

HOUSE OF LORDS

Select Committee on the Constitution

19th Report of Session 2019–21

Covert Human Intelligence Sources (Criminal Conduct) Bill

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Matt Korris (Clerk), Ava Mayer (Policy Analyst) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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Covert Human Intelligence Sources (Criminal Conduct) Bill

Introduction

1. The Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced in the House of Commons on 24 September 2020 and completed its passage on 15 October. It was brought to the House of Lords on 19 October and had its second reading on 11 November. Committee stage is scheduled to begin on 24 November.
2. The Bill provides powers to authorise covert human intelligence sources to participate in conduct which would otherwise constitute a criminal offence. The Explanatory Notes to the Bill state this “is not new activity. It puts existing practice on a clear and consistent statutory footing ... It is a continuation of existing practice that is currently authorised using a variety of legal bases.”¹ **We welcome this Bill in principle, as it brings transparency and legitimacy to the rules that apply to covert human intelligence sources. However, we have concerns about some of the Bill’s provisions, which we set out below.**
3. The Joint Committee on Human Rights (JCHR) has reported on the Bill and raised concerns about its human rights implications.² We welcome its assessment and draw on its conclusions in considering the constitutional issues raised by the Bill.

Authorised activities

4. Clause 1 sets out a regime for “criminal conduct authorisations” (CCAs) that may apply to a covert human intelligence source (CHIS). It provides that criminal conduct may be authorised subject to the following constraints:
 - it is authorised at the same time as, or after, the (separate) authorisation of a CHIS;
 - the authorising official believes it to be necessary, proportionate and in accordance with any additional requirements imposed by order by the Secretary of State;
 - it is necessary in the interests of national security, for the purposes of preventing or detecting crime or of preventing disorder, or in the interests of the economic well-being of the United Kingdom;
 - the authorising official takes account of whether other non-criminal means could reasonably have been used; and
 - other relevant matters, including the requirements of the Human Rights Act 1998, are taken into account.

1 Covert Human Intelligence Sources (Criminal Conduct) Bill [HL Bill 144 (2019–21)], [Explanatory Notes](#), paras 2–8

2 Joint Committee on Human Rights, [Legislative Scrutiny: Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#) (Tenth Report, Session 2019–21, HC 847 / HL Paper 164)

5. The Bill provides no express limits on the types of criminal conduct which may be authorised. This approach contrasts with that in other countries, such as Canada, the United States of America and Germany, which statutorily forbid the authorisation of certain violent crimes. The UK Government's position is that the Human Rights Act 1998 already imposes an effective limit on the criminal conduct that could be authorised under the Bill. The JCHR was not persuaded that this was sufficient.³
6. The circumstances in which the state may authorise the commission of what would otherwise be criminal offences are of fundamental concern to the rule of law. It is essential that the Bill places clear and express limits on the criminal conduct that may be authorised. The JCHR recommended that the Bill should prohibit the authorisation of serious criminal offences, modelled on the approach taken in the Canadian Security Intelligence Service Act.⁴ **The House should examine these proposals closely at committee stage.**

Purposes for which authorisation may be granted

7. As set out above, CCAs may be granted where they are necessary in the interests of national security, for the purposes of preventing or detecting crime or of preventing disorder, or in the interests of the economic well-being of the United Kingdom.
8. "Preventing disorder" and the "economic well-being of the United Kingdom" are broad and vague justifications for the authorisation of criminal conduct.⁵ The latter could relate to a wide class of conduct, including commercial activity that is entirely lawful and appropriate, as well as to the exercise of collective bargaining rights or other forms of lawful and appropriate trade union activity. **While we recognise that threats to the "economic well-being of the United Kingdom" may justify a security response, we are concerned about the use of such a broad concept to authorise serious criminal conduct. The House may wish to consider whether the authorisation of criminal conduct should require more specific justification than a general invocation of the need to protect economic well-being.**
9. **We consider that it would assist both Houses for the Intelligence and Security Committee of Parliament to assess this issue in respect of this legislation and other statutes that contain the same justification.**

Authorising bodies

10. Clause 2(9) inserts a new Part A1 into schedule 1 to the Regulation of Investigatory Powers Act 2000 (RIPA). It lists the bodies that are capable of authorising criminal conduct. These are:

3 *Ibid.*, paras 32–52

4 Following this approach, serious criminal offences could include causing death or bodily harm, violating the sexual integrity of an individual or wilfully attempting to obstruct the course of justice: Joint Committee on Human Rights, *Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill* (Tenth Report, Session 2019–21, HC 847 / HL Paper 164), para 53

5 We recognise that the economic well-being of the UK is a purpose for which the authorisation of investigatory powers and other activities are already permitted. See, for example, the authorisation of surveillance under the [Regulation of Investigatory Powers Act 2000](#) and warrants issued under the [Investigatory Powers Act 2016](#).

