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BRIEFING PAPER

Number 9012, 2 October 2020

Covert Human Intelligence Sources (Criminal Conduct) Bill 2019-2021

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Summary

The *Covert Human Intelligence Sources (Criminal Conduct) Bill 2019-2021* was introduced in the House of Commons on 24 September 2020. It is due to have Second Reading on 5 October.

This short Bill raises "one of the most profound issues which can face a democratic society governed by the rule of law", in the words of the Investigatory Powers Tribunal. It would introduce a power in the *Regulation of Investigatory Powers Act 2000* to authorise conduct by officials and agents of the security and intelligence services, law enforcement, and certain other public authorities, which would otherwise constitute criminality.

The Government has stressed that this is not a new capability. The lawfulness of an internal Security Service policy governing the involvement of agents in criminal conduct was upheld by the Investigatory Powers Tribunal in December 2019. The main purpose of the Bill therefore is to place such activity on a clear statutory footing.

Its principal significance is that, unlike the current policy, it would provide a limitation on both criminal and civil liability to those who engage in authorised criminal conduct.

The need for agents of the security and intelligence agencies and law enforcement to engage in criminal conduct has been tacitly accepted for some time. However, as more details of the practice have emerged, there has been concern as to the sufficiency of safeguards that constrain such activity. The Government argue that the obligation on public authorities to act compatibly with the European Convention on Human Rights is sufficient to prevent the powers contained in the Bill being used to authorise serious abuses.

Notwithstanding widespread acceptance of the operational necessity of authorising criminal conduct on the part of covert human intelligence sources, there are some controversial features of the regime that the Bill would provide for. These include:

- That it places no specific limitations on the type of criminal activity that may be authorised
- By contrast with recent legislation governing the use of other investigatory powers, authorisations are given internally, without judicial approval
- The Bill would limit redress for victims by preventing civil claims for injury or other harm

The Explanatory Notes, Human Rights Memorandum and Delegated Powers Memorandum are published on the Bill page. The Government has also produced a number of Factsheets and a revised Code of Conduct reflecting the changes the Bill would make.

The Bill would extend to England and Wales, Scotland and Northern Ireland. Annex B to the Explanatory Notes provides a summary of territorial extent and application in the UK.

1. Background to the Bill

1.1 Covert human intelligence sources

The recruitment of agents in the fight against terrorism and organised crime has long been recognised as a legitimate means of tackling these problems in the UK and elsewhere. They are referred to in legislation as covert human intelligence sources, or CHIS.

According to the Government's Factsheet, CHIS play a central role in tackling terrorism and serious and organised crime:

- CHIS have helped to identify and disrupt many of the terrorist plots our agencies have stopped.
- In 2018, CHIS operations led the National Crime Agency to disrupt over 30 threats to life, arrest numerous serious organised criminals, seize over 3000kg of Class A drugs, safeguard over 200 people, and take almost 60 firearms and 4000 rounds of ammunition off the street.
- In the last year, CHIS operations by Metropolitan police have led to 3500 arrests, recovery of over 100 firearms and 400 other weapons, seizure of over 400 kg of Class A drugs, and over £2.5m cash.
- Between 2017-19, HMRC CHIS have prevented hundreds of millions of pounds of tax loss. One case alone is anticipated to prevent loss of revenue to the Treasury estimated to exceed £100 million.

That this may involve participation in criminality is also generally accepted. There are various reasons why this may be necessary, for example, membership of a proscribed group may in itself be an offence; they may need to participate in order to maintain cover, avoid repercussions for refusing to do what is asked of them, or to frustrate the purpose of a conspiracy. They may also need to act in self-defence. An agent acting in this way may lack the requisite *mens rea*, or guilty mind, to attract criminal liability. There may also be defences available, and prosecuting authorities would have to determine whether prosecution was in the public interest. But the possibility of criminal prosecution exists.

The agency "running" the agent may be implicated in acquiescing or procuring participation in criminality if the conduct is authorised.

