Covert Human Intelligence Sources (Criminal Conduct) Bill

House of Lords

Committee Stage

Briefing and Suggested Amendments

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Introduction

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.

2. This briefing addresses JUSTICE's serious concerns with the Covert Human Intelligence Sources (Criminal Conduct) Bill (the "Bill"), and sets out our suggested amendments. It follows on from our briefing to the House of Lords for the Bill's Second Reading.[1] An analysis of the human rights implications of this Bill is provided at an annex.

3. Criminal law plays a vital role in our society. It sets the dividing line between what is, and is not, acceptable conduct. This allows individuals - both law enforcement agents and the public - to act with certainty, and control undesirable behaviour accordingly. As the former Supreme Court judge and eminent jurist Lord Bingham stated, "*the purpose of the criminal law [is] to proscribe, and by punishing to deter, conduct regarded as sufficiently damaging to the interests of society*".[2]

4. The Bill would frustrate that purpose, by amending Part II of the Regulation of Investigatory Powers Act ("RIPA"), thereby allowing public bodies to authorise covert human intelligence sources ("CHIS") to engage in criminal activities – including rape, murder and torture - with impunity.

[1] https://justice.org.uk/justice-submits-a-briefing-to-lords-on-the-covert-human-intelligence-sources-criminal-conduct-bill/

[2] R v. H and Secretary of State for the Home Department [2003] UKHL 1, paragraph 19.

Suggested Amendments

5. JUSTICE has considered the amendments tabled in advance of the Bill's Committee Stage in the House of Lords. In order to bring the Bill in line with the UK's international and domestic human rights obligations and best practice, we recommend the following:

Recommendation 1: Delete Provisions Granting Immunity

Amendment 3 Page 1, leave out line 17 **Amendment 5** Page 1, line 19, at end insert— "(3A) In section 27(1) of that Act (lawful surveillance etc.), at the beginning insert "Save for criminal conduct authorised under section 29B,". (3B) After section 27(2) of that Act, insert— "(2A) If a person acts in accordance with a criminal conduct authorisation under section 29B, the nature of that authorisation and compliance with it shall be considered and deemed relevant to— (a) any decision as to whether prosecution for a criminal offence by that person is in the public interest; (b) any potential defences to charges of such criminal conduct; and (c) any potential civil liability on the part of that person, and the quantum of any damages.""

Explanation

6. JUSTICE recommends that the Bill's provisions relating to immunity be deleted, and replaced instead with language, corresponding to the existing Security Services' Guidelines[3] (the "Guidelines"), that would grant CHIS (1) justification to commit specified criminal conduct but not exemption from prosecution and (2) a public interest defence.

7. This would ensure that while necessary and proportionate acts can be undertaken in order to prevent further crime, the person carrying out those acts knows the consequences of their actions and will consequently conduct themselves with all due caution rather than abandon. This is particularly important given that the persons who may be authorised will not only be law enforcement professionals, but could be any member of the public.[4]

[3]Guidelines on the use of Agents who participate in Criminality (Official Guidance), March 2011 - https://privacyinternational.org/sites/default/files/2020-07/DOC%207%20Tab%2012.pdf

[4] Covert Human Intelligence Sources (Criminal Conduct) Bill – Operational Case Studies, Home Office (September 2020) (the "Operational Case Studies") -

8. JUSTICE would welcome placing the Guidelines on a statutory footing. It is important that such measures are transparent, and that they receive appropriate parliamentary scrutiny. However, we are seriously concerned that the powers granting immunity, coupled with weak safeguards, would completely undermine the core principle of criminal law; that it should apply equally to all, both citizen and state. **By passing this Bill unamended, Parliament would approve serious violations of the European Convention on Human Rights ("ECHR"), and set itself apart from international human rights norms.**

Briefing

9. This Bill would allow the State to arbitrarily shield individuals from punishment in a wide range of scenarios. Moreover, far from placing the *status quo* on the statute book, this Bill would create much greater powers than currently exist. The Guidelines, which presently inform covert operatives of their legal status in the course of their operations, clearly state that:

> "*An authorisation of the use of a participating agent* ***has no legal effect and does not confer... any immunity from prosecution****. Rather, the authorisation will be the Service's* ***explanation and justification of its decisions should the criminal activity of the agent come under scrutiny****"*[5]

