



Covert Human Intelligence Sources (Criminal Conduct) Bill

House of Lords

Ping Pong

Briefing

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For further information contact

Tyrone Steele, Criminal Justice Lawyer
email: tsteele@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

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 follows on from a series of JUSTICE briefings to the House of Lords which have addressed our serious concerns with the Covert Human Intelligence Sources (Criminal Conduct) Bill (the "Bill").¹ The Bill would amend Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA"), creating an unprecedented power for public bodies (from law enforcement to the Food Standards Agency) to authorise covert operatives to commit criminal offences with impunity through criminal conduct authorisations ("CCAs"). Far from being highly trained in espionage, these individuals are usually ordinary members of the public, many of whom are seasoned, serious criminals. With immunity from prosecution, along with no restriction on the type of offence which can be authorised, we are concerned that they may commit crime without restraint. Worse, the authorisation to commit crime may be wrongly given in the first place, creating victims of what may be serious crime.
3. JUSTICE has considered the Government's position on a number of key Lords Amendments which would mitigate our concerns with the Bill. We welcome the Government's support for Lords Amendments 3B, 4B to J, and 5 (as amended by Lord Paddick at 5B), which go some way to mitigating our concerns with the reach and scrutiny of CCAs in practice. However, the fundamental problem with the Bill – its grant of immunity for all criminal conduct - persists. We are therefore not satisfied that the legitimate concerns expressed by Peers on all sides of the House have been answered. **JUSTICE therefore maintains that the Bill, unamended, would risk serious violation of the European Convention on Human Rights (ECHR), which could set the UK apart from accepted international human rights norms. We therefore call for Peers to adopt Lords Amendments 2 and 5B, so that there are appropriate restrictions and oversight on the most serious criminal offences which may be authorised.**²

¹ This briefing follows on from JUSTICE's prior briefings to the [Joint Committee on Human Rights](#), as well as to the House of Lords for the Bill's [Second Reading](#), [Committee Stage](#), and [Report Stage](#).

² Covert Human Intelligence Sources (Criminal Conduct) Bill, Marshalled List of Motions to be moved on consideration of Commons Reasons and Amendment. Available [here](#).

Lords Amendment 2: Restrictions on the criminal offences which may be authorised

4. As it stands, the Bill would grant immunity for any criminal act a CHIS may commit pursuant to a CCA, as their conduct would be lawful for all purposes. This would afford CHIS, who are often ordinary un-trained members of the public, or even seasoned criminals, full protection from the consequences of any such conduct. JUSTICE echoes the grave concerns of many Peers, and notes that the risks of immunity are substantial. It could weaken a CHIS' incentive to exercise their responsibility carefully, in the absence of any legal limit.
5. JUSTICE recognises that its initial preference to delete the Bill's powers to grant immunity, and replace with a provision that would provide (i) a justification for a CHIS to commit criminal conduct and (ii) a public interest defence, was ultimately not accepted by the Lords at the Report stage.³ However, Peers did vote in favour of an amendment that would limit the criminal conduct which could be authorised. As such, JUSTICE considers that an amendment which would prohibit authorisation of the most serious offences would represent a significant improvement to the Bill as it stands.
6. The Commons has refused to adopt this amendment, stating that it "*consider[s] specifying types of conduct which criminal conduct authorisations could not authorise on the face of Part 2 of RIPA would place sources, and the wider public, at risk.*"⁴ The Government has additionally claimed that agencies have struggled to recruit and retain CHIS as they have not been able to offer them legal protection.⁵
7. However, these arguments are not convincing. First, creation of CCAs are an excessive response to this supposed issue.⁶ The creation of an immunity would not provide greater

³ This would have reflected the status quo, per the Guidelines, and provide a more appropriate balance between the necessity of certain law enforcement operations versus the public's legitimate expectation that CHIS, who are authorised to commit what would otherwise be criminal offences, are deterred from acting with abandon, and where necessary, held accountable for their actions.

⁴ Covert Human Intelligence Sources (Criminal Conduct) Bill, Marshalled List of Motions to be moved on consideration of Commons Reasons and Amendment, p.2. Available [here](#).

⁵ HL Deb (24 November 2020) Vol. 808, Col. 171. Available [here](#).

⁶ JUSTICE is not aware of any evidence, in the form of statistics or other data, that would allow a proper assessment of the significance of CHIS retention. The Government has not provided any detail on lost intelligence-gathering opportunities as a result of the current process. Moreover, law enforcement agencies are not immune from prosecution when they use force, as with every other member of the public. Use of force resulting in serious injury or death is investigated (by the Independent Office for Police Conduct) and, if referred, the Crown Prosecution Service determines whether it is in the interests of justice to prosecute.

certainty for CHIS. Instead, the absence of limits on the type of crimes which may be authorised would risk placing such individuals - who are often seasoned criminals or untrained, sometimes vulnerable, members of the public - in more precarious situations. For instance, where they may misunderstand, or fail to act within the parameters of a CCA.⁷ Far from creating greater certainty for CHIS, as the Government has claimed,⁸ the Bill would instead create significant grey areas, where a CHIS could shoulder the blame for inadequate or improper CCAs.