1.2 Legislative framework

Security Services Act

The Security Service was first given statutory underpinning with the passage of the *Security Service Act 1989* (SSA). Section 1 of the SSA sets out the functions of the Security Service (MI5) in broad terms, including

> …the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and

> from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

MI5 also has a role in supporting law enforcement agencies in the prevention and detection of serious crime under section 1.

Section 2 provides that operations are under the control of the Director General, who is responsible for the efficiency of the service, including ensuring:

> that there are arrangements for securing that no information is obtained by the Service except so far as is necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings;

The SSA does not explicitly provide for any kind of amnesty or indemnity against civil or criminal liability in relation to the performance of its functions.

This can be contrasted with the *Intelligence Services Act 1994* (ISA) which governs the activities of the secret intelligence service (MI6). Section 7 of the ISA provides that

> If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.

This provision covers both civil and criminal liability, and authorisations can cover acts that are necessary for the discharge of a function of MI6 or GCHQ, provided it is necessary and reasonable.

RIPA

The *Regulation of Investigatory Powers Act 2000* (RIPA) sets out the legislative framework for the use of CHIS.

This includes, but is not limited to, undercover work carried out by law enforcement officers, agents of the intelligence and security agencies, and officials of other specified public bodies.

Under Part II of RIPA, individuals act as CHIS if they: establish or maintain a relationship with another person to obtain information covertly;

- give access to information on another person; or
- disclose information covertly which they have obtained using the relationship or they have obtained because the relationship exists

A relationship is established or maintained for a covert purpose if it is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose.[1]

Authorisations may be given where necessary on the following grounds:

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[1] For further detail see the Covert Human Intelligence Sources: Revised Code of Practice, Home Office, 2018

- in the interests of national security;
- for the purposes of preventing or detecting crime;
- in the interests of the economic well-being of the UK;
- in the interests of public safety;
- for the purpose of protecting public health;
- for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department

There are also specific arrangements that govern the use of individuals under the age of 18 as CHIS. The *Regulation of Investigatory Powers (Juveniles) Order 2000*[2] and CHIS code of practice recognise that juveniles are more vulnerable than adults, and make special provision for them:[3]

- For CHIS under the age of 16:
  - No authorisation can be given where the target relationship would be with a parent or someone with parental authority;
  - An appropriate adult (such as a parent) must be present at meetings between the CHIS and their contact at the 'investigating authority' (eg the relevant police force);
- For CHIS under the age of 18:
  - a risk assessment must be conducted into the nature and magnitude of any risk of physical injury or psychological distress, and any identified risk is justified and explained to the CHIS;
  - the maximum duration of an authorisation is four months (instead of 12 for an adult)

Enhanced authorisation levels are also stipulated for juvenile CHIS.

RIPA also established the Investigatory Powers Tribunal (IPT) which has jurisdiction to determine complaints against public authority use of investigatory powers, including the use of CHIS.

Investigatory Powers Act 2016

The *Investigatory Powers Act 2016* (IPA) created a new single oversight body – the Investigatory Powers Commissioner (IPC) - with responsibility for oversight of surveillance powers, as well as interception and other investigatory powers. [4] This includes oversight of the use of CHIS as provided for by RIPA.

The IPA also introduced judicial authorisation for the use of certain investigatory powers for the first time.

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2 As amended by the Regulation of Investigatory Powers (Juveniles) (Amendment) Order 2018

3 The draft revised Code of Practice contains additional guidance on the use of juvenile CHIS

4 Prior to the enactment of the IPA, oversight was provided by the Office of Surveillance Commissioners and the Intelligence Services Commissioner.

The IPC's first annual report, covering 2017, was published in January 2019.[5] The report noted that in order to be effective sources of intelligence and to protect their identity, CHIS may need to participate in criminality. It acknowledged that this may be seen as controversial, and committed to focusing on the issue in the future.[6]

The 2018 report, published in March 2020, explained that the IPC's oversight of MI5's policy governing participation in criminality (PIC) involved examining a high proportion of cases to ensure that the activity meets a high necessity threshold.[7]

In every case examined, the IPC concluded that the activity authorised was proportionate to the anticipated operational benefits.[8]

With respect to MI5, the report noted:

> However, we are concerned that MI5 lack reliable central records around PIC 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 PIC authorisations, the nature of the activity authorised and the number of times each authorisation has been relied upon.[9]

Human Rights Act

The *Human Rights Act 1998* (HRA) gives domestic effect to the European Convention on Human Rights (ECHR).