10. JUSTICE believes that the Guidelines, which have been in force since at least 2011, could provide a sufficient framework for undercover covert operations. By contrast, the Government's introduction of 'immunity' is both surprising and gravely concerning. First, we believe that it could weaken a CHIS' incentive to exercise their responsibility carefully, in the absence of any legal limit. Second, the lack of appropriate safeguards in legislation could furnish CHIS with a *carte blanche* to commit offences which must fall outside of any reasonable operation.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923238/CHIS__CC__Bill_-_Case_Studies.pdf

[5]In December 2019, the Investigatory Powers Tribunal (the "IPT") issued a judgement concerning the lawfulness of the Guidelines which authorise agents of the Security Service ("MI5") to engage in criminal conduct. While it was agreed that RIPA did not authorise covert operatives to engage in criminal activity, the IPT decided that the Security Service Act 1989 provides an implied power to authorise such acts to fulfil its statutory functions – *See Privacy International & others -v- Secretary of State for Foreign and Commonwealth Affairs & others [2019] UKIPTrib IPT_17_186_CH*, (the "Third Direction Case"), paragraph 15.

11. Clause 1(3) would insert new sub-section (8A) into Section 26 of RIPA. This defines "*criminal conduct*" that takes place in the course of a CHIS' operation as conduct that "*disregarding* [Part 2 of RIPA as amended] *would constitute a crime*". The effect of this clause is to ensure that, with the issuance of a CCA, no crime will have been committed. This is made clear when read in conjunction with Section 27 of RIPA, which states that conduct "*shall be lawful for all purposes*" where (1) an authorisation has been granted and (2) the conduct is in line with the authorisation. The Minister for Security confirmed such analysis in the House of Commons, stating that "*[a] correctly granted authorisation will render conduct lawful for all purposes,* ***so no crime will have been committed****.*"[6] The clear intention of the Bill is, therefore, to offer CHIS immunity from both civil and criminal liability. International comparators further demonstrate the excessive nature of these powers, with equivalent legislation in Canada only affording CHIS a defence to prosecution, rather than blanket immunity.[7]

12. In addition, the provision of immunity also has further damaging consequences for the rights of victims. Under English law, victims of crime have access to three key methods of recourse. First, criminal proceedings, brought by the State or through private prosecution. Second, if the victim has suffered harm (ranging from personal injury to property damage), they may wish to pursue an action in the civil courts. Third, the victim could apply for compensation from the Criminal Injuries Compensation Authority. This Bill would remove access to all three, as legally no crime would have been committed in the first place. [8]

13. This would leave the UK in violation of Article 13 EHCR, which guarantees the right to an effective remedy before a national authority. JUSTICE strongly supports the right of victims of crime to receive compensation. **We believe that 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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[6] James Brokenshire MP, in HC Deb (5 October 2020). vol. 681, col. 612. - https://bit.ly/31oNpwX

[7] Canadian Security Intelligence Service Act 1985., s.20.1(2).

[8] The Bill could create a two tier system, where victims of CCAs are denied access to remedies otherwise available to everybody else. This means that if a victim, as an innocent bystander, suffers property damage (e.g. forced entry to their property, vehicular damage, etc), then they will not be able to pursue action against the CHIS in the civil courts for compensation. Likewise, although a claim for compensation from the Criminal Injuries Compensation Authority for physical injuries can be made with a police crime number, it is possible that no crime would be registered by the police if they were aware that the perpetrator was acting with the benefit of a CCA, as their conduct would be lawful for all purposes.

Recommendation 2: Increase Safeguards

Amendment 17
Page 2, line 17, after “person” insert “reasonably”

Explanation

14. JUSTICE recommends that the safeguards for the granting of CCAs should be strengthened. We consider that the current framework would be critically deficient because the test of necessity would be based on the ‘belief’ of the Authorising Authority, mirroring the requirements employed for the creation of CHIS.[9]

15. This amendment would ensure that the Authorising Authority’s belief in the necessity and proportionality of a CCA, and the existence of satisfactory arrangements, be reasonably held.

Briefing

16. The procedural mechanism by which public bodies (“Authorising Authorities”) could issue CCAs to a CHIS is provided at Clause 1(5) of the Bill, which would insert a new Section 29B into RIPA. It provides that they can only be issued where the Authorising Authority ‘believes’ it is necessary on the grounds of (i) national security, (ii) preventing or detecting crime, or preventing disorder, or (iii) in the interests of the economic well-being of the UK (new Section 29B(4)(a)) and proportionate to what is to be achieved through that operation (new Section 29B(4)(b))

17. We consider that CCAs should warrant stronger, more objective grounds for their issuance, in light of the potential seriousness of the criminal conduct commissioned. A highly subjective test could be open to abuse and unduly broad application, and **external verification in the form of a judicial warrant**, issued by a Judicial Commissioner, would be essential (***see Recommendation 8 below***).

