



House of Commons

House of Lords

Joint Committee on Human
Rights

Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill

Tenth Report of Session 2019–21

*Report, together with formal minutes relating
to the report*

*Ordered by the House of Commons
to be printed 4 November 2020*

*Ordered by the House of Lords
to be 4 November 2020*

**HC 847
HL Paper 164**

Published on 10 November 2020
by authority of the House of Commons and House of Lords

Joint Committee on Human Rights

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Summary

The Covert Human Intelligence Sources (Criminal Conduct) Bill provides a statutory basis for a variety of public authorities to authorise informants, covert agents and undercover officers to engage in criminal conduct.

Litigation successfully defended by the Government in the Investigatory Powers Tribunal (but currently under appeal), known as the *Third Direction* challenge, revealed the existence of a previously secret policy on the authorisation of criminal conduct by agents of MI5. The consequence of authorisation is that a prosecutor considering whether a prosecution would be in the public interest will take the existence of the authorisation into account, making a prosecution highly unlikely. The Bill would place this policy on a statutory footing, by introducing new provisions into the Regulation of Investigatory Powers Act 2000. However, in so doing it would also go further - granting the power to make criminal conduct authorisations to a range of public authorities, not just MI5, and removing prosecutorial discretion by explicitly making authorised conduct 'lawful for all purposes'.

The use of Covert Human Intelligence Sources (CHIS) is crucial for the effective functioning of the intelligence services and the police. On occasions it will be necessary to authorise CHIS to engage in criminal conduct. Moving a previously secret policy covering this practice onto the statute book is to be welcomed. However, state sanctioned criminality has the obvious potential to violate human rights. It is essential that the conduct of CHIS, particularly where acting outside the usual legal boundaries, is subjected to careful constraints, exacting scrutiny and effective oversight. There are numerous areas where the Bill as it stands does not meet these essential requirements.

There is no express limit within the Bill on the type of criminal conduct that can be authorised. This raises the abhorrent possibility of serious crimes such as rape, murder or torture being carried out under an authorisation. Equivalent legislation in other jurisdictions prohibits CHIS from committing serious crimes, and the same approach should be adopted under the Bill. Relying on the Human Rights Act 1998 to prevent the authorisation of crimes that violate human rights is neither appropriate nor sufficient.

The Bill is also unclear in respect of who can be authorised to engage in criminal conduct. There is no exclusion for children. If they must be involved in criminal conduct at all it must only be in the most exceptional circumstances. While criminal conduct may only be authorised where it is believed to be both necessary and proportionate, this is a purely subjective test which offers little protection against overzealous or misguided authorisations.

By extending the power to make authorisations to a range of public authorities, including the Food Standards Agency, the Gambling Commission and the Environment Agency, and by allowing authorisations to be made "to prevent disorder" and to protect "economic well-being", the Bill risks taking the authorisation of criminal conduct well beyond the fight against serious crime and the protection of national security. The use of criminal conduct authorisations should be confined to these core purposes.

A power as exceptional as the authorisation of criminal conduct, granting criminal and civil immunity, requires rigorous and effective oversight. While the Bill does bring the use of criminal conduct authorisations within the oversight functions of the Investigatory Powers Commissioner, it should go further. The best mechanism to protect against abuse would be independent judicial scrutiny before the authorisation is made, as is used in respect of other investigatory powers.

Finally, by granting criminal and civil immunity to persons committing authorised criminal offences, the use of criminal conduct authorisations under the Bill would risk violating the rights of victims. The Government must explain why this change from the existing policy is necessary. Victims' rights can be protected by preventing the authorisation of serious crimes and by confirming that victims will be able to obtain compensation for losses suffered as a result of authorised crimes.

1 Introduction

1. The Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced in the House of Commons on 23 September 2020. The Bill grants certain public authorities the power to authorise informants, covert agents and undercover officers to commit criminal offences, granting them immunity from criminal and civil liability.

Key human rights issues

2. The Bill raises a number of human rights issues:
- a) Authorised criminal offences have the clear potential to interfere with a wide range of qualified and absolute rights, including those guaranteed by the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA);
 - b) Without effective safeguards, authorising criminal conduct risks violating the procedural obligation to carry out effective investigations, capable of leading to the punishment of those responsible, into deaths that involve the State (Article 2 ECHR) and into allegations of torture or mistreatment in breach of Article 3 ECHR;¹ and
 - c) By removing criminal and civil liability, the Bill also threatens the right of victims to an effective remedy for a breach of human rights (Article 13 ECHR).
3. Given the Committee's significant concerns about the Bill's ability to safeguard human rights, the Annex contains a number of suggested amendments to Bill.

Timetable

4. The Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced in the House of Commons on 23 September 2020. It was debated at second reading on 5 October. Committee and report stages, and third reading, all took place on 15 October. This was an unhelpfully contracted timetable for a Bill with such serious consequences for human rights and the rule of law.
5. The Bill passed to the House of Lords for first reading on 19 October 2020. Second reading in the Lords is scheduled for 11 November.
6. The Committee launched an inquiry into the Bill on 30 September 2020. Given the contracted timetable for the passage of the Bill, our inquiry has been condensed. We received eight pieces of written evidence in response to our call for evidence, for which

¹ The UK is under a procedural obligation under Article 2 ECHR (right to life) to conduct effective investigations into deaths and a very similar obligation under Article 3 ECHR (prohibition on torture and inhuman and degrading treatment) to conduct effective investigations into allegations of treatment that violates that Article. This is an obligation of means not ends, but it has been interpreted as requiring the investigation to be capable of identifying the perpetrator and imposing an appropriate punishment.

we are grateful. We wrote to the Home Secretary outlining some of our concerns with the Bill on 12 October. A response, from the Minister of State for Security, was provided on 4 November.²

Policy background

7. The Explanatory Notes that accompanied the Bill explained that its purpose is to:

“[...] provide a statutory power for the security and intelligence agencies, law enforcement agencies and a limited number of other public authorities to authorise Covert Human Intelligence Sources (CHIS) to participate in criminal conduct where it is necessary and proportionate to do so for a limited set of specified purposes.”³

8. The Explanatory Notes also state that CHIS participation in criminal conduct “is not new activity. [The Bill] puts existing practice on a clear and consistent statutory footing.”⁴

9. The existence of a previously secret policy governing the authorisation of criminal conduct by the Security Service (MI5) became public in the course of litigation before the Investigatory Powers Tribunal (IPT), in a case known as the ‘*Third Direction*’ challenge.⁵ Ultimately a narrow 3–2 majority of the IPT held that the policy was lawful. The minority judgments concluded that the policy was not lawful because it had no statutory basis.⁶ The claim is now pending before the Court of Appeal.

10. It is against the background of the ongoing *Third Direction* challenge, and divided judicial views on the legal need for a clearer statutory footing for a policy on CHIS and criminal conduct, that the Bill has been brought forward on an expedited basis. However, the Bill goes further than the policy under scrutiny before the IPT, covering authorisations by numerous public authorities, rather than just the intelligence services, and providing an immunity from criminal and civil liability rather than just a factor for a prosecutor to take into account.

What is a CHIS?

11. Covert Human Intelligence Source or ‘CHIS’ is a term introduced by the Regulation of Investigatory Powers Act 2000 (RIPA).⁷ It covers anyone who establishes or maintains a relationship with another person in order to secretly obtain or access information. CHIS may be civilian ‘informants’ or ‘agents’, or they may be persons holding an office or position within a public authority (such as an undercover police officer). A CHIS within

2 Letter from Rt Hon James Brokenshire MP, Minister of State for Security, [regarding the Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#), dated 4 November 2020

3 [Explanatory Notes to the Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#) [Bill 188 (2019–21) –EN]

4 [Explanatory Notes to the Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#) [Bill 188 (2019–21) –EN]

5 [Privacy International and Others v Secretary of State for Foreign and Commonwealth Affairs and Others](#) [2019] UKIPTrib IPT_17_186_CH

6 This is the first time a public judgment of the IPT has included a dissent

7 Regulation of Investigatory Powers Act 2000 (RIPA), [section 26\(8\)](#). Essentially the same definition appears in the Regulation of Investigatory Powers (Scotland) Act 2000, [section 1\(7\)](#)

this latter group is referred to as a “relevant source”.⁸ The authorisation and deployment of CHIS is governed by Part 2 of RIPA and by a Code of Practice published by the Home Office. A revised draft of this Code of Practice was published together with the Bill.⁹

Role of CHIS - importance and concerns

12. The importance of CHIS in fighting serious crime and protecting national security is beyond dispute. The Explanatory Notes to the Bill describe the use of CHIS as “a key tactic in protecting national security and investigating serious crime” which has “played a crucial part in preventing and safeguarding victims from many serious crimes including terrorism, drugs and firearms offences and child sexual exploitation. This has included helping to identify and disrupt many of the terrorist plots our agencies have stopped.”¹⁰

13. It is also clear that, in certain circumstances, it may be necessary for CHIS to engage in conduct that is against the criminal law. At second reading, the Minister for Security gave the example of a CHIS being:

“[...] required to join the organisation that they are seeking to disrupt. This membership alone will sometimes be criminal but will be deemed necessary and proportionate to prevent more serious criminality from taking place. Again, without going into the specifics, the use of that tactic enabled the police and MI5 to disrupt a planned terrorist attack on No. 10 and the then Prime Minister in 2017.”¹¹