The ECHR memorandum for the Bill states that "It 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."[10]

However, it then identifies the following Convention rights as the most likely to be relevant:

- Article 2: the right to life
- Article 3: freedom from torture and inhuman and degrading treatment
- Article 5: the right to liberty and security
- Article 6: right to a fair trial
- Article 8: the right to privacy
- Article 1 of Protocol 1: the right to peaceful enjoyment of possessions

Article 2 and 3 are absolute rights, meaning that interference by the state cannot be justified. They may also place positive obligations on the state, for example to protect life, and to investigate suspicious deaths.

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5 Annual Report of the Investigatory Powers Commissioner 2017, HC1780, 31 January 2019
6 Para 3.8
7 Annual Report of the Investigatory Powers Commissioner 2018, HC67, 5 March 2020, para 6.6
8 6.7
9 Para 6.8
10 Para 12

The others are 'limited' or 'qualified' rights, meaning that interference may be justified in some circumstances. Any interference with qualified rights must nonetheless be necessary and proportionate in pursuit of a legitimate aim, and prescribed by law.

Section 6 of the HRA makes it unlawful for public authorities to act in a way which is incompatible with human rights. The ECHR memorandum states that "Nothing in this Bill detracts from that fundamental position"[11] and that "authorising authorities are not able to authorise conduct that constitutes or entails a breach of those rights".[12]

It notes that the protective obligations of the state may be engaged in the context of CHIS activity, for example by taking reasonable steps to protect citizens from threats to life or safety.

The memorandum also suggests 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.[13]

The memorandum identifies further relevant safeguards, including oversight of the IPC, jurisdiction of the IPT, and that "Great importance is attached to providing training to all those involved with agent running and agent participation" including on the HRA.[14] It states that "The totality of the interlocking safeguards contained in the Bill are considered to be compatible with the ECHR".[15]

Authorising criminal conduct

The findings of a review into the circumstances surrounding the death of lawyer Patrick Finucane in Belfast during the Troubles was published in 2012.[16]

Conducted by Sir Desmond de Silva QC, the review noted that the "penetration of an agent into the very heart of a terrorist group inevitably involved the agent concerned becoming involved in criminal activity to some degree". Indeed, "the most valuable agents during the Troubles were undoubtedly those positioned deep within the terrorist groups themselves" and this required such individuals to be heavily involved in activity that could amount to serious criminal acts.[17]

Examining the handling of agents during the Troubles, it noted that a detailed legal and policy framework did not exist at the time. Instead, the management of agents was governed by non-statutory guidance and direction, informed to a limited degree by case law concerning criminal liability, particularly relating to conspiratorial offences.

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11 Para 6
12 Para 13
13 Para 16
14 Para 11
15 Para 7
16 Rt Hon Sir Desmond da Silva, The Report of the Patrick Finucane Review, 2012, HC 802-I
17 Ibid, 4.4

The review was informed that internal guidance on agent running at MI5 had contemplated in 1969 the possibility that agents could be involved in criminal activity. However it did not provide any solution to the issue of liability. Attempts were made to formalise guidance for agencies involved in penetrating terrorist groups throughout the 1980s, recognising the need to deal with the issue in the context of the Troubles.[18]

In the early 1990s new draft Guidelines were adopted by relevant agencies without Ministerial approval, which explicitly recognised the need for agents providing intelligence to take part in serious crime.[19]

Another review of agent handling in 1992 endorsed the approach taken in the draft Guidance, but noted that the difficulty was its status, and the extent of Ministerial approval. An Interdepartmental Working Group on Agent Handling was established and concluded that only legislation could satisfactorily resolve the issue. However, the political climate and developments in the peace process meant that no further steps were taken until the introduction of RIPA by a different administration in 2000. As noted above, this did not explicitly deal with the issue of involvement in criminal conduct.