[9] RIPA, s.29(2).

Recommendation 3: Appropriate Parliamentary Oversight

Amendment 62
Page 3, line 16, at end insert—
"(6) In section 78(4A) after "under" insert "section 29B or"."

Explanation

18. The new Section 29B(4)(c) could allow the Secretary of State to amend the test for the issuance of CCAs by introducing additional requirements through secondary legislation.

19. This amendment would require that any changes to the Bill's requirements be subject to the affirmative procedure, that is to say needing consent from both Houses of Parliament.

Briefing

20. JUSTICE believes that the requirements for CCAs **should be explicit in primary legislation**, and not open to amendment through statutory instrument, which would receive far less parliamentary scrutiny. This means that the State, going forward, could more easily – and arbitrarily – expand the scope of CCAs to interfere in citizens' rights in ways which the Bill does not presently contemplate. **The Government must be clear and upfront in defining the scope of such powers, and fully engage Parliament for their future expansion**.[10]

[10] 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: Alexandra Sinclair and Joe Tomlinson '*Plus ça change? Brexit and the flaws of the delegated legislation system*' (2020) Public Law Project https://publiclawproject.org.uk/wp-content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf

Recommendation 4: Appropriate Time Frames for CCAs

Amendment 49
Page 3, line 2, at end insert— "( ) A criminal conduct authorisation must be reviewed monthly by the person by whom it is granted. ( ) A criminal conduct authorisation ceases to have effect on the date it provides, which must be no later than four calendar months after the date it is granted."

Explanation

21. The Bill, at Clause 5, sets out a number of consequential amendments at Schedule 2 of the Bill, which would amend Section 43 of RIPA concerning the "*general rules about grant, renewal and duration*" of CHIS.

22. This requires that the conduct under a CCA is undertaken within a period of (i) seventy-two hours for "urgent" authorisations; or otherwise (ii) a period of up to twelve months. In both cases, CCAs could be renewed by the Authorising Authority before the expiration of the relevant time limit.

23. This amendment would ensure that CCAs are reviewed at an increased regularity (every month), and expire after a reasonable period of four months.

Briefing

24. JUSTICE considers that the period of time, under section 43 of RIPA as amended, could be excessive where disproportionately long timeframes (up to twelve months) are granted.

25. The Code of Practice proposes to detail the authorisation procedures, including the length of time for which a CCA is valid and its cancellation. However, given the overt nature of criminal acts as opposed to passive surveillance, **this legislation should set out more robust limitations against abuse**.[11]

[11] For example, there are stronger protections in the Code of Practice. We consider that these should be explicit within the Bill. *See* - Covert Human Intelligence Sources – Draft Revised Code of Practice – Home Office (September 2020) ("Code of Practice"), Section 6 and 6.36 in particular: "*The authorising officer who granted or renewed the authorisation must cancel it if they are satisfied that the use or conduct of the CHIS no longer satisfies the criteria for the criminal conduct authorisation or the authorisation no longer satisfies the requirements described in Section 29B of the 2000 Act."* - see

Recommendation 5: Restrict the Number of Authorising Authorities

Amendment 63
Page 4, leave out lines 10 to 23

Explanation

26. This amendment would restrict the number of Authorising Authorities which can grant CCAs to the most experienced law enforcement entities, such as the police, the National Crime Agency, the Serious Fraud Office and the intelligence services.

Briefing

27. The Bill, at Schedule 1, would grant powers to an expansive list of public bodies, ranging from the police and intelligence services to the Department for Health and Social Care, the Environment Agency and the Food Standards Agency.[12] While we understand the police and intelligence services' "operational need" for CCAs, the proposed inclusion of several additional entities (as exemplified above), requires more robust justification – particularly where the Government's own Operational Case Studies show that it would likely be **untrained members of the public who would receive CCAs**, and not professional law enforcement agents.[13]

28. JUSTICE believes that it is incumbent on the Government to justify, up front, why any public body must have such broad powers, beyond simple assertions of their necessity. Given this amendment has been tabled, we consider it an opportunity for the Government to explain this extensive selection of public bodies, and provide relevant supporting evidence.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920537/CHIS_Code_-_Bill_amendments.pdf