14. In addition to its successes, however, the use of undercover agents or CHIS has also given rise to serious abuses of power and human rights violations. The Undercover Policing Inquiry was set up in 2015¹² in response to independent reviews by Mark Ellison QC, which found “appalling practices in undercover policing”.¹³ The work of the Undercover Policing Inquiry is wide-ranging and ongoing. The inquiry began hearing evidence on 2 November 2020 and these hearings are expected to last at least three years.¹⁴

15. Submissions to the Committee focused on the need for the Bill to contain effective safeguards against abuse and drew our attention to examples of human rights violations involving CHIS, including:

- a) Undercover police officers entering into long-term intimate relationships with female members of protest groups. In one relationship a child was fathered by an undercover officer without the mother or child being aware of his true identity. The Minister for Security confirmed during the second reading debate on the Bill that:

8 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013 ([SI 2013/2788](#))

9 Home Office, [Covert Human Intelligence Sources - Draft Revised Code of Practice](#), September 2020

10 [Explanatory Notes to the Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#) [Bill 188 (2019–21) –EN]

11 HC Deb, 5 October 2020, [col 652](#)

12 [Undercover Policing Inquiry](#)

13 HC Deb, 6 March 2016, [col 1061](#)

14 In May 2018 Sir John Mitting, Chairman of the Undercover Policing Inquiry, published a [strategic review](#) which included “an ambitious timeline”. This timeline proposed delivering the Final Report to the Home Secretary in December 2023, but it was based on hearings commencing in the summer of 2019.

“It has never been acceptable, as the police have said, for an undercover operative to form an intimate sexual relationship with those they are employed to infiltrate and target, or who they may encounter during their deployment. This conduct will never be authorised, nor must it ever be used as a tactic in deployment.”¹⁵

- b) The deployment of an undercover police officer into one of the groups seeking to influence the family of the murdered teenager, Stephen Lawrence, during the Macpherson Inquiry. This officer was described by Mark Ellison QC, in his Home Office commissioned investigation into allegations of police corruption, as “an MPS spy in the Lawrence family camp during the course of judicial proceedings in which the family was the primary party in opposition to the MPS”.¹⁶
- c) The 1989 murder of Belfast lawyer, Pat Finucane, by a loyalist group that had been infiltrated by undercover agents. The Government accepted the findings of Sir Desmond de Silva in his 2012 review into the murder “that a series of positive actions by employees of the State actively furthered and facilitated [Patrick Finucane’s] murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.”¹⁷ In his statement to the House of Commons on 12 December 2012, Mr David Cameron, then Prime Minister, said:

“The collusion demonstrated beyond any doubt by Sir Desmond, which included the involvement of state agencies in murder, is totally unacceptable. We do not defend our security forces, or the many who have served in them with great distinction, by trying to claim otherwise. Collusion should never, ever happen.”¹⁸

16. These are examples of abuses that have happened in the past. They serve to remind us that without carefully considered safeguards and effective oversight, the use of informants and undercover agents can lead to appalling human rights violations.

15 HC Deb, 5 October 2020, [col 657](#)

16 Mark Ellison QC, The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing in the Stephen Lawrence case: Summary of Findings, [HC 1084](#), March 2014, p 23

17 The Rt Hon Sir Desmond de Silva QC, The Report of the Patrick Finucane Review, [HC 802-I](#), December 2012, para 115

18 HC Deb, 12 December 2012, [col 295](#)

2 Overview of the Bill

17. The Covert Human Intelligence Sources (Criminal Conduct) Bill amends Part 2 of the Regulation of Investigatory Powers Act 2000 and the equivalent provisions in the Regulation of Investigatory Powers (Scotland) Act 2000¹⁹ to introduce a new form of authorisation which covers “criminal conduct in the course of, or otherwise in connection with, the conduct of covert human intelligence sources.”²⁰

18. Under the Bill, only a CHIS whose use or conduct has already been authorised (under s.29 RIPA) can be authorised to engage in criminal conduct. A criminal conduct authorisation (CCA) will essentially cover any criminal conduct that forms part of activities specified or described in the authorisation, as long as it is conduct “by or in relation to” the CHIS to whom the authorisation relates and as long as the conduct is carried out for the purposes of, or in connection with, a specified investigation or operation.²¹ Existing provisions of RIPA establish that an authorisation may extend to conduct outside the United Kingdom.²²

19. The effect of the authorisation is to render all conduct carried out in accordance with the authorisation “lawful for all purposes”—effectively granting the CHIS (or the person acting “in relation to” the CHIS) an immunity from criminal prosecution and from civil liability.²³ Immunity from civil liability also applies in respect of any conduct that is “incidental” to the authorised conduct.²⁴

20. A CCA may only be made if the person making it believes:

- a) That the authorisation is necessary in the interests of national security; for the purpose of preventing or detecting crime or of preventing disorder; or in the interests of the economic well-being of the United Kingdom;
- b) That the authorisation is proportionate to what is sought to be achieved by the criminal conduct; and
- c) That any requirements imposed by order made by the Secretary of State have been met.²⁵

19 To avoid repetition, where the rest of this report refers to RIPA it should also be read as a reference to the equivalent provisions in the Regulation of Investigatory Powers (Scotland) Act 2000.

20 Covert Human Intelligence Sources (Criminal Conduct) Bill (CHIS Bill), [Clause 1\(2\)](#), which inserts a new section 26(1)(d) into RIPA

21 CHIS Bill, [Clause 1\(5\)](#), which inserts a new section 29B(8) to RIPA

22 RIPA, [section 27\(3\)](#)

23 RIPA, [section 27\(1\)](#)

24 Unless the incidental conduct could have, and could reasonably have been expected to have, been the subject of an authorisation - see RIPA, [section 27\(2\)](#)

25 CHIS Bill, [Clause 1\(5\)](#) which inserts a new section 29B(4) & (5) RIPA. The [Memorandum](#) from the Home Office to the Delegated Powers and Regulatory Reform Committee states that this power to make orders “can only be used to further strengthen the safeguards that are attached to the use of criminal conduct authorisations and/or to restrict the circumstances in which a criminal conduct authorisation may be granted.”

21. When considering whether (a) and (b) above have been met, the person making the authorisation must “take into account” whether the same could be achieved without criminal conduct.²⁶ They must also take into account “other matters so far as they are relevant”, with the Human Rights Act 1998 provided by way of specific example.²⁷

22. The Bill provides the Secretary of State with the power to prohibit the authorisation of particular conduct by order, but the Bill itself contains no specific limits on the criminal conduct that can be authorised.

23. Clause 2 of the Bill provides that CCAs may be made by a wide range of public authorities: “Any police force; The National Crime Agency; The Serious Fraud Office; Any of the intelligence services;²⁸ 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; and The Gambling Commission.”

24. The specific rank or office holders within these bodies who would be permitted to grant CCAs will be prescribed by secondary legislation.²⁹ These ‘authorising officers’ are to be the same as those permitted to authorise the use or conduct of a CHIS.

25. The Bill amends the Investigatory Powers Act 2016 to provide that the exercise of the new power to authorise criminal conduct falls within the statutory oversight duties of the Investigatory Powers Commissioner.³⁰ Under the Bill, CCAs are not subjected to any requirement for prior (or prompt) approval by the judiciary or any other body independent of the authorising organisation.

26 CHIS Bill, [Clause 1\(5\)](#) which inserts a new section 29B(6) RIPA. It is notable that the new subsection does not *prohibit* making an authorisation where the same result could be achieved without criminal conduct.

27 CHIS Bill, [Clause 1\(5\)](#) which creates a new section 29B(7) RIPA

28 “The intelligence services” is defined in the [Terrorism Act 2000](#) and elsewhere as including the Security Service (MI5), the Secret Intelligence Service (MI6) and GCHQ

29 [Regulation of Investigatory Powers \(Directed Surveillance and Covert Human Intelligence Sources\) Order 2010](#), as amended by the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013 ([SI 2013/2788](#))

30 CHIS Bill, [Clause 4](#)

3 Human rights implications of the Bill

26. The essential purpose of this Bill, providing a statutory basis for a necessary element of undercover work that has hitherto been authorised by secret policies, is positive and to be welcomed. Conduct that risks interference with human rights should not be carried out without clear legal authority. More specifically, the European Convention on Human Rights (ECHR), incorporated into domestic law through the Human Rights Act 1998 (HRA), requires any power that interferes with a qualified right to be “prescribed by law”.³¹ This means that it must have a basis in domestic law and that this law must: (a) be adequately accessible to the public; (b) be formulated with sufficient precision to allow the public to foresee the circumstances in which and the conditions on which the power may be exercised; and (c) contain legal safeguards against abuse.³²

27. While a move away from secret internal policies on the authorisation of criminal conduct by CHIS to an Act of Parliament is to be welcomed, submissions to the Committee have raised serious questions as to whether the Bill provides adequate safeguards for a power that poses severe risks to human rights. In his submission, Professor Clive Walker, Professor Emeritus at the University of Leeds and Senior Special Advisor to the Independent Reviewer of Terrorism Legislation, states that there is “a need for a far more comprehensive and considered response to the problems inevitably engendered by CHIS” and that “there is a chasm between the Covert Human Intelligence Sources (Criminal Conduct) Bill and the extent of reform now required.”³³ Concerns of this kind emphasise why it is regrettable that the Bill has received such a rushed passage through the House of Commons.