8. Second, alleged operational practicalities cannot trump the UK's domestic and international human rights obligations. Without Lords Amendment 2, therefore, the Bill would risk creating serious inconsistencies between the immunity afforded by CCAs and the UK's human rights obligations to prevent and/or investigate and prosecute improper conduct. 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.*”⁹ The Bill does exactly that.¹⁰ Article 2 requires careful judicial scrutiny, so that the deterrent effect of the judicial system is not undermined.¹¹ **Providing individuals with immunity from prosecution negates this deterrent effect¹² and evades any judicial scrutiny.**

b. Article 3 ECHR - Prohibition of Torture

Article 3 ECHR protects individuals from being subjected to torture or inhuman or degrading treatment. This is reflected in longstanding criminal offences prohibiting

⁷ This risk is particularly profound with respect to children and vulnerable individuals, who may be placed at even higher risk of exploitation, intimidation or manipulation from their handler. JUSTICE has heard from Neil Woods, a former undercover operative and CHIS handler. He informed us of the severe manipulation that occurred when trying to recruit CHIS and the emotional burden it put on him as a professional. Because of this experience, he expressed concern at the effect this would have on a child or vulnerable person.

⁸ HL Deb (11 November 2020) Vol. 807, Col. 1045. Available [here](#).

⁹ *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR, paragraph 239.

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

¹¹ *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR, paragraph 239.

¹² Written evidence from Professor Merris Amos, submitted to the Joint Committee on Human Rights (10 September 2020). Available [here](#).

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*”¹³ 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*”.¹⁴

By 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.*”¹⁵ 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,¹⁶ the UN Slavery Convention,¹⁷ as well as its duty towards victims, both at common law and per the Victim’s Code.¹⁸**

¹³ As stated by Government at the public hearings in the Third Direction Case before the Investigatory Powers Tribunal, 5-6 November 2019.

¹⁴ Article 12, UN Convention Against Torture 1984.

¹⁵ *C.N. v. The United Kingdom* (App No 4239/08) [2012] ECHR, paragraph 66.

¹⁶ 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”.

¹⁷ UN Slavery Convention 1926.

¹⁸ 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*”.

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 police officers routinely adopted a tactic of promiscuity with the 'blessing' of senior commanders*".¹⁹ 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*",²⁰ 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.**

9. 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, and as such all CCAs will be tightly bound so as to not violate Convention rights. At the same time, it maintains that no breach of the ECHR would exist as such conduct would be justified for law enforcement purposes.²¹

10. This reasoning, however, remains problematic. The creation of an immunity, coupled with the absence of any limits on what conduct may be authorised, would severely restrict the ability for CHIS, and the State, to be held to account. Where a CCA is validly granted, the underlying conduct would remain, pursuant to section 27 of RIPA, "lawful for all purposes". This would hinder any claim or investigation of potential ECHR violations in the first place. While the Government has indicated that recourse would be available through the Investigatory Powers Tribunal, this would only address where the Authorising Authority used such powers inappropriately. Moreover, the Bill makes no provision for prior judicial

¹⁹ Mike Creedon, '[Operation Herne – Report 2](#)' (2014), p.3.

²⁰ *Ibid*, p.46.

²¹ "...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." - Covert Human Intelligence Sources (Criminal Conduct) Bill, European Convention on Human Rights, Memorandum by the Home Office. Available [here](#).

authorisation, or for the Investigatory Powers Commissioner's Office to refer investigate or refer such breaches for prosecution. **For this reason, we support Lords Amendment 5B, which would ensure that Judicial Commissioners²² are fully empowered to, *inter alia*, examine improperly granted CCAs and refer the matter to Prosecutors where appropriate.**

11. JUSTICE notes that equivalent Canadian legislation incorporates similar restrictions on the types of conduct which can be authorised.²³ We see no reason why this Bill cannot adopt the same types of restrictions, which would mitigate against the risk of serious human rights abuses being authorised and both State and CHIS enjoying immunity for those actions. **JUSTICE therefore calls on Peers to insist that Lords Amendment 2 be adopted, in full. If not, we have serious concerns that the Bill will enable significant violations of human rights.**

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²² The Investigatory Powers Commissioner's Office 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.

²³ Section 20(18), Canadian Security Intelligence Service Act 1985. Available [here](#).