[12] The Government states that only the Authorising Authorities which have "*demonstrated a clear operational need for the tactic are able to use the power*", and provides the Operational Case Studies to evidence the need, *see* James Brokenshire MP, in HC Deb (5 October 2020). vol. 681, col. 662. - https://bit.ly/3jC9rTS

[13] It is important to note that CHIS are often members of the public, and could be highly vulnerable individuals or those with serious criminal records, including sexual offences, murder or drug trafficking. Due consideration of CCAs granted to such individuals is therefore essential, *see* – https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923238/CHIS__CC__Bill_-_Case_Studies.pdf

Recommendation 6: Prohibit the Use of CHIS as *Agents Provocateurs*, and Focus on Serious Criminal Conduct

Amendment 41
Page 3, line 2, at end insert "; and
(d) is not carried out for the primary purpose of—
(i) encouraging or assisting, pursuant to sections 44 to 49 of the Serious Crime Act 2007, the commission of an offence by, or
(ii) otherwise seeking to discredit,
the person, people or group subject to the authorised surveillance operation."

Explanation

29. This amendment would prohibit the use of CHIS as agent provocateurs. It provides that tasking a CHIS to incite a criminal offence, or otherwise seek to discredit the group or people subject to the surveillance operation, would not be acceptable uses of these powers.

Amendment 26
Page 2, line 28, after "preventing" insert "serious"

Amendment 27
Page 2, line 30, at end insert "so far as those interests are also relevant to the interests of national security"

Amendment 30
Page 2, line 30, at end insert—
"(5A) For the purposes of subsection (5) "serious disorder" has the same meaning as "riot" as provided by section 1 of the Public Order Act 1986."

Explanation

30. JUSTICE recalls that the purpose of a CHIS is to facilitate law enforcement, often in the context of very serious crimes. For instance, there are valid scenarios where undercover informants are necessary when infiltrating domestic terrorist groups, or to crack down on sex trafficking rings. However, a CCA could be invoked for reasons well beyond law

enforcement purposes, including where it is necessary to "*prevent disorder*" or "*in the interests of the economic well-being of the UK*".[14] These criteria are vague and would be potentially open to abuse.

31. These amendments would limit the application to CCAs to solely disrupting serious criminal conduct and avoid any broader, inappropriate usage.[15]

Briefing

32. It is perfectly foreseeable that a CHIS, with the benefit of a CCA, could either provoke or encourage criminal activity that otherwise would not take place. This risk is not merely hypothetical, and has occurred within more than one thousand political or trade union groups since 1968.[16] For instance, in July 2011, the Court of Appeal quashed the convictions of 20 climate change activists, following revelations that their protest group was one of a number that had been infiltrated by an undercover police officer named Mark Kennedy and that the Crown Prosecution Service had failed to disclose this at their trial.[17] Among other things, the Lord Chief Justice found that Kennedy "*was involved in activities which went much further than the authorisation he was given, and appeared to show him as an enthusiastic supporter of the proposed occupation of the power station and, arguably, an agent provocateur*".[18] The Bill, as drafted, would not prohibit CHIS, armed with CCAs, acting as *agent provocateurs* within the groups which they could target.

33. In such scenarios, due to the secrecy that would be attached to CHIS' use of CCAs, the public would likely never know the extent of the State's involvement in potentially politically charged incidents. Historic events in Northern Ireland, such as the murder of Pat Finucane in which there had been "*shocking levels of state collusion*", further demonstrate this

[14] The Bill, Clause 1(5) which inserts new Section 29B(5) into RIPA.

[15] *See* the Operational Case Studies.

[16] Rob Evans, '*UK political groups spied on by undercover police – search the list*' (The Guardian, 13 February 2019) - https://www.theguardian.com/uk-news/ng-interactive/2018/oct/15/uk-political-groups-spied-on-undercover-police-list

[17] *R v Barkshire and others* [2011] EWCA Crim 1885.

[18] *Ibid*, paragraph 18.

danger.[19] JUSTICE believes that it is unacceptable to permit interference with legitimate political or trade union activities.