- Any police force
 - The National Crime Agency
 - The Serious Fraud Office
 - Any of the intelligence services
 - Any of Her Majesty's forces
 - Her Majesty's Revenue and Customs
 - The Department of Health and Social Care
 - The Home Office
 - The Ministry of Justice
 - The Competition and Markets Authority
 - The Environment Agency
 - The Financial Conduct Authority
 - The Food Standards Agency
 - The Gambling Commission.
11. The Government has set out real and hypothetical examples of the circumstances in which these bodies might justifiably issue CCAs.⁶
12. However, the JCHR considered the range of public authorities to be excessively broad:
- “The authorisation of criminal conduct by the security and intelligence services and the police may on occasion be necessary to allow those agencies to carry out their vital functions. However, in the absence of satisfactory explanation from Government, it is hard to see any justification for extending the use of CCAs to bodies whose central function is not protecting national security or fighting serious crime.”⁷
13. We share the concerns of the JCHR about the range of bodies that may authorise criminal conduct. While national security and fighting serious crime are core functions of the police and the intelligence and security agencies, this is not the case for all the bodies listed in clause 2(9). **The House may wish to consider whether it is appropriate for all the bodies listed in clause 2(9) to have the power to authorise criminal conduct.**

Accountability and oversight

14. Clause 4 extends the oversight function of the Investigatory Powers Commissioner to criminal conduct authorisations. It requires the Commissioner to keep under review the exercise of the power to grant authorisations and to report annually on the use of the powers.

6 Home Office, *Operational Case Studies*, 1 October 2020: <https://www.gov.uk/government/publications/covert-human-intelligence-sources-draft-code-of-practice/covert-human-intelligence-sources-bill-case-studies-accessible-version> [accessed 11 November 2020]

7 Joint Committee on Human Rights, *Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill* (Tenth Report, Session 2019–21, HC 847 / HL Paper 164), para 81

15. However, there is no requirement in the Bill for prior authorisation of criminal conduct by an independent body. This is in contrast to Terrorism Prevention and Investigation Measures and targeted interception under the Investigatory Powers Act 2016, for which it is necessary to obtain a warrant from a judge beforehand.⁸
16. The JCHR considered the lack of prior independent approval of CCAs inappropriate. It concluded:

“The Bill must be amended to include a mechanism for prior judicial approval of CCAs (with appropriate provision for urgent cases). It is noted that Judicial Commissioners appointed under the Investigatory Powers Act 2016 carry out a prior approval function in respect of other covert investigatory activities. This function of Judicial Commissioners could be extended to cover the grant of CCAs.”⁹
17. **We agree with the JCHR that the authorisation of criminal conduct should be subject to prior judicial approval, except where this is not reasonably practicable. Where it is not possible to obtain judicial approval in advance (e.g. in urgent cases), authorisation should be required as soon as reasonably possible afterwards.**

8 In exceptional circumstances warrants under the Investigatory Powers Act 2016 may be issued without prior judicial authorisation, but judicial oversight of that decision is required soon afterwards.

9 Joint Committee on Human Rights, *Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill* (Tenth Report, Session 2019–21, HC 847 / HL Paper 164), para 100

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Lord Sherbourne of Didsbury
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple
 Baroness Corston
No relevant interests
 Baroness Drake
No relevant interests
 Lord Dunlop
No relevant interests
 Lord Faulks
No relevant interests
 Baroness Fookes
No relevant interests
 Lord Hennessy of Nympsfield
No relevant interests
 Lord Howarth of Newport
No relevant interests
 Lord Howell of Guildford
No relevant interests
 Lord Pannick
No relevant interests
 Lord Sherbourne of Didsbury
No relevant interests
 Baroness Taylor of Bolton (Chair)
No relevant interests
 Lord Wallace of Tankerness
Chair of the Board of Trustees, Reprieve

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.