The De Silva report concluded that the running of agents within terrorist groups was not illegitimate or unnecessary, on the contrary it went "to the heart of tackling terrorism". However, it should be conducted within a rigorous framework, structured so as to ensure adequate oversight and accountability. In particular the report concluded

> [I]t 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.[20]

This would require "clear statutory recognition that agents must be run at the heart of terrorist groups" and "some recognised limits as to the extent to which agents could become involved in criminal enterprises".[21] RIPA did not offer a real resolution because it provided little guidance as to the limits of the activities of CHIS.

The same year as the De Silva report was published, the Prime Minister wrote to the Intelligence Service Commissioner (ISC), Sir Mark Waller, asking him to provide oversight of

> a long-standing policy for [Security Service] agent handlers to agree to agents participating in crime, in circumstances where it is considered such involvement is necessary and proportionate in providing or maintaining access to intelligence that would allow the disruption of more serious crimes of threats to national security.[22]

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18 Ibid, part 4
19 Ibid
20 Ibid, executive summary, paras 112-113
21 Ibid, 4.88
22 Letter from Rt Hon David Cameron to Sir Mark Waller, available at privacyinternational.org

The letter directed that the ISC should keep the application of the policy under review with respect to the necessity and proportionality of authorisations. It envisaged that a sample of authorisations would be reviewed retrospectively "in the same way that you currently consider … authorisations under Section 7 of the Intelligence Services Act".[23]

It further stated that oversight "would not provide endorsement of the legality of the policy", nor would the ISC be asked for a view on referring cases to the prosecuting authorities.[24]

The letter was not published at the time "on the basis that doing so would be detrimental to national security and contrary to the public interest".[25] It was subsequently disclosed in legal proceedings.

Following the 2012 letter, the ISC provided oversight of the policy, but the substance of this was not made public. The ISC's 2015 annual report stated:

> Agent Participation in the Commission of an Offence
>
> There may be occasions where a CHIS participates in a criminal offence in order to gather the required intelligence, for example membership of a proscribed organisation or handling stolen goods. However in specific situations where the intelligence dividend justifies it, a good argument can be made that it is in the public interest and for the greater good to become involved. Although such activity cannot be made lawful I have recommended that the agency must justify the public interest test.[26]

The existence of the direction was disclosed in legal proceedings before the IPT concerning the acquisition and retention of bulk data by the agencies.[27] Previously, two directions issued by the Prime Minister were in the public domain, the Consolidated Guidance, governing the UK's involvement in the detention and interviewing of persons overseas, and the Bulk Personal Datasets direction. Hence this became known as the 'Third Direction'. The content of the direction remained secret, only its existence had been made public.

In July 2017, in a confidential annex to his annual report for 2016, Sir Mark Waller noted that the existence of the direction had been disclosed, and recommended that the Government should consider how it communicated any additional oversight it asked the IPC to undertake.[28]

In 2017, when responsibility for oversight had transferred to the IPC, the Prime Minister directed that the IPC

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23 ibid
24 Ibid
25 Ibid
26 Report of the Intelligence Services Commissioner for 2015, 2016, HC 459, page 11
27 Privacy International v Secretary of State for Foreign and Commonwealth Affairs, IPT/15/110/CH
28 [2019] UKIPTrib IPT/17/86/CH, para 23

> … keep under review the application of the Security Service guidelines on the use of agents who participate in criminality and the authorisations issued in accordance with them.[29]

1.3 Legal challenge: the Third Direction case

In 2017 Privacy International and Reprieve brought legal proceedings against the security and intelligence services and their sponsoring departments challenging the lawfulness of the policy known as the Third Direction.[30]

The claimants challenged the policy on a number of grounds, including that there was no lawful basis for it in statute or common law, and that it was not compatible with the European Convention on Human Rights.

