

Committee:	Date:
Police Authority Board	20 April 2021
Subject: Covert Human Intelligence Sources (Criminal Conduct) Act 2021	Public
Which outcomes in the City Corporation's Corporate Plan does this proposal aim to impact directly?	1, 6, 12
Does this proposal require extra revenue and/or capital spending?	No
Report of: Remembrancer Report author: Kiki Hausdorff	For Information

Summary

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which received Royal Assent on 1st March 2021, makes provision for the authorisation of criminal conduct in the course of, or otherwise in connection with, the conduct of a covert human intelligence source (CHIS). The Act amends the Regulation of Investigatory Powers Act 2000 and introduces a power to authorise conduct by officials and agents of the security and intelligence services, law enforcement, and certain other public authorities, which would otherwise be unlawful. During its Parliamentary process, the Act was heavily criticised for including a power to authorise criminal conduct by a juvenile CHIS (i.e. under age 18), and for not placing a limit on the type of criminal conduct that may be authorised. The Government persuaded Parliament that sufficient safeguards were in place to protect juveniles, and that limiting the type of conduct that may be authorised would create a risk to public safety.

Recommendation

Members are asked to note the contents of this report.

Main Report

Commencement of the Act

1. The Act received Royal Assent on 1st March 2021. Its substantive provisions will be brought into effect by regulations which have yet to be made.

Definition of key terms

2. A covert human intelligence source (CHIS) is defined in the 2000 Act as a person who establishes or maintains a relationship with another person for the covert purpose of covertly obtaining information, providing another person with access to

information, or disclosing information obtained through that relationship. A CHIS may be authorised to carry out this activity by a use and conduct authorisation.

3. An activity or purpose is “covert” if it is calculated to ensure that one of the parties to the relationship is unaware of the activity or purpose. Not all human sources of information will qualify as “covert” and a conduct authorisation under the 2000 Act will therefore not always be appropriate.
4. The Act inserts new provisions into the 2000 Act which enable certain public authorities to grant a “criminal conduct authorisation” (CCA) to a CHIS. This authorises conduct by a CHIS which would otherwise constitute crime.

Criminal Conduct Authorisations

Granting CCAs

5. CCAs must be linked to a use and conduct authorisation (i.e. an authorisation for non-criminal conduct) granted under the 2000 Act and will cease to have effect if the related use and conduct authorisation is cancelled or expires.
6. CCAs may be granted by designated officers of the City of London Police and a number of other bodies including the Serious Fraud Office, the Financial Conduct Authority and the Competition and Markets Authority.

Effect and scope of CCAs

7. CCAs provide lawful authority for specified conduct of a CHIS carried out for the purposes of, or in connection with, the investigation or operation described. They must contain clear parameters to ensure that the CHIS knows what criminal conduct they are authorised to participate in. Criminal conduct that goes beyond what is permitted by an authorisation remains unlawful.
8. The Chair of the Intelligence and Security Committee, Julian Lewis, summarised the effect of the Act in the House of Commons Second Reading debate: “We are now legislating to make properly authorised criminal conduct lawful, rather than continuing with the current position whereby... [the] authorising authority is able to argue that it would not be in the public interest for prosecuting authorities to prosecute properly authorised criminal conduct, but there is no guarantee of immunity. What we are now saying is that they are not breaking the law, rather than, as in the past, that they were breaking the law, but that it was against the public interest to prosecute.”
9. The Advocate-General for Scotland, Lord Stewart of Dirleton, said at Second Reading in the House of Lords that the Act “provides greater certainty for CHIS that they will not be prosecuted for activity the state has asked them to commit... it may also help to recruit and retain CHIS in the future and maximise the intelligence we can gather through this technique.”
10. A CCA may authorise criminal conduct by someone else “in relation to” a CHIS, namely those within a public authority that are involved in or affected by the authorisation.