Engagement of human rights

28. The ECHR memorandum provided with the Bill states that “[i]t would be impossible to seek to identify which if any of the Convention rights may or may not be engaged by any particular authorisation of criminal conduct.”³⁴ Regardless of whether that is indeed the case, what is obvious is that authorising criminal conduct has clear potential to engage ECHR rights.³⁵ For example, authorising a CHIS to use violence or otherwise act in a way that results in a person’s death would violate Article 2 ECHR (the right to life); authorising a CHIS to engage in non-fatal physical violence is likely to violate the victim’s rights under Article 8 ECHR (the right to respect for private life, which includes respect for bodily integrity) or Article 3 ECHR (the prohibition on torture and inhuman

31 This is the language used in Article 5, Article 10 and Article 11 ECHR. Article 8 ECHR uses the alternative phrase “in accordance with the law” but this has essentially the same meaning (see, for example, [Gillan and Quinton v Commissioner of Police of the Metropolis \[2006\] UKHL 12](#) at [31])

32 Even in the context of secret surveillance - see [Malone v United Kingdom \(1985\) 7 EHRR 14](#) at [66]-[68] See also [Gillan and Quinton v Commissioner of Police of the Metropolis](#) at [34]. “The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.”

33 Emeritus Professor Clive Walker ([CHIS0007](#))

34 Home Office, [ECHR memorandum](#)

35 That is, the rights of the ECHR included in [schedule 1](#) to the Human Rights Act 1998

or degrading treatment or punishment);³⁶ authorising a CHIS to steal or handle stolen property will likely violate a victim's rights under Article 1 of Protocol 1 ECHR (the right to peaceful enjoyment of possessions); and authorising a CHIS to detain someone against their will is likely to violate their rights under Article 5 ECHR (the right not to be unlawfully deprived of your liberty). Conversely, there will be some circumstances in which criminal conduct will not engage Convention rights. For example, authorising a CHIS to profess membership of a proscribed organisation will be criminal but will not, in of itself, infringe human rights.

29. The process of authorising criminal conduct will engage state responsibility. The State will be responsible under the ECHR for human rights violations carried out by its agents in the performance of their duties. The State will also be responsible if it fails to take reasonable steps to protect an individual from an anticipated breach of Article 2 (the right to life) or Article 3 (prohibition on torture) by a third party. Furthermore, "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention."³⁷ Criminal conduct may also impose obligations on the State to investigate human rights violations and to provide an effective remedy to those whose rights have been abused.³⁸

30. While it may be lawful to interfere with qualified human rights such as the right to respect for private life (Article 8) or the right to peaceful enjoyment of possessions (Article 1 of Protocol 1) where it is deemed necessary and proportionate, the law must still contain adequate safeguards against abuse. Furthermore, other rights under the ECHR are absolute and unqualified. For example, there is no situation in which it would be lawful for a public authority to authorise conduct that amounts to torture or inhuman or degrading treatment or punishment. Similarly, authorising a CHIS to kill (other than in self-defence or defence of another) would inevitably violate Article 2 (the right to life).

31. Removing the authorisation of criminal conduct by CHIS from secretive policies and placing it on a statutory footing is welcome. However, the obvious potential for authorised criminal conduct to interfere with human rights means that the Bill must contain effective protections against human rights violations, including stringent safeguards against unnecessary or abusive authorisations.

36 Article 3 ECHR does not contain a specific definition of torture. Torture is defined [in Article 1\(1\) of the UN Convention on Torture](#) as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*" (emphasis added).

37 [Ilascu v Moldova \(App. No. 48787/99\)](#) at [318]

38 See further Chapter 8 below

4 Limits on the criminal conduct that can be authorised

No express limit on type of crime that can be authorised

32. The Bill contains no express limit on the types of criminal conduct that can be authorised. Even the most serious offences such as rape, murder, sexual abuse of children or torture, which would necessarily violate a victim’s human rights, are not excluded on the face of the Bill.

33. The Home Office have argued that specifying offences that cannot be authorised would risk exposing actual and suspected informants and undercover officers to tests designed to expose their subterfuge:

“The Bill does not list specific crimes which may be authorised, or prohibited, as to do so would place into the hands of criminals, terrorists and hostile states a means of creating a checklist for suspected CHIS to be tested against.”³⁹

Approach taken in other jurisdictions

34. Placing no express limit on the types of crimes that can be authorised is not the approach that has been taken in other jurisdictions, where the same risks of CHIS being ‘tested’ would apply.

35. In their joint written submission to the Committee, the NGOs Reprieve, the Pat Finucane Centre, Privacy International, the Committee on the Administration of Justice, Rights and Security International, and Big Brother Watch⁴⁰ have noted that under the Canadian Security Intelligence Act there is a power to authorise criminal conduct similar to that proposed in the Bill.⁴¹ However, the Canadian legislation expressly provides that nothing in the Act justifies:

- (a) causing, intentionally or by criminal negligence, death or bodily harm to an individual;
- (b) wilfully attempting in any manner to obstruct, pervert or defeat the course of justice;
- (c) violating the sexual integrity of an individual;
- (d) subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of the Convention Against Torture;
- (e) detaining an individual; or

39 Home Office, [Guidance: Limits of Authorised Conduct](#), 1 October 2020

40 For the sake of brevity, these NGOs will be referred to as “Reprieve et al” for the rest of this report.

41 Reprieve et al ([CHIS0002](#))

(f) causing the loss of, or any serious damage to, any property if doing so would endanger the safety of an individual.⁴²

36. The Committee's attention was also drawn to the situation prevailing in the USA. There the FBI have operated since 2016 under guidelines that do not permit an informant to "participate in any act of violence except in self-defense."⁴³

37. In his submission to the Committee, Professor Clive Walker also referred us to Australian Federal law and specifically the Crimes Act 1914. Part 1AB of this Act contains, amongst other matters, detailed provision for "controlled operations" (i.e. law enforcement operations which may involve officers or civilian participants in criminal conduct). The Act provides protection from criminal responsibility and indemnification for civil liability⁴⁴ where authority for criminal conduct has been given, but only where:

"[...] the conduct does not involve the participant engaging in any conduct that is likely to:

(i) cause the death of, or serious injury to, any person; or

(ii) involve the commission of a sexual offence against any person.⁴⁵

Power to prohibit certain conduct by order

38. It is also hard to reconcile the Government's claim that no express limit can be placed on the types of crime that are authorised under the Bill with the fact that the Bill grants the Secretary of State power to make orders prohibiting the authorisation of any specified criminal conduct.⁴⁶ It is unclear for what purpose this power has been reserved,⁴⁷ but, following the Government's argument, whatever might be prohibited by order could be used by criminals as a checklist to test CHIS against. If limits can be placed on authorised criminal conduct in publicly available secondary legislation without putting informants and undercover officers at undue risk, it is unclear why express limits cannot also be set out in primary legislation.

The HRA as an effective safeguard

39. The Government's position is that the HRA already imposes an effective limit on the criminal conduct that could be authorised under the Bill. This point is made in the ECHR memorandum which accompanied the Bill. It states that since all public authorities are bound by the HRA, "[a]uthorising authorities are not permitted by this Bill to authorise conduct which would constitute or entail a breach of those rights."⁴⁸

42 Canadian Security Intelligence Service Act at [section 20\(18\)](#)

43 [The Attorney General's Guidelines regarding the use of FBI confidential human sources](#)

44 It is noteworthy that this Act provides for indemnification rather than the removal of civil liability, thus protecting the victim's ability to obtain redress.

45 Crimes Act 1914 (Australia), sections [15HA](#) and [15HB](#)

46 CHIS Bill, [Clause 5](#) which would insert a new section 29B(10)(a) into RIPA

47 The [Memorandum](#) from the Home Office to the Delegated Powers and Regulatory Reform Committee states that this power "can only be used to further strengthen the safeguards that are attached to the use of criminal conduct authorisations and/or to restrict the circumstances in which a criminal conduct authorisation may be granted." It offers by way of example a similar power (contained in s29 RIPA) which has been used to impose "specific requirements that must be met in relation to the authorisation of CHIS in connection with material that is subject to legal professional privilege."

48 Home Office, [ECHR memorandum](#)

40. Reliance on the HRA as providing an effective limit on the conduct that can be authorised appears inconsistent with the Government’s justification for its refusal to exclude specific offences on the face of the Bill. If a criminal gang or terrorist group was familiar enough with the relevant legislation to test a CHIS against it, they would presumably be equally able to test them against the guarantees and protections set out in the HRA.

41. The underlying assumption that the HRA provides sufficient protection against excessive or inappropriate authorisations is troubling. It is correct, as a matter of law, that the HRA requires all public authorities to comply with Convention rights. However, this does not make it appropriate to legislate by providing open-ended powers and relying on the HRA as a safety net. For example, it would not be reasonable to provide the police with an unconstrained statutory power to deprive someone of their liberty or to break up political demonstrations, relying only on the HRA and Article 5 (right not to be arbitrarily detained) or Article 11 ECHR (right to free assembly) to prevent that power being used in a manner that violates individual rights.

42. The Government should not introduce unclear and ambiguous laws that would, on their face, purport to authorise state-sanctioned criminality that would lead to serious human rights violations such as murder, sexual offences and serious bodily harm. The existence of the HRA does not alter this.

