders and preventing further harm.

Limits on the conduct that can be authorised

Your question on placing limits on the face of the Bill is one that was discussed in detail during Commons stages of the Bill. It is not straightforward to make comparisons between what we are proposing here and what might exist for other countries; we each have our own legal systems, our operational partners each have their own practices and functions, and perhaps most importantly, we each have a very different threat picture. As the Committee will be aware, the United Kingdom is the only Five Eyes member that is a signatory to the European Convention on Human Rights.

We cannot underestimate the context of Northern Ireland-related terrorism, where CHIS testing has been, and will continue to be, a very serious consideration. To place limits on the Bill would create a checklist of crimes that CHIS will never be able to undertake, which criminal and terrorist groups could exploit to seek out CHIS within their ranks. As I said during Second Reading, in drafting this legislation, we will have achieved little if we cannot protect CHIS from being identified by those they inform against. If it would be helpful, I am happy to arrange for operational partners to provide you with a further briefing on this point.

Liability for Human Rights Act violations

You ask whether public authorities will take responsibility for any violations of the Human Rights Act 1998 (HRA) by a CHIS operating under a CCA. Please let me reiterate that a CHIS will never be given unlimited authority to commit any or all crimes. No public official may grant a CCA in breach of section 6 of the HRA. If they were to do so, the authorisation would be invalid and the conduct of the CHIS would not be rendered lawful.

Prior judicial approval

On the question of prior judicial approval, the Bill will provide the relevant public authorities with the powers that they need to keep the public safe whilst also ensuring they are subject to appropriate safeguards. All public authorities will have to demonstrate that the criminal activity they wish to authorise meets robust necessity and proportionality thresholds. Prior judicial approval is not the only way to provide robust oversight of investigatory powers and it is important to consider the most appropriate oversight for each capability.

Unlike other investigatory powers, there is a human element to the authorisation of CHIS and so a need to consider CHIS safety as part of the authorisation process. When considering the authorisation of CHIS involvement in criminality, a thorough understanding of the CHIS themselves, their strength and weaknesses, is required alongside an in-depth knowledge of the operational context and associated risks to the CHIS and the public. This allows for safe and very precise tasking; these decisions must be correct and made at the right time. This human element also means that there will be a need to sometimes provide urgent authorisations, which adds further complexity and practical challenge which is not seen elsewhere.

These authorisations are taken by an experienced and highly trained authorising officer who is in the best position to consider the necessity and proportionality of conduct, while also considering the operational specifics and safety of the CHIS. Robust, retrospective oversight is provided by the Investigatory Powers Commissioner (IPC), who has wide-ranging powers to carry out his functions. This includes regular and in-depth inspections of all public bodies that use this power. The IPC sets the frequency of these inspections, and public authorities are required to provide unfettered access to documents and information. The findings from those inspections are included in the IPC's annual report. In addition, the Bill explicitly requires the IPC to keep CCAs "in particular" under review and to include information on public authorities' use of the power in his annual report.

Redress for victims

Finally, on the issue of redress, let me first say that there is no barrier under the Bill for affected persons seeking to judicial review a decision made by a public authority. In addition, any person or organisation is able to make a complaint to the Investigatory Powers Tribunal (IPT) with regards to any investigatory powers, including this power. Any complaint will be independently considered by the Tribunal. The IPT operates one of the most open and transparent systems in the world for investigating allegations that the agencies have breached human rights. The Tribunal hears cases in open where possible and publishes detailed reports on its work and rulings. I am conscious that this is an area of concern for some Members of the House, and as such I am considering whether anything further is needed.

I thank you again for your and the Committee's careful consideration of this Bill, and I am happy to discuss any of the above points in further detail.

Yours sincerely,