The case led to the disclosure, subject to redactions, of the policy itself, called the 'Security Service Guidelines'.[31]

These Guidelines explained that whilst neither RIPA nor the Code of Practice provide for CHIS to be authorised to participate in criminality, MI5 had established its own procedure to operate in parallel with RIPA. The Guidelines provided that those with authority to give CHIS authorisations could authorise participation in crime, where the required information could not readily be obtained by other means and its benefit to the public interest outweighed the potential harm of the criminal activity.

The Guidelines also explained that these authorisations had no legal effect and did not confer immunity from prosecution on either the agent or those involved in the authorisation process. However, the authorisation would be the explanation and justification if any criminal activity came to the attention of the prosecuting authorities.

By a majority of three to two, the IPT dismissed the claim, agreeing with the Government that the SSA 1989 contained an implied power for MI5 to engage in the activities covered by the policy. This did not mean that there was an associated power to confer immunity for such activity, either as a matter of civil or criminal law.

With respect to the arguments relating to compatibility with the ECHR, the IPT noted that nothing in the policy could detract from MI5's obligation under section 6 of the HRA, as a public authority, to act compatibly with Convention rights. Further, the IPT concluded that there was nothing inherent in the policy that created a significant risk of a breach of Article 3 or any other Convention right, and that the question of whether or not there has been a breach of a Convention right is usually to be determined after the event on the basis of concrete facts.

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29 Investigatory Powers Commissioner (Additional Oversight Functions) (Security Service participation in criminality) Direction 2017, available at ipco.org.uk

30 [2019] UKIPTrib IPT/17/86/CH

31 Guidelines on the use of Agents who participate in Criminality (Official Guidance), available at privacyinternational.org

In his dissenting judgment, Charles Flint QC disagreed with the majority conclusion that the SSA contained an implied power to authorise such activity, noting that Sir Desmond de Silva had found that there had been no clear guidance on the issue from the Government at the time and had recommended the introduction of a statutory framework. He also pointed to the contrast with the provisions of the SSA which at the time governed entry to or interference with property.[32] These required a warrant, oversight by the Security Services Commissioner, and a Tribunal to hear complaints. Noting that the implied power to authorise participation in criminal activity is not subject to any requirement to obtain a warrant, or to any external oversight, and is not challengeable in the Tribunal, he suggested

> The legislative purpose of providing statutory protection of property rights, but not making any provision for the more serious power to authorise the commission of a criminal offence or tort against a person is difficult to understand.[33]

Professor Graham Zellick QC also dissented from the majority view that the SSA 1989 provided a legal basis for the power. He described the argument that Parliament had intended this result as "fanciful"[34]. He also pointed to the De Silva report as irrefutable evidence that this was not the case, noting that at no point had any of the papers submitted to the review suggested that the SSA 1989 provided a lawful basis for the policy. He concluded

> …legislation to authorise a matter as important and grave as the practices and policy relating to agent participation in criminality must be expressed in clear and unambiguous language, even if national security considerations demand that much of the detail must remain confidential.[35]

In light of their conclusions as to the lack of legal basis for the power, both Charles Flint and Professor Zellick concluded that any interference with Convention rights under the policy was not "in accordance with law".

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32 Since superseded by provisions in the Intelligence Services Act 1994
33 [2019] UKIPTrib IPT/17/86/CH, para 118
34 Ibid, para 161
35 Ibid, para 176

2. The Bill

The Bill would amend Part II of RIPA to provide a power for security, intelligence, and law enforcement agencies, as well as a number of other public bodies, to authorise CHIS to participate in criminal conduct.

Section 27 of RIPA provides that conduct to which Part II applies is lawful for all purposes provided that an authorisation exists to engage in that conduct and the conduct is in accordance with the authorisation.

Conditions for authorising criminal conduct

Part II governs CHIS authorisations. Section 26 of RIPA sets out the conduct to which Part II applies, currently:

- Directed surveillance
- Intrusive surveillance
- The conduct and use of CHIS

Clause 1 of the Bill would add to this list "criminal conduct in the course of, or otherwise in connection with, the conduct of [CHIS]".