Recommendation 7: Prohibit CCAs for Children and Vulnerable Individuals

34. JUSTICE has set out its recommended amendments concerning children and vulnerable individuals in a joint briefing with Just for Kids Law and the Children's Rights Alliance for England.[20]

Briefing

35. It is unfortunately well established that children are engaged as CHIS by a range of public authorities. While the legality of their controversial use was recently subject to judicial review, the High Court determined that this may be appropriate in certain circumstances where the welfare of the child would be protected.[21] This is guaranteed by Section 11 of the Children Act 2004, which mandates that public authorities promote and safeguard the welfare of children. Article 3 UN Convention on the Rights of the Child further provides that:

> "*[i]n 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*."

36. The Minister for Security acknowledged these obligations in the House of Commons, stating that "*all public authorities that task juvenile CHIS must have regard to their safety, welfare and wellbeing*".[22] The Code of Practice further states that "*[j]uveniles should only be authorised to act as a CHIS in exceptional circumstances*".[23] The IPC has confirmed that "*17 juvenile CHIS authorisations had been approved across 11 public authorities*" between 2015 and 2018.[24]

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[19] 'Pat Finucane murder: *'Shocking state collusion', says PM*' (BBC, 12 December 2012) - https://www.bbc.co.uk/news/uk-northern-ireland-20662412

[20] *See* Just for Kids Law and JUSTICE's Joint Briefing on the Covert Human Intelligence Sources (Criminal Conduct) Bill regarding children and vulnerable individuals

[21] *R (Just for Kids Law) v Secretary of State for the Home Department* [2019] EWHC 1772 (Admin).

[22] James Brokenshire MP, in HC Deb (15 October 2020). vol. 682, col. 584 - https://bit.ly/2GkaF81

[23] Code of Practice, paragraph 4.3.

[24] Investigatory Powers Commissioner's Office, 'Annual Report 2018' (2018), paragraph 2.29 - https://www.ipco.org.uk/docs/IPCO%20Annual%20Report%202018%20final.pdf ("IPC Annual Report 2018").

37. It is, nevertheless, difficult to envisage how public authorities would fulfil this duty if they are complicit in authorising, and thereby encouraging children to commit criminal offences, no matter how exceptional their use might be. Such activities can be incredibly damaging to the welfare of children and vulnerable individuals. We have heard from Neil Woods, a former undercover police officer with experience of being – and handling – CHIS, of the great emotional strain that maintaining deception can incur.

38. This could lead to severe long-term damage to a CHIS's mental health. This assessment is echoed by Dr. Eileen Vizard CBE, a child psychiatrist at University College London, who further expressed her concerns that the deployment of children as a CHIS could incur significant lasting physical and emotional damage to the child. By encouraging children to commit crimes, she explained that the State could in fact engender the creation of new criminals by placing them in criminogenic environments, where they would be exposed to morally hazardous situations and learn patterns of behaviour which ought to be discouraged, not promoted. In addition, she explained that children are not sufficiently mature to evaluate the consequences of their actions, and it would be difficult for them to act consistently within the framework of a CCA, which could further exacerbate any risk to their wellbeing. In sum, the cohort of children that are likely to be engaged as CHIS are inherently vulnerable, and due attention must be given to their specific welfare needs, which would likely be heightened through being tasked as a CHIS.

39. There are further significant concerns as to whether children and vulnerable adults can give informed consent to being a CHIS at all. We have heard that vulnerable adults, such as trafficking victims are often used to being in situations of extreme pressure and psychological control with all decision-making stripped from them. It is fundamentally harder for such victims to feel a sense of choice and not be vulnerable to pressures from authoritative bodies like the police – especially when they may still be living in an exploitative environment as a CHIS.[25]

40. It is therefore troubling that the Bill remains silent on the granting of CCAs to children, which could place them in dangerous or abusive situations. JUSTICE believes that **CCAs for children should be expressly excluded from the Bill, as this could risk serious violations of both domestic and international law with respect to the rights of the child.** At a minimum, the Government should provide in the Bill more robust 'exceptional'

[25] *See* Just for Kids Law and JUSTICE's Joint Briefing on the Covert Human Intelligence Sources (Criminal Conduct) Bill regarding children and vulnerable individuals

circumstances in which it would be appropriate for a child to be given a CCA, and how their welfare would be protected.[26]

Recommendation 8: Mandate Prior Judicial Authorisation for CCA Applications by Judicial Commissioners

Amendment 12

Page 2, line 8, at end insert—

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

Amendment 61

Page 3, line 16, at end insert—

"29C Approval for criminal conduct authorisations

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

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

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

(a) at the time of the grant the person granting the authorisation had reasonable grounds to believe that the requirements of section 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.

