



Home Office

Rt Hon James Brokenshire MP
Minister of State for Security

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Humza Yousaf MSP
Cabinet Secretary for Justice
Scottish Government
St Andrew's House
Regent Road
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15 September 2020

Dear Humza,

Covert Human Intelligence Sources (Criminal Conduct) Bill

I am writing regarding the Covert Human Intelligence Sources (Criminal Conduct) Bill ahead of its introduction to Parliament on Thursday 17 September 2020.

I am grateful to you and your officials for the constructive discussions we have had on this Bill. I am also grateful to the Lord Advocate and his officials for their engagement. I have attached a copy of the draft Bill and Explanatory Notes, which your officials have fed into. I would be grateful if these are held in confidence until the Bill is introduced.

Content of the Bill

As you know, this is a short, single issue Bill that provides an express power for a limited number of public authorities to authorise CHIS to participate in conduct which may otherwise be criminal. As you are aware, the activity that will be authorised under the Bill is not new activity, it is a continuation of existing practice.

The Bill does this by amending the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) to create a new 'criminal conduct authorisation'. The effect of a criminal conduct authorisation is to provide that no offence is committed as a result of properly authorised conduct. It will not apply retrospectively.

The Bill will restrict, on the basis of operational necessity, the public authorities able to grant an authorisation for CHIS conduct that would otherwise constitute an offence, ensuring that it will only be used by public authorities that have demonstrated a clear operational need for the power.

A criminal conduct authorisation will be granted by a senior and experienced authorising officer within the public authority, where it is deemed to be both necessary and proportionate.

The exercise of the power will continue to have robust and independent oversight from the Investigatory Power's Commissioner.

The number of public authorities able to authorise this conduct has been restricted from those who can authorise the use and conduct of CHIS generally. Only the intelligence agencies, NCA, Armed Forces, police, HMRC, and ten other public authorities will be able to authorise criminal conduct.

For authorisations under RIPSAs, this is the Scottish Police Service and the Scottish Administration (for the Scottish Prison Service).

Territorial Extent

The provisions of the Bill extend to the whole of the United Kingdom. A Criminal Conduct Authorisation may be granted where it is necessary for one of three purposes; national security, prevention or detection of crime or economic wellbeing. National security and economic wellbeing are reserved. We recognise that the prevention or detection of crime is generally a devolved matter in Scotland; and that the proposed amendments to RIPSAs, as well as those aspects of the amendments to RIPA that relate to prevention or detection of crime engage the legislative consent process.

Current position

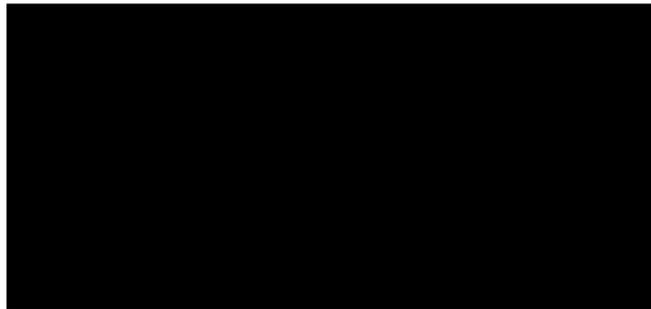
[Redacted]

On this basis, the Bill is drafted to apply UK-wide and includes amendments to the Regulation of Investigatory Powers (Scotland) Act 2000, but I recognise that you will take a final decision on legislative consent once our ongoing discussions have concluded. I also recognise that this is also subject to ongoing discussion between our officials on a couple of

points raised by the Lord Advocate, as to how we can provide the necessary reassurance on the points that have been raised.

Subject to the conclusion of our ongoing discussions, I would be grateful if you could write to confirm whether you agree with this devolution analysis and indicate if you would be content, in principle, to begin the legislative consent process in the Scottish Parliament.

I am copying this letter to the Lord Advocate, the Secretary of State for Scotland, the Advocate General for Scotland and the Minister for the Cabinet Office.



**RT HON JAMES BROKENSHIRE
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25 September 2020

Dear James

Covert Human Intelligence Sources (Criminal Conduct) Bill

Thank you for your letter of 15 September and subsequent message confirming introduction of the Bill to be on 24 September.

I can confirm that I will take forward the necessary legislative consent process. This is required for the amendments to the Regulation of Investigatory Powers (Scotland) Act 2000 and to the Regulation of Investigatory Powers Act 2000 for those UK public bodies authorising a Criminal Conduct Authorisation for the devolved purpose of preventing or detecting crime in Scotland.

During our discussions, however, you are aware that my strong view is that the Investigatory Powers Commissioner's Office (IPCO) should be engaged at an early stage of the authorisation process. I believe we are very close to achieving agreement around that point and it is on that basis that I am content for the RIP(S)A provisions to be included in the Bill at introduction. Until such time as amendments are made to provide for that situation, I will be unable to recommend that the Scottish Parliament should support the legislative consent motion.

It would therefore be helpful if those amendments could be tabled at the earliest opportunity.

Our officials will continue to keep in close contact. In particular it is appreciated if your officials can continue to work with the Crown Office and Procurator Fiscal Service to address the outstanding issues that still need resolved.

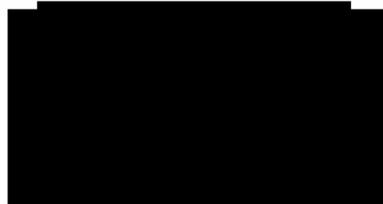
As you will appreciate I require to be confident that the concerns of the Lord Advocate as the independent head of the prosecution service in Scotland have been addressed before I can recommend consent of the Scottish Parliament for this Bill.

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Once these matters have been resolved to all relevant parties' satisfaction, I would be content to seek the consent of the Scottish Parliament.

Thank you again for the helpful and co-operative manner you have shown in taking these matters forward.

I am copying this letter to the Lord Advocate, the Secretary of State for Scotland, the office of the Advocate General for Scotland and the Minister for the Cabinet Office.



HUMZA YOUSAF

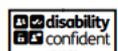
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28 October 2020

Dear James

I am writing to set out my concerns regarding the progress of the Covert Human Intelligence Sources (Criminal Conduct) Bill. I have noted the considerable level of criticism that has been levelled at the Bill. This has included concerns being expressed by Trade Unions and, not surprisingly, the fact that the Bill lacks adequate independent oversight of the criminal conduct authorisation (“CCA”) process. Despite this, no significant amendments were accepted by the Government.

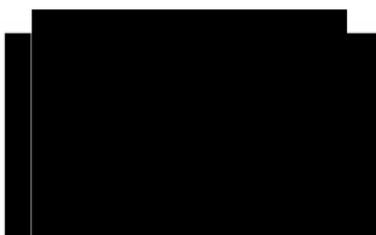
From my perspective, our engagement has been positive, but it remains that despite your acknowledgement of my views around the requirement for independent oversight at the earliest possible stage of the process, **[Redacted]**

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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This was something which you hinted towards in your recent address to the House of Commons and I **[Redacted]**

As matters stand I am not in a position to recommend that the Scottish Parliament consent to the provisions in the Bill which trigger the legislative consent requirement. I shall await to see what comes from the Lord's consideration but this Bill would have to be substantially changed with far greater independent oversight and with flexibility shown by the Government to address some very legitimate concerns that have been expressed before I can make a recommendation to the Scottish Parliament seeking support.



HUMZA YOUSAF

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