Criminal conduct is defined by the Bill as any conduct that would otherwise be criminal that takes place in this context.

Section 29 of RIPA sets out the conditions for granting a CHIS authorisation. These include, that the person granting it believes:

- It is necessary on certain specified grounds, namely:
  - National security
  - Preventing or detecting crime or disorder
  - The economic well-being of the UK
  - Public safety
  - Public health
  - Assessing or collecting tax or other charge
  - For another purpose specified in an order, subject to the affirmative resolution procedure
- That it is proportionate
- That there are adequate handling arrangements in place in respect to the CHIS

The Bill would insert a new section 29B into RIPA that would govern criminal conduct authorisations. It would also provide that a section 29 authorisation would need to be in place at the same time as an authorisation under new section 29B, and that a section 29 authorisation could not be used to authorise criminal conduct. As a result, criminal conduct could only be authorised subject to the conditions in both section 29 and new section 29B.

The conditions for granting a criminal conduct authorisation under new section 29B are that the person granting it believes:

- That it is necessary on the grounds of
  - National security
  - Preventing or detecting crime or preventing disorder
  - The economic well-being of the country
- That it is proportionate
- That arrangements are in place to satisfy any further requirements imposed by the Secretary of State via secondary legislation.[36]

When considering necessity and proportionality, the person granting the authorisation must 'take into account' whether the same result could be achieved without criminal conduct.

They would also be required to "take into account other matters so far as they are relevant", such as the HRA. The explanatory notes state that the decision would also be subject to the requirements of the Human Rights Act 1998, section 6 of which requires public authorities to act in a way that is compatible with Convention rights. The ECHR memorandum states that "authorising authorities are not permitted by this Bill to authorise conduct which would constitute or entail a breach of [Convention] rights".

The authorisation would only apply in relation to specified activities conducted by or in relation to the person to whom the authorisation relates.

Authorisations

Clause 2 of the Bill would amend section 30 of RIPA, which governs authorisations under Part II. It would insert a new Part A1 into Schedule 1 of RIPA providing that the following public authorities are able to make criminal conduct authorisations:

- Any police force
- The National Crime Agency
- Any of the intelligence services
- Any of Her Majesty's Forces
- HMRC
- The Department of Health and Social Care
- The Home Office
- The Ministry of Justice
- The Competition and Markets Authority
- The Environment Agency

[36] This would be subject to the negative resolution procedure. The Delegated Powers Memorandum explains that this is because the power would allow for additional requirements to be imposed, and would thus strengthen safeguards. They reflect existing powers in section 29 of RIPA

- The Financial Conduct Authority
- The Food Standards Agency
- The Gambling Commission
- The Serious Fraud Office

Additional bodies could be added to (or removed from or amended) this list by order, subject to the affirmative resolution procedure. The Delegated Powers Memorandum states that this is most likely to be used to address changes such as the abolition of a body, the transfer of its functions to a new body, or the creation of a new body by statute. An existing body may also be able to make a compelling operational case for the use of criminal conduct authorisations.

The Bill would extend the Secretary of State's existing power under section 30 of RIPA to designate the ranks, officials or positions within these public authorities that are able to grant authorisations, to the new criminal conduct authorisations. It would also extend the existing power to impose restrictions on the circumstances in which, or the purposes for which, ranks, officials or positions within public authorities are able to grant authorisations, to criminal conduct authorisations.

These powers would be subject to the negative resolution procedure. The Delegated Powers Memorandum states that this is the appropriate procedure because, by enacting clause 1, Parliament will be conferring a power on designated persons to grant criminal conduct authorisations, and these powers would allow for additional safeguards. It also points to the fact that the existing powers in section 30 of RIPA are subject to the negative procedure, and there is therefore an established precedent.

Oversight

The Bill would also amend the Investigatory Powers Act 2016 to provide that the exercise of the new section 29B power to authorise criminal conduct is listed as one of the statutory oversight functions of the IPC and that it is included in annual and other reports. As noted above, the IPC currently provides oversight of the existing Guidance in accordance with a direction from the Prime Minister.