(4) In this section—

"Convention rights" has the meaning given in section 1(1) of the Human Rights Act

[26] The safeguards for the use of children as a CHIS are set out in the Code of Practice, which specifies that (1) an appropriate adult must be present at any meetings with a child under 16, and between 16-18 on a case by case basis, and (2) there must be an 'enhanced risk assessment'. We do not consider these 'safeguards' to be sufficient to mitigate against the risk of harm to a child sent out to commit a criminal act. See Section 4 of the Code of Practice - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920537/CHIS_Code_-_Bill_amendments.pdf

1998; and "Judicial Commissioner" has the meaning given in section 227 of the Investigatory Powers Act 2016."

Explanation

41. JUSTICE recommends that judicial authorisation by Judicial Commissioners[27] be mandatory for each CCA application.

42. While we understand that similar amendments (Amendments 11 and 59) have been proposed which would provision for urgent authorisations, JUSTICE believes that it would be preferable to create a separate, accelerated process for such applications to be made in advance of the granting of the CCA. This would avoid the risk of improper criminal conduct having already occurred in the intervening period.

Briefing

43. Section 29 of RIPA provides for a public authority to authorise the use of a CHIS in essentially the same manner as that proposed for the issuance of a CCA.[28] There would be no need for authorisation from a Judicial Commissioner by way of warrant, nor approval from the Secretary of State.

44. There are obvious flaws in any authorisation procedure in which the main safeguard against a public body carrying out unjustified surveillance is a senior official from the same organisation. Even the most diligent official would struggle to remain objective, particularly if the organisation is under pressure to meet targets or achieve certain results. JUSTICE considers that there are already insufficient safeguards for the creation of CHIS under the present RIPA regime and judicial approval is essential for the exercise of this new power.

45. The Government claims that prior judicial authorisation is not necessary because the "*use of CHIS requires deep expertise and close consideration of the personal qualities of that CHIS, which then enables very precise and safe tasking*". This argument, which prioritises

[27]The IPC is supported by Judicial Commissioners, who are serving or retired members of the senior judiciary in the UK. They provide independent authorisation of applications for the use of certain investigatory powers by public authorities.

[28] RIPA, s.29(4A), as amended by the Policing and Crime Act 2009, which further stipulates that there will at all times be two qualifying persons who will be responsible for overseeing the source, their activities and maintain a record of their use.

operational need over independent assessment, is not convincing. There is a significant difference between authorising passive CHIS observation as opposed to proactive criminal conduct. Lord Macdonald, a former Director of Public Prosecutions, agrees, stating that:

> "*There is no comfort in allowing senior figures in the police or the intelligence agencies the power to sanction lawbreaking, without the need to first obtain independent warrants from judges or some other authority*."[29]

46. JUSTICE has previously recommended prior judicial authorisation for the use of powers under RIPA to provide an additional safeguard against their abuse.[30] The benefits of judicial authorisation are further detailed in the case of *Szabó and Vissy v. Hungary*, where the Court held it offers "*the best guarantees of independence, impartiality and a proper procedure*". This is particularly pertinent in the case of surveillance, which is "*a field where abuse is potentially so easy in individual cases*" that "*could have such harmful consequences for democratic society".* The Court concluded that *"it is in principle desirable to entrust supervisory control to a judge*".[31] Such scrutiny would be highly compelling for the potential use of CCAs.

47. Concerns about operational workability are also unmerited. We see no reason why Judicial Commissioners could not review CCAs. They are already well practised in making complex assessments of sensitive material, in an independent, detached manner and at short notice.

[29] Ken Macdonald, '*Government must not give green light to lawbreaking'*, The Times (5 October 2020) - https://www.thetimes.co.uk/article/government-must-not-give-green-light-to-lawbreaking-fpp3kwrhz

[30]JUSTICE, '*Freedom from Suspicion: Surveillance Reform for a Digital Age*', (2011), page 58 - https://www.statewatch.org/media/documents/news/2011/nov/uk-ripa-justice-freedom-from-suspicion.pdf

[31] *Szabó and Vissy v. Hungary* (Application no. 37138/14) [2016] ECHR, paragraph 77.