43. The claim that the HRA provides sufficient protection to prevent any breach of human rights under this Bill in particular also appears problematic for the following additional reasons.

44. Firstly, the HRA has not prevented previous human rights violations connected with undercover investigations or CHIS. For example, the HRA was in force for much of the period when undercover police officers of the National Public Order Intelligence Unit were engaging in intimate relationships with women involved in the groups they had infiltrated.⁴⁹

45. Secondly, there are likely to be legal disagreements as to the extent to which the HRA applies to the conduct of CHIS (particularly those who are not office holders or employees of public authorities). For example, in the ECHR memorandum to the Bill the Home Office states that:

“It is to be expected that there would not be State responsibility under the Convention for conduct where the intention is to disrupt and prevent that conduct, or more serious conduct, rather than acquiesce in or otherwise give official approval for such conduct, and/or where the conduct would take place in any event.”⁵⁰

49 For example, PC Mark Kennedy of the National Public Order Intelligence Unit, whose undisclosed undercover involvement led a trial of environmental protesters to collapse. His intimate relationships with women involved in the groups he had infiltrated took place after the HRA came into force in 2000. See the Home Affairs Committee, Thirteenth Report of Session 2012–13, [Undercover Policing: Interim Report](#), HC 837

50 Home Office, [ECHR memorandum](#), para 16

46. In their submission to the Committee, Reprieve et al noted that “[i]f this analysis is correct, an informant could be authorised to actively participate in, for example, a punishment beating or shooting, on grounds that the perpetrator intended to disrupt crime or that the shooting ‘would take place in any event.’”⁵¹

47. The position taken by the Home Office in the ECHR memorandum is concerning. In respect of criminal conduct that violates absolute rights, such as the right to life and the prohibition on torture, the intention behind that conduct cannot justify the violation. That is the nature of an absolute right. Furthermore, as Dr Paul F. Scott, Senior Lecturer in Law at the University of Glasgow, commented in his submission to the Committee “to suggest the state bears no responsibility because the conduct may have taken place even without an authorisation is wholly unconvincing.”⁵²

48. In any event, the position taken by the Home Office in the ECHR memorandum shows that the Government does not accept that the HRA applies to authorised criminal conduct by CHIS in every circumstance. This suggests that, even from the Government’s perspective, there are gaps in the protection the HRA provides against abuse of the authorisation of criminal conduct under the Bill.

49. There is even less clarity in respect of the protection provided by the HRA where criminal conduct by CHIS occurs overseas.⁵³ The extra-territorial effect of the HRA and ECHR is far from straightforward, depending as it does on establishing the exercise of effective control over a person or area. Its precise scope has been fiercely disputed by the Government in a number of legal challenges.⁵⁴ It is therefore questionable whether public authorities authorising CHIS overseas would accept that they are bound by the requirements of the HRA.

50. Thirdly, the future of the HRA is far from certain. In its manifesto for the 2019 general election the Conservative Party pledged to “update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government”.⁵⁵ In a recent letter to the Chair of the JCHR, the Justice Secretary confirmed that the Government will “announce further details on an independent review into the operation of the HRA in due course.”⁵⁶ Uncertainty over the future of the HRA undermines its role as an effective long term protector against abuses of the power contained in this Bill.

51. Fourthly, there is very little scope for human rights violations to be brought to light when they result from CCAs that go further than the HRA would permit. This is because the fact that criminal conduct has been authorised will be secret, and thus highly unlikely to be discovered by any victim who might draw attention to that fact. In the rare event

51 Reprieve et al ([CHIS0002](#))

52 Dr Paul F Scott ([CHIS0001](#))

53 See RIPA [section 27\(3\)](#), which states that conduct that can be authorised under Part 2 includes conduct occurring outside the UK

54 For example, [Al-Skeini v United Kingdom](#), 7 July 2007 (App.No. 55721/07)

55 Proposals to review or reform the HRA are not unique to the present government. Similar proposals have been mooted under previous Labour and Conservative governments. See, for example, the [Conservative Party’s 2017 manifesto](#): “ We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes.” and leaked proposals made by the then Prime Minister Tony Blair in 2006 - see “[Blair ‘to amend human rights law’](#)”, BBC News, 14 May 2006.

56 Letter from Rt Hon Robert Buckland MP, Secretary of State for Justice, [regarding Human Rights Proposals](#), dated 1 October 2020

that a victim is aware that the crime committed against them has been authorised by the State, the CCA provides the criminal with immunity in both criminal and civil law. While the Bill does provide an oversight mechanism, it is incapable of picking up on every unnecessary or disproportionate authorisation (see Chapter 7 below).

52. There appears to be no good reason why the Bill cannot state clearly that certain offences or categories of offences are incapable of authorisation. The protections provided by the HRA are important. However, reliance on the HRA to make up for the lack of any specific constraint on the type of criminal conduct that can be authorised is inadequate. A power as exceptional as that provided by the Bill requires careful and specific constraints.

53. The Bill requires amendment to include a prohibition on the authorisation of serious criminal offences, in similar terms to that appearing in the Canadian Security Intelligence Service Act.

5 The scope of authorisations

Authorisation of criminal conduct “in relation to” a CHIS

54. The definition of what amounts to “criminal conduct” for the purposes of a CCA is wider than simply criminal activity by a CHIS. It extends to “conduct [...] comprised in any activities which involve” criminal conduct “in connection with” the conduct of a CHIS.⁵⁷ The conduct must also be conduct that “consists in conduct by or in relation to” the CHIS and is carried out for the purpose of the relevant investigation or operation.⁵⁸ This is an unhelpfully obscure definition.

55. What is clear is that the conduct authorised need not be the conduct of the CHIS themselves but may also be conduct “in relation to” the CHIS. The best available explanation of this phrase appears in the draft CHIS Code of Practice that was published with the Bill, which explains only that:

“6.18 The criminal conduct that may be authorised is not limited to criminal conduct by a CHIS: a criminal conduct authorisation may authorise conduct by someone else “in relation to” a CHIS, namely those within a public authority that are involved in or affected by the authorisation.”⁵⁹

56. The Code of Practice gives no indication of the circumstances in which it would be necessary or appropriate to authorise criminal conduct by a person within a public authority who is “involved in or affected by the authorisation.” It seems plausible that the purpose of authorising conduct “in relation to” a CHIS is to ensure that those authorising or handling a CHIS are not exposed to prosecution on the basis of secondary liability— but this is not a justification that has been put forward by the Home Office. If this is their reason they should say so.

57. In any event, the broad definition of criminal conduct within the Bill, particularly its use of the terms “in connection with” and “in relation to”, goes further than is necessary to protect against secondary liability. For example, the Bill would theoretically allow for a CCA that authorised an assault committed against a CHIS by a police officer or even the use of violence by a manager against a CHIS handler.

58. The precise extent of what conduct can be authorised under the Bill lacks clarity. Furthermore, the Government has provided no clear explanation why there is a need to authorise criminal conduct by someone other than the CHIS him or herself. *The Bill requires amendment to clarify who can be authorised to commit criminal offences. In the absence of a clear explanation of the need for a CCA to authorise more than the conduct of the CHIS, only the conduct of the CHIS and any resulting secondary liability, should be capable of authorisation.*

57 Those activities (not the conduct) must be specified or described in the CCA.

58 CHIS Bill [Clause 1\(5\)](#) which inserts a new section 29B(8) RIPA

59 Home Office, [Covert Human Intelligence Sources \(CHIS\) Draft Revised Code of Practice, September 2020](#)

No exclusion for children

59. The existing law expressly caters for the use of children as CHIS (although the relevant legislation and guidance refers to them as ‘juveniles’).⁶⁰ The Joint Committee on Human Rights has previously raised concerns about the use of ‘child spies’ in an exchange of letters with the Minister for State for Security and Economic Crime in 2018 and the Investigatory Powers Commissioner (IPC) in 2019.⁶¹ Also in 2019, the High Court assessed whether the scheme in place to regulate the use of children as CHIS provided sufficient safeguards to comply with Article 8 ECHR. The Court concluded that the scheme was compliant. However, it was accepted that the use of a child as a CHIS was:

“[...] liable to interfere with the child’s ‘private life’, which covers the physical and moral integrity of the person. The dangers to the child of acting as a CHIS in the context of serious crimes are self-evident.”⁶²

60. In its submission to the Committee, Justice understandably observed that it is “inconceivable that the Bill remains silent on the granting of CCAs to children, which could place them in dangerous or abusive situations at the Government’s behest.”⁶³ The Bill provides only for the authorisation of criminal conduct by CHIS, and does not make any distinction between adults and children. Neither is any distinction drawn between adults and children for the purposes of CCAs within the Revised CHIS Code of Practice.⁶⁴

61. It is hard to see how the involvement of children in criminal activity, and certainly serious criminal activity, could comply with the State’s obligations under the HRA and under the UN Convention on the Rights of the Child (UNCRC) in anything other than the most exceptional circumstances. Article 3 UNCRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

62. The use of children as CHIS is likely to engage their Article 8 rights. A child acting as a CHIS in respect of serious crime is self-evidently at significant risk. Authorising a child to commit criminal offences substantially raises the risk to them and increases the likelihood of their rights being violated. We have seen no specific justification provided for authorising children to engage in criminal conduct. Deliberately involving children in the commission of criminal offences could only comply with Article 3 UNCRC or Article 8 ECHR in the most exceptional cases.

