

Written evidence from JUSTICE (CHIS0006)

About JUSTICE

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Introduction

2. This briefing addresses questions posed by the Joint Committee on Human Rights with respect to the Covert Human Intelligence Sources (Criminal Conduct) Bill (the **Bill**).
3. The Bill amends the Regulation of Investigatory Powers Act 2000 (**RIPA**), creating a statutory process for public bodies to authorise covert human intelligence sources (**CHIS**) to engage in criminal activities – including rape, murder and torture - with impunity. As a consequence, victims could be denied access to recourse in the courts, as well as to compensation. Moreover, the Bill's safeguards are woefully inadequate. As Lord Macdonald observed, “[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”.¹ JUSTICE submits that the Bill is neither necessary nor proportionate, and would incur severe human rights implications.

Authorising Authorities

4. The Bill, at Schedule 1, authorises an unjustifiably wide range of public bodies (**Authorising Authorities**) which could grant criminal conduct authorisations (**CCAs**). These range from the police and intelligence services to the Department for Health and Social Care and the Environment Agency.
5. The Government claims that only the Authorising Authorities which have “*demonstrated a clear operational need for the tactic are able to use the power*”.² However, they neglect to provide concrete evidence for many of those listed, not least the Food Standards Agency, to have the power to grant immunity for serious crimes. It is incumbent on the Government to justify, up front, why any public body must have such powers, beyond assertions that there is an ‘operational need’.

¹ <https://www.thetimes.co.uk/article/government-must-not-give-green-light-to-lawbreaking-fpp3kwrhz>

² HC Deb (5 October 2020). vol. 681, col. 662. - <https://bit.ly/3jC9rTS>

6. It is equally concerning that the Bill grants the Secretary of State the power to add or remove Authorising Authorities from this Schedule through secondary legislation. This would allow for the undue expansion of these troubling powers without the appropriate level of parliamentary scrutiny or oversight.³

Criminal Conduct Authorisations

7. The Bill would insert a new Clause 29B into RIPA, which sets out the criteria for issuing a CCA to a CHIS. The test mirrors the requirements for authorising CHIS, namely that the authorisation is both necessary and proportionate. Both authorisations would be granted by the same person, with limited oversight.⁴

8. JUSTICE submits that the test is deficient on two counts:

- a. **First**, the test of necessity is based on the ‘belief’ of the Authorising Authority. This is far too subjective, and would rely solely on its assessment, without external verification.

- b. **Second**, proportionality is assessed in accordance with the new Clause 29B(7), which states that “*other matters so far as they are relevant*” must be “*taken into account*”, (giving the Human Rights Act 1998 (**HRA**) as the only example). The Bill, unfortunately, provides little comfort that the HRA would act as any impediment to the authorisation of serious violations of human rights. On the contrary, the Government, regrettably, takes the position that the UK’s European Convention on Human Rights (**ECHR**) obligations would not be engaged, stating:

“...it is to be expected that there would not be State responsibility under the [ECHR] 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.”⁵

9. The scope of a CCA also extends beyond national security purposes, including operations to “*prevent disorder*” and to promote “*the interests of economic wellbeing of*

³ For more information, see the Public Law Project’s recent report on the executive’s extensive use of delegated legislation, and the concerns with its lack of scrutiny: *A Sinclair and J Tomlinson (2020), Plus ça change? Brexit and the flaws of the delegated legislation system, Public Law Project* - <https://publiclawproject.org.uk/wp-content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf>

⁴ RIPA, Part 2, s.28

⁵ [https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf)

the UK.⁶ This means that Authorising Authorities could approve a CHIS to undertake **any type of criminal offence in an alarmingly unspecified number of contexts**. The Government has admitted as much, stating that they “*will not go into the limits of what can and cannot be done*” because it would provide “*a list against which sources can be tested*”.⁷ Serious offences are therefore within the scope of a CCA if it meets the abovementioned broad test. It would also provide greater legal protections to CHIS than to police and soldiers, who benefit from no such immunity. This creates a perverse double standard in permissible conduct.