Requirement of necessity and proportionality

11. CCAs may only be granted where the authorisation is necessary either in the interests of national security, for the purpose of preventing or detecting crime or preventing disorder, or in the interests of the economic well-being of the UK. The conduct authorised must also be proportionate to what is sought to be achieved.
12. Under the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with the European Convention on Human Rights (ECHR). This position is not altered by the 2021 Act. Public authorities granting CCAs, including the City of London in its capacity as a police authority, must continue to ensure that they are acting in compliance with the Articles of the ECHR, and may not authorise conduct that constitutes or entails a breach of ECHR rights.

Procedural safeguards

13. The Act inserts new provisions into the 2000 Act requiring a person who grants or cancels a CCA to give written notice to a Judicial Commissioner setting out the grounds on which the authorisation is deemed necessary and proportionate and specifying the conduct that is authorised.
14. The Act amends other legislation to require the independent Investigatory Powers Commissioner to keep under review the exercise of the power to grant or renew CCAs. The Investigatory Powers Tribunal will continue to have jurisdiction to investigate and determine complaints against public authorities' use of CHIS authorisations.

Safeguards for juveniles

15. The Act also inserts new provisions into the 2000 Act to implement additional safeguards for the authorisation of juveniles (i.e. individuals under 18 years old) as CHIS. There are extra requirements before an authorisation may be granted to a juvenile, for example special arrangements for meetings including the presence of an appropriate adult.
16. The use of juvenile CHIS was a key issue of contention in Parliament and the provisions relating to CCAs for juveniles were fiercely debated. In the House of Lords, the Home Office Minister said, "I completely understand why many noble Lords' starting position would be to seek to prohibit any authorisation of a juvenile. The danger of that approach is that in prohibiting their use as a CHIS you increase their use by criminal gangs, which will be reassured that a juvenile cannot be working on behalf of the state." She reassured the House that, under the Act, a juvenile CHIS may "be authorised only in exceptional circumstances... only where there is no reasonably foreseeable harm to the juvenile as a result of the authorisation, and where the authorisation is believed to be compatible with the best interests of the juvenile."
17. Labour Peer and former Security and Counter-Terrorism Minister, Lord West of Spithead, said he was initially "taken aback" when he learned of the use of juveniles as CHIS but said he had "come to realise that, to some extent, the concern about juveniles in relation to the Bill is due to the conflation of the broader question of whether under-18s should be used as CHIS at all. That of course is not the matter at hand that we are discussing, rather it is the narrower issue of whether those involved should be able to participate in criminality and with what

safeguards, which is what the Bill addresses.” He added that he had come to accept that juvenile CHIS should be used “in very exceptional circumstances,” and felt the Act “will put appropriate safeguards in place which will ensure that that can be done with maximum gain and minimum risk.”

Safeguards for vulnerable adults

18. Further safeguards for vulnerable adults acting as CHIS are introduced by the Act’s insertion of new provisions into the 2000 Act. This includes the requirements that, before a CCA may be granted to a vulnerable adult, the risks of harm have been sufficiently explained to and understood by them and the need to safeguard them has been taken into account.
19. Where it is known or suspected that an individual may be vulnerable, they should only be authorised to act as a CHIS in the most exceptional circumstances, and only by specified authorising officers.

Authorisation of serious criminal conduct

20. There is no limit on the type of criminal conduct that may be authorised by a CCA. During the Act’s passage through Parliament, opposition amendments were passed in the House of Lords which aimed to exclude serious criminal conduct, such as rape and murder, from being authorised by CCAs. The Government successfully argued that the necessity and proportionality requirements, and the requirement under the Human Rights Act 1998 of compliance with ECHR rights, were sufficient safeguards.
21. Attorney General Michael Ellis (who was Solicitor General at the time of the Act’s passage through Parliament) warned that placing explicit limits within the Act on the type of conduct that could be authorised by CCAs would create a risk to operations and the safety of CHISs and the public, by creating a “checklist” that would make it “very easy for criminal gangs and others to develop initiation tests.” He stressed the “need to avoid presenting criminals and criminal gangs with a means to test those people they suspect are agents,” as “some criminals, in seeking to demonstrate that they are not a CHIS, will go away and do what is asked of them, and perhaps even commit rape or another serious offence to demonstrate their loyalty.”

Conclusion

22. As noted above, Royal Assent has now been given and the Act awaits implementation by regulations.

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