63. *The Bill must be amended to exclude children or to make clear that children can only be authorised to commit criminal offences in the most exceptional circumstances.*

60 [Regulation of Investigatory Powers \(Juveniles\) Order 2000](#) and Home Office, [Covert Human Intelligence Sources \(CHIS\) Draft Revised Code of Practice, September 2020](#), paras 4.2–4.7

61 [“Child spies: use of juveniles as covert human intelligence sources”](#), Joint Committee on Human Rights, 12 September 2018

62 [R \(Just for Kids Law\) v SSHD](#) [2019] EWHC 1772 (Admin)

63 JUSTICE (CHIS0006)

64 The [Revised Code of Practice](#) does, however, contain a section dealing more generally with Juvenile Sources at 4.2–4.7

'Belief' in necessity and proportionality

64. The Bill provides that a CCA may only be made where the person authorising it “believes” the tests of necessity and proportionality have been met. There is no requirement in the Bill that the belief needs to be a reasonable one.⁶⁵ This appears to mean that whether or not the CCA can be made relies only on the subjective belief of the person making the authorisation. The authorisation will be valid regardless of how unreasonable an honestly held belief might be.

65. Objectively reasonable belief is a standard requirement for the exercise of police powers - from stop and search,⁶⁶ to arrest,⁶⁷ to applying for a search warrant.⁶⁸ This prevents these powers being lawfully exercised without reasonable justification. It is a vital protection against overzealous or misguided officers. Plainly there is a risk of criminal conduct being authorised where it is unnecessary and disproportionate, and thus likely to violate human rights, if the belief upon which it is based is not an objectively reasonable one.

66. The effect of a CCA is to exclude the CHIS committing the authorised criminal conduct from criminal and civil liability. If a test of “reasonable belief” were applied to the making of an authorisation, a CCA made without objective justification would be invalid. However, the CHIS acting under the CCA would not know this. This could result in the CHIS being exposed to criminal prosecution or a civil claim, despite the fault being with the individual making the authorisation.

67. It cannot be acceptable for CCAs to be made on the basis of an unreasonable belief in their necessity and proportionality. However, simply requiring the person authorising the criminal conduct to have an objectively reasonable belief could result in CHIS being prosecuted or subjected to civil claims unfairly. For this reason, it would be more effective for a test of objective reasonableness to be applied in the course of an independent judicial approval process (see Chapter 7 below).

Authorising criminal conduct in the interests of “preventing disorder” or of the “economic well-being of the UK”

68. The Bill permits CCAs to be made for a limited number of purposes. Authorising criminal conduct may in certain circumstances be necessary and proportionate in the interests of national security or for the purpose of preventing or detecting serious crime. These were the purposes considered by the Investigatory Powers Tribunal when they approved MI5’s policy in the *Third Direction* challenge. They are also the purposes highlighted by the Home Office in the Explanatory Notes (“The use of CHIS is a key tactic in protecting national security and investigating serious crime”). However, the Bill does not limit the use of CCAs to protecting national security or preventing/detecting serious crime, but permits them to be made for the purposes of “preventing disorder” and for the “economic well-being of the United Kingdom”.

65 The Draft Revised CHIS Code of Practice, at paragraph 3.10, states that “it is expected that the person granting the authorisation should hold a reasonable belief that the authorisation is necessary and proportionate” but this is not a legal requirement.

66 Police and Criminal Evidence Act 1984 (PACE), [section 1](#)

67 [PACE, section 24](#)

68 [PACE, section 8](#)

69. The language used in the test of necessity and proportionality contained in the Bill, including the references to preventing disorder and to economic well-being, mirrors some of the permissible justifications for interferences with qualified rights that appear in the Convention.⁶⁹ However, this alone does not justify including these purposes within the Bill.

70. It is difficult to understand why it is necessary to include ‘preventing disorder’ as a potential justification for authorising criminal conduct. Serious disorder would amount to a crime, most obviously under the Public Order Act 1956, and therefore be covered by the purpose of “preventing crime”. Any non-criminal disorder would not be serious enough to justify the use of criminality to prevent it.

71. In the same way, using CCAs to detect or disrupt criminal or terrorist activity that puts at risk the economic well-being of the country will be covered by the purpose of preventing crime or protecting national security. It is far from clear how non-criminal activity that poses an economic risk could justify the use of criminality to prevent it.

72. In relation to the use of CHIS in respect of non-criminal activity, Reprieve et al raised concerns in their written evidence that in the Bill:

“There is no express prohibition [...] in relation to the activities of Trade Unions, anti-racism campaigns and environmental campaigns that have been the site of illegitimate CHIS activity in the past.”⁷⁰

73. Extending the use of CCAs into non-criminal situations risks unjustified interferences with the activities of trade unions and other legitimate activists and campaigners and their rights under Articles 10 and 11 ECHR (the right to free expression and the right to free assembly). *The purposes for which criminal conduct can be authorised should be limited to national security and the detection or prevention of crime.*

74. Overall, the power to authorise criminal conduct contained in the Bill is far too extensive, in respect of the type of criminal conduct that can be authorised, who can be authorised to carry it out and the purposes for which they can authorise that conduct. The lack of limits on the use of CCAs risks the human rights of victims, and of CHIS, being violated.

69 See [Article 8\(2\)](#): “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

70 Reprieve et al ([CHIS0002](#))

6 Public authorities granted power to authorise crime

Wide range of authorities who can authorise crime

75. We accept that 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. Where criminal conduct is necessary, interferences with qualified rights will be capable of being justified provided they are proportionate. However, the Bill proposes granting the power to make CCAs not only to the security and intelligence services and the police but to a substantially wider range of public authorities, including, for example the Department of Health and Social Care; the Environment Agency; the Gambling Commission; and the Food Standards Agency. This provision of the Bill, coupled with the ability to authorise criminal conduct in the interests of preventing disorder and preserving economic well-being (see paragraphs 67–71 above), extends the power to authorise criminal conduct well beyond the core area of national security and serious crime.

76. Considering this aspect of the Bill from a human rights perspective, the first key question is whether the exceptional power to authorise crimes to be committed without redress is truly necessary for each and every one of these public authorities. The second key question is whether the benefit of granting that power would be proportionate to the human rights interferences that are likely to result.

77. Answering these questions is difficult because the Government has provided limited and insufficient specific justification for the authorisation of criminal conduct by bodies such as those listed above. The Home Office has published brief guidance on this issue as well as a series of “Operational Case Studies”.⁷¹ These provide examples of the authorisation of criminal conduct by CHIS by the Medicines and Healthcare products Regulatory Agency (MHRA) and Her Majesty’s Revenue and Customs. They also provide hypothetical examples of where CAAs might be used by the Environment Agency and the Food Standards Agency. In his letter to the Chair of the Committee, the Minister of State for Security went further and explained that the Environment Agency is responsible for “investigating and prosecuting offences which create serious risks of harm to people and the environment, such as illegal landfills, misdescription of hazardous waste and illegal waste exports” while the Food Standards Agency has a specialist Food Crime Unit - “a law enforcement capability within the Agency.”⁷² Yet even these limited examples do not answer a crucial question: why would the police, or another body whose function is expressly focused on the prevention of crime, not take responsibility for any need to authorise criminal conduct in the course of undercover work that falls within the purview of these organisations? It is assumed such bodies have greater experience and expertise in the deployment and handling of CHIS.

71 Home Office Guidance: “[Public Authorities able to authorise CHIS Criminal Conduct Authorisations](#)” and the Home Office, Covert Human Intelligence Sources (Criminal Conduct) Bill, [Operational Case Studies](#), September 2020

72 Letter from Rt Hon James Brokenshire MP, Minister of State for Security, [regarding the Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#), dated 4 November

78. To assess whether the power provided by the Bill is truly needed, it is important to establish whether the authorisation of criminal conduct by each of these bodies has previously been considered necessary. The Explanatory Memorandum states that the Bill represents “a continuation of existing practice that is currently authorised using a variety of legal bases”.⁷³ However, it is unclear from the Home Office publications referred to above whether all the public authorities named in the Bill have in fact previously authorised criminal conduct. Furthermore, other than in respect of the security service, and the policy considered in the *Third Direction* challenge, it has not been made clear on what basis those public authorities are currently permitted to authorise criminal conduct. In his written evidence to the Committee, Dr Paul F. Scott commented that:

“If the government believes it is necessary for each of these bodies to have the power to grant authorisations it should be explicit about whether those bodies already possess non-binding ‘powers’ to authorise the commission of crimes and provide more detail as to how, and how often, those powers are used. In the absence of such an account, there is no reason to accept that all of those bodies require the powers the Bill would give them.”⁷⁴

79. In the absence of this kind of detail from the Government, it is hard to be confident that the authorisation of a criminal offence by agencies whose primary function is not to combat serious crime or protect national security could genuinely be necessary and proportionate.

Power to grant additional public authorities the power to authorise crime

80. The Committee notes that under s.30(5) RIPA the Secretary of State will have the power to make an order adding other public authorities to the list of those permitted to authorise criminal conduct. While the power to extend RIPA powers to other public authorities has been used sparingly in the past, it remains of concern that additional authorities with little or no relation to national security or fighting serious crime could be added to the list of those permitted to make CCAs, with limited Parliamentary oversight.