Recommendation 9: Strengthen the Role of the Investigatory Powers Commissioner

Amendment 46
Page 3, line 2, at end insert— "(8A) Where a person grants a criminal conduct authorisation, that person must give notice of that authorisation to the Investigatory Powers Commissioner. (8B) A notice under subsection (8A) must – (a) be given in writing; (b) be given as soon as reasonably practicable, and in any event within seven days of the grant; and (c) include the matters specified in subsection (8C). (8C) Where a person gives notice under subsection (8A) in respect of the granting of a criminal conduct authorisation, the notice must specify – (a) the grounds on which the person giving the notice believes the matters specified in subsection (4) are satisfied; and (b) the conduct that is, or is to be authorised under subsection (8). (8D) Any notice that is required by subsection (8A) to be given in writing may be given, instead, by being transmitted by electronic means."

Explanation

48. This amendment would introduce a requirement to notify the IPC as soon as reasonably practicable of the grant of a CCA. JUSTICE considers that this would allow for improved oversight mechanisms in the use of CHIS by Authorising Authorities.

Briefing

49. The Bill contains extremely limited oversight mechanisms. It proposes, at Clause 4(2), that the IPC *"keeps under review"* the use of these powers in its Annual Report (Clause 4(3)).[32] JUSTICE considers that the IPC's reporting lacks efficacy and efficiency, and would not provide the oversight necessary for the use of CCAs.

[32] The IPC currently oversees more than 600 public bodies' exercise of RIPA derived powers - https://www.ipco.org.uk/

50. Since its creation in 2017, the IPC has only published two reports,[33] with the 2019 report still outstanding. Such significant delays mean that assessments of any overreach by public bodies will take place long after a CCA has occurred. Moreover, it is also unclear whether recommendations made in the Annual Report were sufficiently implemented. The Investigatory Powers Act 2016 does not mandate public bodies to do so; it simply requires them to assist with the Judicial Commissioner's initial investigation/audit.[34] In 2018, the IPC reported that MI5 lacked central records[35], a consistent review process and failed to inform the IPC of serious compliance risks.[36] There were also reports of MI5 officers authorising their own conduct, which the IPC claimed was "*not ideal*".[37]

51. JUSTICE was pleased to see that MI5 implemented the IPC's recommendations.[38] Yet at the same time, despite making multiple recommendations, the IPC worryingly concluded that MI5's processes were of a high standard.[39] The Bill, as drafted, would not improve the reporting process, which would be essential to account for such an increase in powers. By contrast, equivalent Canadian legislation[40] provides that a report must contain a general description of the measures taken during the period of threat,[41] the number of warrants issued during that period,[42] and requires a report each time the Director is of the opinion that an employee has acted unlawfully in the performance of his duties under the Act.[43]

52. In addition, it is unclear how abuses of CCAs would be prosecuted. At present, citizens who suspect that their rights may have been violated by the security and intelligence services can lodge a (speculative) complaint to the IPT. For potential interference caused by other public bodies, the ordinary courts may be seized.[44]

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[33] The Investigatory Powers Act 2016 abolished the IPC's predecessor, the Intelligence Services Commissioner ("ISC"), and replaced it with the IPC. The ISC has also published annual reports which can be found here - https://www.ipco.org.uk

[34] Investigatory Powers Act 2016, s.235.

[35] IPC Annual Report 2018, paragraph 6.8.

[36] *Ibid*, paragraph 6.2.

[37] *Ibid,* paragraph 7.6.

[38] *Ibid,* paragraphs 6.11 - 6.13.

[39] *Ibid,* paragraph 6.4.

[40] Canadian Security Intelligence Service Act 1985.

[41] *Ibid*, s.5(a).

[42] *Ibid*, s.5(b).

[43] *Ibid*, s.2.

[44] https://www.ipt-uk.com/content.asp?id=12

53. JUSTICE believes that this framework unduly places the onus on individuals whose rights have been infringed to bring a claim. The Bill should strengthen the role of the IPC so that it can act as a greater safeguard for the use of CCAs. First, it should mandate more detailed reporting, akin to the Canadian example above. Second, the IPC should be given greater powers to examine every CCA issued, and assess its legality.

JUSTICE

20 November 2020

Annex

Human Rights Analysis of the Bill

1. The analysis set out below has already been provided in JUSTICE's briefing to the House of Lords for the Bill's second reading. However, for ease of reference, it is also detailed here.

