



Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

Rt Hon Priti Patel MP
Home Secretary

By email.

12 October 2020

Dear Priti,

The Joint Committee on Human Rights is currently scrutinising the Covert Human Intelligence Source (Criminal Conduct) Bill. The Bill has on its face a statement from you, under s19(1)(a) of the Human Rights Act, confirming that its provisions comply with Convention rights. We have received the ECHR memo, which provides the rationale behind this s19(1)(a) statement. However, the Committee has serious concerns about the human rights impact of a Bill that has profound implications; permitting officials to secretly allow informants to commit crimes on British streets, with complete impunity.

While we welcome the decision to put the previously secret policy on authorising criminal conduct by covert human intelligence sources (CHIS) on a statutory footing, this Bill goes much further than the policy at issue in the *'Third Direction'* challenge. Not only does it purport to provide full immunity from criminal and civil law in respect of authorised criminal conduct by CHIS, but it also permits criminal conduct authorisations to be made by bodies whose responsibilities do not include national security or combating serious crime, such as the Food Standards Agency and the Department of Health and Social Care. Even if public authorities like these did need to use CHIS, rather than leaving such activities to intelligence and law enforcement bodies, the Committee is unable to see in what circumstances it could be necessary and proportionate for such public authorities to authorise CHIS to commit criminal offences. This concern is amplified by the Bill permitting the use of criminal conduct authorisations not only in the interests of national security and to prevent crime, but also "in the interests of the economic well-being of the United Kingdom".

While recognising that the use of children as CHIS is rare, the Committee is also troubled that the Bill imposes no prohibition on authorising children to commit criminal offences.

The Committee is particularly concerned by the Bill's failure to include any limits on the type of criminal conduct that could be authorised. There is no prohibition on violent assaults, kidnapping, torture or even murder. There can be no circumstances in which it would be conscionable or lawful for a public authority to authorise serious offences of violence against the person, so why does the Bill allow for such an authorisation on its face? The Committee notes the explanation given in the guidance document '*Limits of Authorised Conduct*' that placing any limit on the criminal conduct that could be authorised would provide criminals with "a means of creating a checklist for suspected CHIS to be tested against." You will no doubt be aware that this is not the conclusion that has been reached in other jurisdictions, including Five Eyes allies Canada and the USA. In any event, the Bill provides the Secretary of State with a power to specify limits on the conduct that can be authorised – a power that could only be needed if it is accepted that placing some limits on criminal conduct is possible. Furthermore, the Home Office has stated that the Human Rights Act (HRA) provides a ceiling on the types of crime that could be authorised, surely amounting to an acknowledgment that such a ceiling can reasonably be provided in statute. This also rather suggests that the Bill, as drafted, allows conduct going beyond that which would comply with the UK's ECHR obligations, as protected by the HRA.

The mere existence of the HRA does not provide sufficient protection against the authorisation of unacceptable criminal conduct. While the HRA is undoubtedly a vital protection for human rights, it cannot make up for the absence of clear and careful limits on intrusive powers exercisable by government agents. This is all the more so when dealing with covert powers that are not subject to regular accountability mechanisms.

In this respect, the Committee is also concerned about the lack of effective safeguards in the Bill against abuse of the power to authorise criminal conduct. Supervision by the IPC is welcome, but it provides only an *ex post facto* review and very little in the way of protection for the potential victims of any authorised crime – most, if not all, of whom will not be aware that the offence committed against them was sanctioned by the State. For a power as exceptional and potentially harmful as authority to override the criminal law, some form of prior independent review, preferably judicial, is appropriate to ensure against violations of human rights.

In light of these significant concerns, the Committee would be grateful if you could provide answers to the following questions:

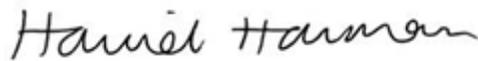
- 1) Why do government departments and agencies whose main functions are not directly concerned with national security or preventing serious crime need the exceptional power to authorise criminal conduct?
- 2) Why does the Bill not prohibit the authorisation of children to commit criminal offences?
- 2) Given that there are no circumstances in which a public authority could possibly authorise behaviour that violates Articles 2 or 3 ECHR, why can the Bill not expressly prohibit the authorisation of serious crimes such as assault causing bodily harm, kidnap, sexual assault, murder or torture?

3) Given your department's position that the HRA would prevent the authorisation of crimes that violate human rights, can you confirm that the authorising body would be responsible under the HRA for any and all violations of human rights by a CHIS in the course of authorised criminal conduct?

4) Why does the Bill not require prior judicial approval for authorisation of criminal conduct when a careful scheme involving prior approval is required for other measures, such as targeted interception under the Investigatory Powers Act 2016?

5) What measures are in place to address any loss suffered by victims of state-sanctioned crime?

Yours sincerely

A handwritten signature in black ink that reads "Harriet Harman". The signature is written in a cursive, flowing style.

Rt Hon Harriet Harman MP
Chair of the Joint Committee on Human Rights

Annex

Amendment A

In clause 1(5), at page 3, line 3 insert a new sub-section (8A) as follows:

“(8A) A criminal conduct authorisation may not authorise any criminal conduct:

(a) intentionally causing death or grievous bodily harm to an individual or being reckless as to whether such harm is caused;

(b) involving an attempt in any manner to obstruct or pervert the course of justice;

(c) amounting to an offence under the Sexual Offences Act 2003, the Sexual Offences (Scotland) Act 2009 or any offence listed in Schedule 3 to the Sexual Offences Act 2003;

(d) subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of Article 3 of Part 1 of Schedule 1 to the Human Rights Act 1998; or

(e) depriving a person of their liberty, within the meaning of Article 5 of Part 1 of Schedule 1 to the Human Rights Act 1998.”

Amendment B

In clause 1(5), page 2:

at line 25, insert “or” after “national security.”

at line 27, replace “; or” with “.”

remove lines 28 and 29

Amendment C

In clause 2(9), page 4, remove lines 10 to 23

Amendment D

In clause 1, page 2, line 8 insert a new sub-section (1A) as follows:

“(1A) Authorisations granted under this section require approval in accordance with s.29C”

At page 3, line 17 insert as follows:

“29C Approval for criminal conduct authorisations

(1) This section applies where an authorisation has been granted under section 29B.

(2) The authorisation has no effect until such time (if any) as the Judicial Commissioner has approved the grant of the authorisation.

(3) The Judicial Commissioner may give approval under this section to the granting of an authorisation under section 29B if, and only if, the Judicial Commissioner is satisfied that—

(a) at the time of the grant the person granting the authorisation had reasonable grounds to believe that the requirements of 29B(4), and any requirements imposed by virtue of section 29B(10), were satisfied in relation to the authorisation, and

(b) at the time when the Judicial Commissioner is considering the matter, there remain reasonable grounds for believing that the requirements of section 29B(4), and any requirements imposed by virtue of section 29B(10), are satisfied in relation to the authorisation, and

(c) the authorisation granted does not authorise conduct that is incompatible with any Convention rights.

(4) In this section-

“Convention rights” has the meaning given in s1(1) of the Human Rights Act 1998; and

“Judicial Commissioner” has the meaning given in s.227 of the Investigatory Powers Act 2016.