81. 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.

82. *The power to authorise criminal conduct should be restricted to public authorities whose core function is protecting national security and fighting serious crime.*

73 [Explanatory Memorandum](#) to the Covert Human Intelligence Sources (Criminal Conduct) Bill, prepared by the Home Office in place of an Impact Assessment

74 Dr Paul F Scott ([CHIS0001](#))

7 Adequacy of oversight mechanisms

83. In his report into the death of Patrick Finucane, Sir Desmond Da Silva QC, stated that:

“[...] I have not concluded that the running of agents within terrorist groups is an illegitimate or unnecessary activity. On the contrary, it is clear that the proper use of such agents goes to the very heart of tackling terrorism. The principal lesson to be learned from my Report, however, is that agent-running must be carried out within a rigorous framework. The system itself must be so structured as to ensure adequate oversight and accountability. Structures to ensure accountability are essential in cases where one organisation passes its intelligence to another organisation which then becomes responsible for its exploitation.

It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist groups are rigorously pursued.”⁷⁵

84. Sir Desmond da Silva QC’s conclusions are consistent with the requirements of human rights law. For any interference with human rights to be considered “in accordance with the law” for the purposes of the ECHR, the law that governs it must contain effective safeguards against abuse. Does the Bill provide the rigorous framework of oversight and accountability necessary to safeguard against abuse of the exceptional power to authorise criminal conduct? In their submission to the Committee, the law reform and human rights organisation Justice described the Bill as “extremely limited in its oversight mechanisms” and summarised its safeguards as being “woefully inadequate”.⁷⁶

Internal oversight

85. Published with the Bill, the draft revised Code of Practice provides detail on the way in which the CCA process will operate. It notes that only a designated authorising officer within a public authority may make a CCA.⁷⁷ CCAs must be made in writing unless urgent (when the full detail should subsequently be recorded as soon as possible), and authorising officers cannot authorise themselves to carry out criminal conduct. Otherwise, in respect of oversight, the Code of Practice provides for how applications for authorisations ‘should’ (not must) be made and recorded;⁷⁸ and how authorisations once granted ‘should’ (not must) be kept under regular review by the authorising officer and subjected to audit by the CHIS controller.

86. The Code of Practice is issued pursuant to section 71 of RIPA. It can be revised at any time, but only by an order of the Secretary of State that has been laid before Parliament and approved by a resolution of each House.⁷⁹

75 The Report of the Patrick Finucane Review, *The Report of the Patrick Finucane Review*, [HC 802-I](#), December 2012, paras 112–113

76 JUSTICE ([CHIS0006](#))

77 The designated authorising officer is identified by rank or office in the [Regulation of Investigatory Powers \(Directed Surveillance and Covert Human Intelligence Sources\) Order 2010](#)

78 The only strict requirement is that “the public authority must ensure that the case for the authorisation is presented in the application in a fair and balanced way” ([Code of Practice](#) at 6.17)

79 RIPA, [section 71\(9\)](#)

Oversight by the Investigatory Powers Commissioner

87. In respect of external oversight, the Bill does no more than bring CCAs within the responsibility of the Investigatory Powers Commissioner (IPC).

88. The IPC must be a senior judicial figure, and this requirement is well met by the current incumbent, Sir Brian Leveson.⁸⁰ The IPC already has an obligation to keep under review a wide range of covert investigatory functions.⁸¹ These relate to the interception of communications and acquisition of data, covert surveillance and the use of CHIS. The IPC, so far as directed by the Prime Minister, must also keep under review any aspect of the functioning of the intelligence services (or Her Majesty's Forces or the Ministry of Defence when engaging in intelligence activities).⁸² It is now known that one such direction from the Prime Minister (known as the 'Third Direction') requires the IPC to scrutinise the authorisation of criminal conduct by MI5.⁸³

89. In carrying out his or her review function, which under the Bill will include review of the use of CCAs, the IPC⁸⁴ has the power to conduct investigations, inspections and audits. However, these are oversight functions only. The IPC plainly does not have the capacity to investigate every time a CCA is used.

90. Otherwise the IPC's oversight role under the Bill is restricted to covering the use of the power to grant CCAs in his annual report to the Prime Minister.⁸⁵ This annual report must be published and laid before Parliament, but may first be redacted.⁸⁶

91. In their submissions to the Committee, both Justice and Reprieve et al, highlighted what they considered was a need for greater transparency than the Bill currently provides. Justice commented that:

“Transparency is essential in establishing legitimacy for the use of CHIS [...] it is vital that the public understand how widely such powers are used, and have effective mechanisms for challenging overreach by the state.”⁸⁷

92. Reprieve et al compared the provisions of the Bill with the arrangements in place in other jurisdictions:

“Once more, the oversight powers in the Bill are far weaker than those operated by the UK's intelligence partners. The FBI has repeatedly released details of the number of crimes committed by its agents as part of efforts to increase transparency over the use of this power [...] Canada's new legislation requires details of the use of CHIS to be issued in an annual

80 Former President of the Queen's Bench Division and Head of Criminal Justice - see <https://www.ipco.org.uk/>

81 Investigatory Powers Act 2016, [section 229](#)

82 Investigatory Powers Act 2016, [section 230](#)

83 [Privacy International & others -v- Secretary of State for Foreign and Commonwealth Affairs & others IPT/17/86 & 87/CH](#)

84 With the assistance of Judicial Commissioners, to whom the IPC may delegate functions- see Investigatory Powers Act 2016, [section 227\(8\)](#), and staff

85 CHIS Bill, [Clause 4](#), which inserts a new section 234(2)(ba) Investigatory Powers Act 2016

86 Investigatory Powers Act 2016, [section 234\(7\)](#)

87 JUSTICE ([CHIS0006](#))

report, as this Bill does, but requires it to include not only the number of authorisations issued each year but also the nature of the acts committed—which this Bill does not.”⁸⁸

93. The IPC’s ability to conduct even a high-level review of the use of CCAs effectively will depend on the provision of clear data on their use by the bodies authorised to make them. In this regard, the most recent available annual report of the IPC is of some concern. Whilst no concerns were raised about the authorisations examined, the IPC noted that

“MI5 lack reliable central records around [participation in criminal] activity and that there is no consistent review process. We recommended that MI5 should implement a system to capture accurately the extent of participation in criminality by CHIS across the organisation. This should record the number of [...] authorisations, the nature of the activity authorised and the number of times each authorisation has been relied upon.”⁸⁹

Lack of prior independent scrutiny or approval for CCAs

94. The case law of the European Court of Human Rights indicates that where public authorities are being granted exceptional powers with obvious potential for interfering with human rights, such as the power to grant CCAs, the best form of protection against abuse is prior independent scrutiny by a judge.⁹⁰ The IPC’s role in the oversight of CCAs is entirely ‘after the event’. The IPC carries out no check on CCAs before they are made, nor does the Bill provide for the IPC to be informed of authorisations at the time they are made so that prompt scrutiny can take place.

95. The lack of prior independent scrutiny for CCAs under the Bill stands in marked contrast to the procedures in place for other investigatory functions. For example:

- a) Police search warrants—the police make an application to magistrates who must authorise the warrant in advance for it to be valid.⁹¹ The magistrates must be satisfied that there are objectively reasonable grounds for the warrant.
- b) Targeted interception of communications (or ‘phone-tapping’) warrants—these warrants must first be approved by the Secretary of State (or Scottish Ministers)

88 Reprive et al ([CHIS0002](#))

89 Investigatory Powers Commissioner’s Office, Annual Report of the Investigatory Powers Commissioner 2018, [HC 67](#), para 6.8

90 See [Roman Zakharov v Russia](#), 4 December 2015 (App.No. 47143/06) at [233]: “ Review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual’s knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded. In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure.”

91 [Section 8, Police and Criminal Evidence Act 1984](#). See also [section 26, Theft Act 1968](#), [section 23 of the Misuse of Drugs Act 1971](#) and [schedule 5, paragraph 1 and 11 of the Terrorism Act 2000](#).

and then authorised by a Judicial Commissioner before they can be activated.⁹² This is referred to as the ‘double-lock’, which the IPC’s website states “ensures that all Investigatory Powers Act warrants issued are necessary, proportionate and lawful”.⁹³

- c) Retention of data - the power to require telecommunications operators to retain communications data for investigatory purposes can be exercised by the Secretary of State but must be approved by a Judicial Commissioner (the ‘double lock’).⁹⁴

96. The primary concern in respect of each of these examples is to avoid unnecessary or excessive interference with the privacy of the subject. While privacy is a vitally important right, protected under Article 8 ECHR, the authorisation of criminal conduct gives rise to significant risks of more damaging human rights violations - including physical violence. As the former Director of Public Prosecutions, Sir Ken MacDonald, put it: “[u]nder this bill it will be easier for a police officer to commit a serious crime than to tap a phone or search a shed”.⁹⁵

97. It is notable that the Bill as it stands imposes no requirement that the belief of the individual making the CCA that it is necessary must be a reasonable belief (see further Chapter 5 above). A significant advantage of prior judicial scrutiny would be that it would allow a requirement of objectively reasonable belief to be applied before the authorisation is made. This would safeguard against unreasonable authorisations being made. It would also prevent the CHIS themselves only finding out after the event that their criminal conduct was not covered by a valid CCA.