2. JUSTICE considers that the Bill would create serious inconsistencies between the immunity afforded by CCAs and the UK's human rights obligations. Key examples include:

    a. Article 2 ECHR - Right to Life

    The Bill could breach the procedural obligations under Article 2 ECHR to conduct an effective investigation into allegations of unlawful killings. 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."*[45] The Bill does exactly that.[46] Article 2 requires careful judicial scrutiny, so that the deterrent effect of the judicial system is not undermined.[47] **Providing individuals with immunity from prosecution negates this deterrent effect[48] and evades any judicial scrutiny.**

    b. Article 3 ECHR - Prohibition of Torture

    Article 3 ECHR protects individuals from being subjected to torture or inhumane or degrading treatment. This is reflected in longstanding criminal offences prohibiting violence against the person. The Bill would fail to explicitly exclude these types of crimes, and the Government claims that *"it would be unreal to hold the state responsible"*[49] if CHIS engaged in such conduct. The provision of immunity would make impossible any investigation of allegations of Article 3 infringement. This could also conflict with the UN Convention against Torture, ratified by the UK, which mandates that torture be subject to a "*prompt and impartial investigation*".[50] **By**

[45] *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR, paragraph 239.

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

[47] *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR, paragraph 239.

[48] Written evidence from Professor Merris Amos, submitted to the Joint Committee on Human Rights - https://committees.parliament.uk/writtenevidence/11454/html/

[49] As stated by Government at the public hearings in the Third Direction Case before the Investigatory Powers Tribunal, 5-6 November 2019.

[50] Article 12, UN Convention Against Torture 1984.

granting immunity for torture and inhuman or degrading treatment, Parliament would frustrate the UK's positive obligation to investigate and punish such acts.

c. Article 4 ECHR - Prohibition of Slavery and Forced Labour

Article 4 ECHR places "*a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour.*"[51] JUSTICE is concerned that the Bill's powers could place vulnerable individuals at significant risk by unnecessarily exposing them to traffickers who could inappropriately have immunity from prosecution. This is not difficult to envisage; JUSTICE recognises the important work that CHIS could offer in the fight against modern slavery. However, the simple fact that a slave master may act as a CHIS should not allow them to gain immunity for continuing such crimes, particularly when they are so egregious. By offering immunity at the discretion of public bodies, and rendering prosecution or investigation impossible, **the UK could be in breach of its obligations under Article 4 ECHR,**[52] **the UN Slavery Convention,**[53] **as well as its duty towards victims, both at common law and per the Victim's Code.**[54]

d. Article 8 ECHR - Right to Respect for Private and Family Life

Where a CHIS is authorised to adopt a new identity, and form a relationship with an investigative target, the target's Article 8 right to have private relationships is at risk. The potential for infringement of Article 8 has already been proven by the 'Special Demonstration Squad'. Over several years, the Metropolitan Police engaged in undercover operations with the aim of infiltrating and gathering evidence on a range of groups. In March 2014, an internal inquiry was issued to examine potential wrongdoing, not least concerning allegations that "*undercover*

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[51] *C.N. v. The United Kingdom* (App No 4239/08) [2012] ECHR, paragraph 66.

[52] The UK has a poor history of adequately prosecuting modern slavery, *see C.N. v. UK* (App No 4239/08) [2012] ECHR, paragraph 76 -

"*the legislative provisions in force in the United Kingdom at the relevant time were inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention […]* ***Victims of such treatment who were not also victims of one of these related offences were left without any remedy***".

[53] UN Slavery Convention 1926.

[54] See, the Code of Practice for Victims of Crime (2015), pursuant to s.33 of the Domestic Violence, Crime and Victims Act 2004. It details victims' entitlements from the criminal justice system, not least to an "*enhanced service if you are a victim of serious crime*", *see* https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime

police officers routinely adopted a tactic of promiscuity with the 'blessing' of senior commanders".[55] Although the inquiry found that there were never *"any circumstances where it would be appropriate for such officers to engage in intimate sexual relationships with those they are employed to infiltrate and target",* [56] this Bill could make such instances of sexual offending legal. **The potential for individuals to be manipulated into close relationships with CHIS could result in traumatic consequences for the deceived.**

3. These concerns are emphasised by the Government's attempts to have it both ways. It claims that the ECHR and Human Rights Act 1998 apply to public authorities, whilst simultaneously refusing responsibility for CHIS' actions should they act in contravention.[57] JUSTICE maintains that the Government must ultimately accept responsibility for actions that is has expressly approved.

[55] Mike Creedon, *'Operation Herne – Report 2'* (*2014),* page 3 - 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

[56] *Ibid*, page 46.

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