3. Reaction

The four NGOs involved in the Third Direction challenge, Reprieve, Privacy International, the Pat Finucane Centre, and the Committee on the Administration of Justice, together with Rights and Security International, published a response to the Bill.[37] Whilst welcoming legislation in this area as a "belated recognition that regulating the permitted conduct of CHIS must be set up by a formal legislative footing", they expressed serious concerns about the Bill.

These include:

- That the Bill places no express limits on the types of crimes which can be authorised, by contrast with the law in comparable jurisdictions, including the US and Canada.[38] They note in particular that there is nothing that would expressly prevent authorisations covering murder, torture or sexual violence. The NGOs suggest that the Government's argument that setting clear limits would enable criminal gangs to set 'tests' in order to identify CHIS is undermined by the reliance on the HRA. They suggest that if the position on the prohibition of such abuses under the HRA is clear, then this would not prevent gangs setting 'tests'. The solution in cases where a CHIS is truly forced into committing such an offence lies in prosecutorial discretion, they suggest.
- That the HRA is not a sufficient safeguard, in light of the Government's stated position that it would not apply to certain acts committed by agents. They cite Government submissions in the Third Direction case to the effect that the state could not be treated as responsible where a CHIS committed "severe abuses such as torture". The limitations on state responsibility referred to at paragraph 16 of the ECHR memorandum (see above at section 1.2) reinforce the NGOs' view that under the provisions of the Bill an agent could be authorised to participate in serious violent crime
- That the Bill represents a significant expansion of the existing policy, by making authorised criminal conduct 'lawful for all purposes'. This would bypass prosecutors, thus eroding the separation of powers and removing the ability of independent prosecutors to bring prosecutions where it is in the public interest.
- That the authorisation regime envisaged by the Bill is weaker than for other investigatory powers, such as interception, despite potentially involving more harmful conduct. They note that independent judicial approval is required for interception and other powers governed by the IPA, whereas criminal conduct would be authorised internally under the provisions of the Bill.

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37 Briefing for Second Reading of the Covert Human Intelligence Sources (Criminal Conduct) Bill, October 2020

38 Canadian legislation specifically excludes certain criminal offences from the scope of authorisations, in addition to requiring adherence to the Canadian Charter of Fundamental Freedoms. In the US, Department of Justice Guidance for the FBI excludes acts of violence except in self-defence.

- That the Bill would prevent victims from seeking redress by protecting those who commit authorised crimes from civil liability. They suggest that the Bill would also prevent victims from seeking compensation under the Criminal Injuries Compensation Scheme.

Amnesty International UK also expressed concern at the absence of express limits prohibiting authorisations for crimes such as torture, pointing to the experience in Northern Ireland as highlighting the consequences of allowing agents to act with impunity.[39]

MI5 and the law enforcement community have welcomed the Bill.

Ken McCallum, Director General of MI5 described the power as "vital so we can continue to meet our duty to keep the public safe".[40]

Graham McNulty, the National Police Chiefs' Council CHIS lead welcomed the creation of an express power and said that the bill would help to disrupt the activities of violent gangs and keep communities safe.[41]

Lynne Owens, GD of the NCA described the capability as "crucial" and said that without it they would not be able to bring criminals to justice.[42]

The Intelligence and Security Committee of Parliament also expressed strong support for the principle behind the legislation. The Committee said that "the need for such authorisations is clear and we support the principle of their use by MI5", and noted the need for checks and balances to maintain public confidence in the use of the powers.[43]

39 Press Release, UK: Amnesty issues start warning over Covert Human Intelligence Sources (Criminal Conduct) Bill, 24 September 2020, amnest.org.uk
40 News story, New legislation protects national security capability to fight serious crime, 24 September 2020, Gov.uk
41 Ibid
42 Ibid
43 Statement on the Covert Human Intelligence Sources (Criminal Conduct) Bill, Intelligence and Security Committee, 24 September 2020

BRIEFING PAPER
Number 9012
2 October 2020

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