GENERAL CRIME BRIEFING NOTE

The Covert Human Intelligence Sources (Criminal Conduct) Bill.

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Statute: The Covert Human Intelligence Sources (Criminal Conduct) Bill HL144

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The Covert Human Intelligence Sources (Criminal Conduct) Bill is in the process of being considered by Parliament. It is currently at the Committee stage in the House of Lords, having passed the House of Commons. The provisions of the Bill make far-reaching changes to the law regarding the state's power to authorise criminal activity and have attracted considerable public scrutiny, and criticism, so far.

Why has this Bill been introduced?

In a judgement handed down on 20 December 2019 (*Privacy International and others v Secretory of State for Foreign and Commonwealth Affairs and others* [2019] UKIPTrib IPT_17_186_CH), the Investigatory Powers Tribunal examined the purported 'authorisation' given to officials and agents of the Security Service (also known as MI5) to commit criminal offences.

The position of the Security Service in this regard is different to the Secret Intelligence Service (aka SIS or MI6). The SIS (as currently constituted) is a statutory creation of the Intelligence Services Act 1994. Section 7 of the 1994 Act provides for a system of authorisations for the SIS by the Secretary of State for acts done outside the British Islands which would attract liability in the United Kingdom. The Security Service, by contrast, takes its powers from the Security Service Act 1989 which contains no similar provision.

The Regulation of Investigatory Powers Act 2000 ('RIPA') creates a regime for authorising the use and conduct of Covert Human Intelligence Sources ('CHISs') and the RIPA regime applies to the Security Service and to police forces and other national and local governmental and law enforcement agencies. It was however agreed by all parties in the *Privacy International* case that the RIPA regime does *not* provide a mechanism whereby criminal conduct of a CHIS or an officer may be authorised, or whereby immunity from prosecution may be given to a CHIS or officer who commits crime. That is because the 'conduct' being authorised via RIPA is very tightly defined within RIPA itself as being limited to the obtaining and disclosure of information derived from a personal or other relationship. To put it another way, RIPA can only provide protection for covert sources in respect of the interference with an individual's right to privacy, not for criminal activity more generally.

There are in existence 'Guidelines', issued in 2011, relating to the criminal activities of those acting as a CHIS, which the Security Service has used up to now in lieu of any statutory scheme. Those have recently been made publicly available - in part.

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Those Guidelines state that a Security Service officer who is empowered to issue a CHIS authorisation under RIPA may also, in appropriate cases, authorise the use of an agent participating in crime. That authorisation has no legal effect, and does not provide any immunity from prosecution, but constitutes rather the Service's justification of its decisions for the purposes of later providing representations to a relevant prosecuting authority that a prosecution is not in the public interest.

In 2017, the then Prime Minister gave a direction (known as the "Third Direction") to the Investigatory Powers Commissioner ('ISC') stating that the ISC should keep under review the application of the Security Service Guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them. The Third Direction was given initially in secret, but later itself disclosed.

Four campaigning organisations - Privacy International, Reprieve, the Committee on the Administration of Justice and the Pat Finucane Centre – brought proceedings in the Tribunal against the Foreign Secretary, the Home Secretary, GCHQ, the Security Service and the SIS challenging the lawfulness of the Third Direction and the Security Service Guidelines. It was accepted by all parties in the case that if there was any power for Security Service to act in this way it could only be provided by the 1989 Act (RIPA being irrelevant for these purposes), but it was submitted by the Claimants that there was in fact no such power on a correct reading of the 1989 Act.

This contention would, of course, have very significant consequences if correct. To take one example, membership of a 'proscribed organisation' is a criminal offence under the Terrorism Act 2000, and obviously the Security Service would have a clear need to operate CHISs who were members of such organisations. CHISs will also inevitably have a need to commit crimes in order to prove their credentials to other criminals, to gain access to the persons they are targeting, to keep their status as a government agent a secret, or to avoid repercussions.

The Tribunal ruled (by a 3-2 majority) that, although the 1989 Act did not have any similar explicit provision to that in the 1994 Act, the 1989 Act did however provide an *implicit* power to the Security Service or agents to engage in criminality, based on the wording of ss.1 and 2 of the 1984 Act. The Tribunal also held (by the same majority) that the oversight powers of the ISC under the Third Direction, and the policy itself, did not breach any of the various obligations on the State under the ECHR. The Tribunal did not rule though that any immunity from, or defence to, criminal liability could be given by the Security Service to individuals by the 1989 Act or the Guidelines – and the Guidelines themselves disavow the existence of any such power in any event.

The dissenting opinions of two members of the five-person Tribunal were that there was no legal basis in the 1989 Act for the authorisation by the Security Service of participation in criminality, and that consequently the activity was in breach of the law under the ECHR. Both opinions relied heavily on the absence of any explicit positive justification passed by Parliament in statute.

The Claimants are appealing the Tribunal's decision to the Court of Appeal. That, and the criticism of the minority of the Tribunal about the lack of any explicit statutory authorisation for this activity, appears to have been a major trigger for the drafting of this new Bill.

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It is also the case, of course, that other governmental and law-enforcement organisations also use CHISs who may engage in criminality. As such there is a real risk that the precise legal rationale of the majority of the Tribunal regarding the statutory basis for the Security Service's power to engage in this activity would not necessarily apply to those other agencies and bodies.