98. Bringing CCAs within the review function of the IPC provides some reassurance of independent scrutiny of their use after the event. However, this is insufficient protection for human rights. It is unacceptable for this Bill to propose that the authorisation of crime, and the consequential grant of civil and criminal immunity, should have fewer safeguards than the authorisation of search warrants and phone tapping.

99. *In his annual report the IPC must provide as much detail on the use of CCAs as possible, in the interests of transparency. Bodies permitted to make CCAs must also ensure accurate records are made and shared with the IPC.*

100. *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.*

92 Investigatory Powers Act 2016, [section 23](#). Where a warrant is urgent it can be granted without approval from the Judicial Commissioner, but the Judicial Commissioner must be notified and must approve the warrant within 3 days or it will lapse - see [sections 24–25](#).

93 <https://www.ipco.org.uk/>

94 Investigatory Powers Act 2016, [section 89](#)

95 [“Government must not give green light to lawbreaking”](#), The Times, 5 October 2020

8 Immunity from criminal prosecution and civil liability

Immunity rather than prosecutorial discretion

101. Under the Bill the consequence of authorising criminal conduct is that it is rendered “lawful for all purposes” - creating an immunity from criminal prosecution and from civil liability for the person carrying out the authorised crime. The Explanatory Notes state that the Bill puts “on a [...] statutory footing” pre-existing policy. However, the pre-existing policy considered in the *Third Direction* challenge did not create an immunity from prosecution or civil liability. It merely provided that the fact criminal conduct had been officially authorised would be taken into account when assessing whether prosecution would be in the public interest.⁹⁶ The Minister for Security has suggested that the practical difference is limited, but there is a substantial constitutional difference between legislating for criminal conduct to be “lawful for all purposes” and inviting an independent prosecution to assess whether prosecution is in the public interest. Thus, the Bill goes significantly further than the one publicly available policy it replaces.

102. It is highly exceptional for the law to provide an explicit immunity from prosecution, as this Bill purports to do, and thereby to trespass on prosecutorial independence. In their submission to the Committee, Reprieve et al raise concerns about the potential impact of removing prosecutorial discretion in this area. They note that “the independence of decision making by the Director of Public Prosecutions (DPP) has in particular been a cornerstone of the justice reforms of the Northern Ireland peace process” and suggest that the Bill “threatens to reverse reforms of the peace process in one of the most controversial areas of policing and prosecutorial policy.” It is not clear that the Government have taken into account the particular sensitivities for Northern Ireland of providing pre-emptive criminal immunity to undercover agents.

103. This is not the first time that legislation has provided criminal and civil immunity to intelligence agents. Section 7 of the Intelligence Services Act 1994 provides that agents operating outside the UK will not be liable under UK criminal or civil law if their conduct has been authorised by the Secretary of State.⁹⁷ However, the power in the Covert Human Intelligence Sources (Criminal Conduct) Bill is far more wide ranging in its coverage and effects. It goes much further than the 1994 Act in respect of who can be authorised to commit crimes, who can authorise crime and notably where those crimes may be committed (both inside and outside the UK).⁹⁸ It is of particular significance that, in contrast with crimes authorised under the 1994 Act, authorised crimes committed within the UK will inevitably fall within the territorial jurisdiction of the UK for ECHR purposes.⁹⁹

96 Security Service Guidelines at (9), as discussed in the [IPT ‘Third Direction’ judgment](#), paras [15] and [67]

97 The extent to which the 1994 Act has been used to protect MI6 agents from prosecution or civil liability and the degree to which this regime has protected human rights falls outside the scope of this report. Nevertheless, we note the findings of the Intelligence and Security Committee of Parliament: *Detainee Mistreatment and Rendition 2001–2010*, [HC 1113](#), 28 June 2018

98 RIPA [section 27\(3\)](#) would appear to confirm that CCAs would cover not only criminal conduct in the UK but also “conduct outside the United Kingdom.”

99 Authorised criminal conduct committed outside of the UK may fall within the extra-territorial jurisdiction of the ECHR - see [Al-Skeini and Others v. the United Kingdom](#) [GC], no. 55721/07, ECHR 2011

Victims' rights

104. Article 1 ECHR requires the UK to secure the rights of all those within its jurisdiction, including the rights of victims of crime. Where a crime also amounts to a human rights violation, the victim has a right to an effective remedy under Article 13 ECHR. A victim also has an Article 6 right “to have any claim relating to his or her civil rights and obligations brought before a court or tribunal.”¹⁰⁰

105. The rights of victims of crime are typically respected by an effective criminal justice system, coupled with the ability to bring civil litigation against those that have harmed them. Under the Bill, the rights of a victim of authorised crime would not be vindicated through the criminal justice system because the perpetrator would not have committed an offence.

106. In respect of serious offences, this would not be consistent with the requirements of the ECHR. The State is under a positive obligation to carry out effective investigations into allegations of treatment that violates Article 3 or Article 2. Such investigations must be capable of leading to the identification *and punishment* of those responsible.¹⁰¹ The European Court of Human Rights has specifically held that “national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished.”¹⁰² Looking beyond the ECHR, Article 7 of the UN Convention Against Torture (CAT) requires that allegations of torture must be submitted to the prosecuting authorities who must decide whether to prosecute “in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

107. The Bill might also frustrate a victim’s ability to recover compensation for injury or loss. The Criminal Injuries Compensation Scheme provides victims of a “crime of violence” with access to compensation.¹⁰³ Since the Bill would render authorised criminal conduct “lawful for all purposes”, were it known to those considering an application under the scheme that the crime in issue had been authorised, a victim of that conduct would not be eligible to be compensated.

108. The victim would also be unable to secure an effective remedy by bringing a civil claim against the person who caused them harm. Again, authorised criminal conduct would be ‘lawful for all purposes’ and therefore not tortious. The Government has placed considerable reliance on the HRA as providing a limit on the criminal conduct that could be authorised under the Bill, but once a CCA is in place a claim under the HRA against a CHIS or handler deemed to be carrying out a public function would also appear to be unavailable. In his letter to the Chair of the Committee, the Minister for Security stated that any authorisation found to have been made in breach of s.6 HRA (which requires public authorities to act compatibly with Convention rights) “would be invalid and the conduct of the CHIS would not be rendered lawful.” However, it is not plain on the face

100 [Golder v. the United Kingdom](#), 21 February 1975, § 36, Series A no. 18

101 [Assenov v Bulgaria](#), App.no. 24760/94, 28 October 1998 at para 102

102 [Da Silva v UK](#), App.No. 5878/08, 30 March 2016

103 The HM Courts & Tribunals Service, [Criminal Injuries Compensation Scheme](#), 27 November 2012, covers crimes that have taken place in England, Scotland or Wales. A separate [Northern Ireland Criminal Injuries Compensation Scheme](#) covers Northern Ireland.

of the Bill that this would be the consequence of an authorisation that was inconsistent with human rights. Nor is it clear what would be the consequence of a CHIS carrying out a validly authorised offence in an excessive or disproportionate manner.¹⁰⁴

109. A victim could still theoretically bring a claim under the HRA against the public authority who authorised the criminal conduct, as the immunity from civil liability applies only to the person who carried out the criminal conduct.¹⁰⁵ However, a number of those who provided written evidence to the Committee have raised concerns that the Government does not accept that the HRA applies to all authorised criminal conduct.¹⁰⁶

110. We note that the regime in place in Australia, under Part 1AB of the Crimes Act 1914, takes a different approach to a complete immunity from civil action. Section 15HB provides *indemnification* for any participant who incurs civil liability in the course of an undercover operation. The effect of this provision would be to ensure that the participant (i.e. the CHIS) would not suffer the consequences of civil liability, but it would also ensure that the victim of the conduct would obtain civil redress while secrecy is maintained.

Practical consequences for victims

111. Our attention has also been drawn to the uncertain practical consequences of secretly authorising criminal conduct by CHIS. Victims of crimes authorised under a CCA will not be aware that the perpetrator was acting under an authorisation. Indeed, it is not obvious how the police or prosecuting authorities will be made aware that a criminal offence reported to them by a victim was authorised. It is also unclear how the Government proposes that victims of authorised criminal conduct will be dealt with by the police, prosecution or judiciary. As Dr Paul F. Scott asked in his submission to the Committee:

“Will those who are the victims of criminal acts authorised under the powers contained in the Bill be told that this is the case? Or will they simply be told that a decision has been taken that it is not in the public interest to prosecute the offence in question?”¹⁰⁷

112. By rendering criminal conduct lawful for all purposes, the Bill goes further than the existing MI5 policy by removing prosecutorial discretion. The reason for this change in policy has not been made clear. It has significant ramifications for the rights of victims. The Government has missed an opportunity to include within the Bill provision for victims of authorised criminal conduct, both legally and practically. This is another reason why the Bill requires additional safeguards to ensure there can be no authorisation of serious criminality.

113. *The Government must explain why the existing policy on criminal responsibility, which retained prosecutorial discretion, has been altered in the Bill to a complete immunity. Victims’ rights must be protected by amending the Bill to ensure that serious criminal offences cannot be authorised. In respect of civil liability, the Government*

104 Although a claim under the HRA could be brought in the Investigatory Powers Tribunal in respect of conduct that was not covered by a valid authorisation

105 A claim in tort could also be available on the basis of joint tortfeasance or common design

106 See paras 45–49 above

107 Dr Paul F Scott ([CHIS0001](#))

must confirm that authorising bodies will accept legal responsibility for human rights breaches by CHIS or alter the Bill to provide that CHIS will be indemnified rather than made immune from liability.