10. It is equally 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.⁸

11. JUSTICE envisages significant potential breaches of the ECHR:

a. Articles 2, 3 and 4 ECHR

- i. The Bill could breach the procedural obligations under Articles 2, 3 and 4 ECHR to conduct an effective investigation into allegations of unlawful killings, torture or slavery. In *Da Silva v UK*, the court held that “*national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished*”.⁹ This Bill does exactly that.¹⁰ Equally, international treaties mandate the prohibition of both torture¹¹ and slavery¹² in all circumstances. The Bill would provide immunity for such crimes.

b. Article 8 ECHR

- i. Where a CHIS adopts a new identity and forms relationships with investigative targets, the target’s Article 8 rights to develop private relationships are at risk. Recent conduct of the Metropolitan Police evidences a clear violation of this right. In 2014, an internal inquiry found that there were never “*any circumstances where it would be appropriate*

⁶ Clause 29B(5)

⁷ [https://hansard.parliament.uk/commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources(CriminalConduct)Bill)

⁸ See Article 3 of the UN Convention on the Rights of the Child, 1989 – “*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.*”

⁹ *Armani Da Silva v UK* (App No 5878/08) 30 March 2016 [239]

¹⁰ Pursuant to Article 15 ECHR, **these obligations are non-derogable**, and individuals enjoy absolute protection from their infringement.

¹¹ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

¹² UN Slavery Convention, 1926

for such officers to engage in intimate sexual relationships with those they are employed to infiltrate and target".¹³ This Bill could provide cover for future instances of sexual offending which result in traumatic consequences for the deceived.

12. JUSTICE notes that the Secretary of State may amend the test by introducing additional requirements through secondary legislation. JUSTICE submits that the requirements for CCAs should be explicit in primary legislation, and not open to amendment through secondary legislation, which receives less parliamentary scrutiny.

13. It is inconceivable that the Government should not be accountable for serious criminal offences committed with its approval. By contrast, equivalent legislation in Canada only affords CHIS a defence to prosecution, rather than blanket immunity.¹⁴ **By adopting the Bill in its current form, Parliament would approve serious violations of the ECHR, and set itself apart from accepted international human rights standards.**

Appropriate Safeguards

14. The Bill is extremely limited in its oversight mechanisms. It proposes that the Investigatory Powers Commissioner "*keep[s] under review*" the use of these powers in its Annual Report.¹⁵ Complaints as to the exercise of these powers may be made to the Investigatory Powers Tribunal, per RIPA.

15. This could allow the Government to hide the extent and scope of CHIS and CCA use. Again, Canadian legislation goes further, requiring details of CHIS use to be publicly issued, revealing the number and type of authorisations granted.¹⁶

16. Transparency is essential in establishing legitimacy for the use of CHIS. While JUSTICE appreciates the need for confidentiality in certain circumstance due to operational practicalities, it is vital that the public understand how widely such powers are used, and have effective mechanisms for challenging overreach by the state.

¹³ https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/priorities_and_how_we_are_doing/corporate/operation-herne---report-2-allegations-of-peter-francis-operation-trinity

¹⁴ <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>

¹⁵ Clause 4

¹⁶ <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>

Compensation for Victims

17. JUSTICE strongly supports the right for victims of crimes to receive compensation. We are proud to have pioneered the creation of the Criminal Injuries Compensation Authority in the 1960s.

18. This Bill would deny victims the right to compensation for harm suffered as a result of CCAs, as legally no crime would have been committed in the first place. This contravenes Article 13 EHCR, which guarantees the right to an effective remedy before a national authority.

19. Victims should not suffer additional loss due to the operational decisions of state bodies which are outside their control. They should remain entitled to compensation, as well as to any civil and criminal remedy, which the Bill otherwise excludes.

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