How will this Bill (as currently drafted) change the existing rules on the use of Covert Human Intelligence Sources (CHIS) under RIPA 2000?

What the Bill proposes is an expansion of the powers within Part II of RIPA to cover '*criminal conduct in the course of, or otherwise in connection with, the conduct of covert human intelligence sources*.' The definition of 'criminal conduct' within the Bill is simply '*any conduct which would constitute crime*' – a wide definition. The Bill amends section 26 of RIPA to incorporate that definition and adds a new section 29B to the Act providing for the authorisation regime.

The new section 29B states that a designated person from one of a list of public authorities may grant a 'criminal conduct authorisation' ['CCA']. A CCA may only be granted alongside an authorisation under the pre-existing section 29 provisions governing the conduct and use of CHISs generally. It will be a matter for regulations made by the Secretary of State as to which particular ranks and persons will be designated for the purposes of granting CCAs.

A CCA under the new section 29B may only be granted if the designated person believes that the authorisation is necessary in the interests of national security, for the purpose of preventing or detecting crime or public disorder, or in the interests of the economic well-being of the UK. That is a smaller list than the list of criteria for granting a general authorisation for the use of a CHIS under section 29 RIPA: the CCA list does not include the rationales of public safety, public health and assessing or collecting taxes etc.

When granting a CCA the designated person must also be satisfied that the authorised conduct is proportionate to what is sought to be achieved by the conduct. That assessment of proportionality must 'take into account' whether the same result could be achieved without engaging in criminal conduct. The assessment must also 'take into account other matters so far as they are relevant' – and that would include considerations under the Human Rights Act 1998 and the European Convention. The government suggests that means that there could never be authorisation of crimes which would contravene the right to life or the prohibition on subjecting someone to inhuman or degrading treatment or punishment.

The effect of a CCA will (like authorisations for the use of CHISs generally), serve to make the activity in question '*lawful for all purposes'*, by reason of s.27 RIPA – again, an extremely wide provision.

Which public bodies will be allowed to use the powers under the Bill? Are there any notable exceptions from the list?

The public bodies which may grant a CCA are: any police force, the National Crime Agency, the Serious Fraud Office, any of the intelligence services or armed forces, HMRC, the Department of Health, the Home Office, the Ministry of Justice, the Competition and Markets Authority, the Environment Agency, the Financial Conduct Authority, the Food Standards Agency and the Gambling Commission.

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There are a number of bodies which may currently grant authorisations for using a CHIS under RIPA which are not included in the list of bodies able to grant a CCA. They include the Departments for Work & Pensions, Business, Transport, Energy & Climate Change, and Housing, Communities & Local Government, the Welsh Government, the Charity Commission, the Care Quality Commission, the Health and Safety Executive and local authorities, among others.

Local authorities, who often use CHIS in the investigation of many regulatory offences, including trading standards offences and consumer protection offences, are not included on the list of PAs. Why is that and will LA's existing use of CHIS under RIPA 2000 be impacted by this Bill?

If the Bill becomes law, it seems clear that any criminal conduct by CHISs outside of duly granted CCAs will by definition be 'unauthorised'. To that end, section 29 of RIPA is amended by the Bill to make it clear that that '*an authorisation for the conduct or the use of a covert human intelligence source does not authorise any criminal conduct in the course of, or otherwise in connection with, the conduct of CHIS*'.

As such, local authorities will have to be very clear that any CHIS operated by them does not have any authorisation to engage in any criminal conduct. The authority and its officers will also be liable, potentially, for conspiratorial or accessorial liability for any crimes committed by the CHIS, further incentivising those authorities to ensure that no criminal activity is undertaken by any CHIS being operated by them. Undoubtedly, public interest considerations against prosecution will still apply where crime is committed in the conduct of a CHIS operation, but the effect of those considerations may now be lessened in the mind of prosecutors, given that Parliament will have specifically legislated *against* permitting local authorities to authorise criminal activity.

What criticism has there been of the Bill?

The Claimant organisations in the *Privacy International* case have welcomed the recognition that criminal conduct by CHISs needed to be placed on a proper legislative footing. They have however criticised the lack of any limits on the conduct that may be authorised, leading to the possibility that murder, torture and sexual violence may be authorised, where it is believed by the authorising body that it is proportionate to do. They have also criticised the apparent removal of prosecutorial discretion in dealing with such matters (by dint of the 'lawful for all purposes' clause). Similarly, there has been criticism of the apparent prevention (again by means of the 'lawful for all purposes' clause) of victims from either seeking civil redress for wrong-doing committed against them or for making claims for compensation under the Criminal Injuries Compensation Scheme. It has also been pointed out that the authorisation regime envisaged by this Bill is, surprisingly, considerably weaker than that currently in place for other investigatory powers (such as interception) despite potentially involving much more harmful conduct. Given the list of those bodies excluded from the CCA regime (and given that the stated purposes of a CCA do *not* include issues of public health and safety), some have found it irrational that the Food Standards Agency and the Environment Agency will be able to grant CCAs. Finally, there is criticism that the scheme does not prevent CCAs being granted in respect of children and provides insufficient statutory protection for juvenile CHISs.

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