Conclusions and recommendations

Human rights implications of the Bill

1. Removing the authorisation of criminal conduct by CHIS from secretive policies and placing it on a statutory footing is welcome. However, the obvious potential for authorised criminal conduct to interfere with human rights means that the Bill must contain effective protections against human rights violations, including stringent safeguards against unnecessary or abusive authorisations (Paragraph 31)

Limits on the criminal conduct that can be authorised

2. There appears to be no good reason why the Bill cannot state clearly that certain offences or categories of offences are incapable of authorisation. The protections provided by the HRA are important. However, reliance on the HRA to make up for the lack of any specific constraint on the type of criminal conduct that can be authorised is inadequate. A power as exceptional as that provided by the Bill requires careful and specific constraints. (Paragraph 52)
3. *The Bill requires amendment to include a prohibition on the authorisation of serious criminal offences, in similar terms to that appearing in the Canadian Security Intelligence Service Act.* (Paragraph 53)

The scope of authorisations

4. The precise extent of what conduct can be authorised under the Bill lacks clarity. Furthermore, the Government has provided no clear explanation why there is a need to authorise criminal conduct by someone other than the CHIS him or herself. *The Bill requires amendment to clarify who can be authorised to commit criminal offences. In the absence of a clear explanation of the need for a CCA to authorise more than the conduct of the CHIS, only the conduct of the CHIS and any resulting secondary liability, should be capable of authorisation.* (Paragraph 58)
5. The use of children as CHIS is likely to engage their Article 8 rights. A child acting as a CHIS in respect of serious crime is self-evidently at significant risk. Authorising a child to commit criminal offences substantially raises the risk to them and increases the likelihood of their rights being violated. We have seen no specific justification provided for authorising children to engage in criminal conduct. Deliberately involving children in the commission of criminal offences could only comply with Article 3 UNCRC or Article 8 ECHR in the most exceptional cases. (Paragraph 62)
6. *The Bill must be amended to exclude children or to make clear that children can only be authorised to commit criminal offences in the most exceptional circumstances.* (Paragraph 63)
7. It cannot be acceptable for CCAs to be made on the basis of an unreasonable belief in their necessity and proportionality. However, simply requiring the person authorising the criminal conduct to have an objectively reasonable belief could result

in CHIS being prosecuted or subjected to civil claims unfairly. For this reason, it would be more effective for a test of objective reasonableness to be applied in the course of an independent judicial approval process. (Paragraph 67)

8. Extending the use of CCAs into non-criminal situations risks unjustified interferences with the activities of trade unions and other legitimate activists and campaigners and their rights under Articles 10 and 11 ECHR (the right to free expression and the right to free assembly). *The purposes for which criminal conduct can be authorised should be limited to national security and the detection or prevention of crime.* (Paragraph 73)
9. Overall, the power to authorise criminal conduct contained in the Bill is far too extensive, in respect of the type of criminal conduct that can be authorised, who can be authorised to carry it out and the purposes for which they can authorise that conduct. The lack of limits on the use of CCAs risks the human rights of victims, and of CHIS, being violated. (Paragraph 74)

Public authorities granted power to authorise crime

10. 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. (Paragraph 81)
11. *The power to authorise criminal conduct should be restricted to public authorities whose core function is protecting national security and fighting serious crime.* (Paragraph 82)

Adequacy of oversight mechanisms

12. Bringing CCAs within the review function of the IPC provides some reassurance of independent scrutiny of their use after the event. However, this is insufficient protection for human rights. It is unacceptable for this Bill to propose that the authorisation of crime, and the consequential grant of civil and criminal immunity, should have fewer safeguards than the authorisation of search warrants and phone tapping. (Paragraph 98)
13. *In his annual report the IPC must provide as much detail on the use of CCAs as possible, in the interests of transparency. Bodies permitted to make CCAs must also ensure accurate records are made and shared with the IPC.* (Paragraph 99)
14. *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.* (Paragraph 100)

Immunity from criminal prosecution and civil liability

15. By rendering criminal conduct lawful for all purposes, the Bill goes further than the existing MI5 policy by removing prosecutorial discretion. The reason for this change in policy has not been made clear. It has significant ramifications for the rights of victims. The Government has missed an opportunity to include within the Bill provision for victims of authorised criminal conduct, both legally and practically. This is another reason why the Bill requires additional safeguards to ensure there can be no authorisation of serious criminality. (Paragraph 112)
16. *The Government must explain why the existing policy on criminal responsibility, which retained prosecutorial discretion, has been altered in the Bill to a complete immunity. Victims' rights must be protected by amending the Bill to ensure that serious criminal offences cannot be authorised. In respect of civil liability, the Government must confirm that authorising bodies will accept legal responsibility for human rights breaches by CHIS or alter the Bill to provide that CHIS will be indemnified rather than made immune from liability.* (Paragraph 113)

Annex: Proposed amendments

This amendment establishes a prohibition on the authorisation of serious criminal offences, in similar terms to that appearing in the Canadian Security Intelligence Service Act.

In clause 1(5) insert a new sub-section 29B(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 to 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.”

This amendment clarifies who can be authorised to commit criminal offences.

In clause 1(5), omit new section 29B(8)(b) and replace with the following:

“(b) consists in conduct–

(i) by the person who is so specified or described as the covert human intelligence source to whom the authorisation relates, or

(ii) by another person holding an office, rank or position within the public authority making the criminal conduct authorisation, which assists or encourages criminal conduct by the covert human intelligence source to whom the authorisation relates; and”

This amendment prohibits the authorisation of criminal conduct by children.

In clause 1(5) at page 2, line 11, insert new sub-section 29B(2A) as follows:

“(2A) A criminal conduct authorisation may not be granted in relation to a covert human intelligence source who is under the age of 18”

This amendment limits the use of criminal conduct authorisations to protecting national security and preventing crime.

In clause 1(5):

In new section 29B(5)(a) insert “or” after “national security;”

In new section 29B(5)(b) omit “or of preventing disorder; or” and replace with “.”

Omit new section 29B(5)(c)

This amendment restricts the power to authorise criminal conduct to public authorities whose core function is protecting national security and fighting serious crime

In clause 2(9): omit E1 to N1

This amendment imposes a requirement for prior judicial approval of CCAs (with provision for urgent cases).

In clause 1(5) insert a new sub-section 29B(1A) as follows:

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

In clause 1(5), after new section 29B, insert a new section 29C as follows:

“29C Approval for criminal conduct authorisations

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

(2) Unless the authorisation is an urgent authorisation, the authorisation has no effect until such time (if any) as a Judicial Commissioner has approved the grant of the authorisation.

(3) If the authorisation is an urgent authorisation:

(a) it is effective when granted; but

(b) the authorisation will cease to have effect if it is not approved by a Judicial Commissioner in accordance with this section within 48 hours of being granted.

(4) A 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;

(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.

(5) A Judicial Commissioner may only give approval to the granting of an urgent authorisation if the Judicial Commissioner is also satisfied that at the time of the grant the person granting the authorisation had reasonable grounds to believe the authorisation must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised.

(6) In this section—

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

“Judicial Commissioner” has the meaning given in section 227 of the Investigatory Powers Act 2016; and

“Urgent authorisation” means an authorisation under s29B that the person granting it believes must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised. (unless the need for the authorisation to be granted immediately has arisen as a result of fault by the authorising public authority)”

Declaration of Interests

Lord Brabazon of Tara

- No relevant interests to declare

Lord Dubs

- No Interests declared

Baroness Ludford

- No Interests declared

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No Interests declared

Lord Trimble

- No Interests declared

Formal minutes

Wednesday 4 November 2020

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Lord Brabazon
Ms Karen Buck MP	Lord Dubs
Joanna Cherry MP	Baroness Massey of Darwen
Dean Russell MP	Lord Singh of Wimbledon
	Lord Trimble

Draft Report (*Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 113 read and agreed to.

Annex and Summary agreed to.

Resolved, That the Report be the Tenth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 11 November at 2.30pm.]

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

CHIS numbers are generated by the evidence processing system and so may not be complete.

- 1 JUSTICE ([CHIS0006](#))
- 2 KRW LAW LLP ([CHIS0010](#))
- 3 Reprieve, The Pat Finucane Centre, Privacy International, The Committee on the Administration of Justice, Rights and Security International, and Big Brother Watch ([CHIS0002](#))
- 4 School of Law, University of Glasgow (Dr Paul F Scott, Senior Lecturer in Law) ([CHIS0001](#))
- 5 University of Leeds (Professor Emeritus Clive Walker, Professor Emeritus) ([CHIS0007](#))
- 6 University of Salford (Dr Samantha Newbery, Reader in International Security) ([CHIS0009](#))
- 7 White ([CHIS0008](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2019–21

First Report	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 149 HL 37
Second Report	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
Third Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
Fourth Report	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
Fifth Report	Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities	HC 395 HL 72
Sixth Report	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
Seventh Report	The Government's response to COVID-19: human rights implications	HC 265 HL 125
Eighth Report	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
Ninth Report	Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill	HC 665 HL 155
First Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313