Covert Human Intelligence Sources (Criminal Conduct) Bill
HL Bill 144 of 2019–21

The Covert Human Intelligence Sources (Criminal Conduct) Bill is a government bill that would provide an express power to authorise covert human intelligence sources (CHIS) to participate in conduct which would otherwise constitute a criminal offence. It would do this by amending the Regulation of Investigatory Powers Act 2000. The bill would provide the security and intelligence agencies, law enforcement agencies, and several public authorities a statutory power to authorise CHIS to participate in criminal conduct, when deemed necessary and proportionate to do so.

Under the 2000 act, a person is defined as a CHIS if they establish or maintain a personal or other relationship with an individual for the covert purpose of obtaining or disclosing information. Although not mentioned in the 2000 act, the Government has noted that there will be occasions where a CHIS may need to participate in criminal conduct. The Government has described such actions as an "essential and inescapable feature of CHIS use", to gain the trust of those under investigation. It has also argued that it enables CHIS to work at the "heart of groups" that would cause the UK harm to find information and intelligence which other investigative measures may not detect.

The Government introduced the bill in the House of Commons on 24 September 2020. Second reading took place on 5 October 2020, with the remaining stages held on 15 October 2020. During second reading, James Brokenshire, the Minister for Security at the Home Office, said that the bill would be "looking to achieve just one thing", which was to "ensure" that intelligence agencies and law enforcement bodies are "able to continue to utilise a tactic that has been, and will continue to be, critical to keeping us all safe". However, opposition MPs such as the Shadow Home Secretary, Nick Thomas-Symonds, expressed several concerns with the bill. Concerns included: that trade unions could be targeted by sources; that "heinous" crimes, such as murder and sexual offences, could be carried out by a CHIS; and that there was "self-authorisation" in the bill. Despite these concerns, the bill passed through the House of Commons without amendment. The bill had its first reading in the House of Lords on 19 October 2020.

MI5 and several law enforcement agencies have welcomed the bill. However, several rights organisations have expressed concerns about some of its provisions. This included that the bill would place no express limits on the types of crimes that can be authorised, unlike similar arrangements in the United States and Canada. Other commentators, such as Kate Wilson, who was in a false relationship with an undercover police officer for 12 years, has called for the bill's progression to be delayed until the end of the Undercover Policing Inquiry, which begins its evidence hearings in November 2020.

Eren Waitzman | 22 October 2020

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1. Background

1.1 Covert human intelligence sources

A covert human intelligence source (CHIS) may be a police officer, an individual holding a position in a public authority who is acting undercover, or a member of the public recruited by a public authority.[1]

Part II of the Regulation of Investigatory Powers Act 2000 (RIPA) provides for the authorisation of use or conduct of a CHIS. Under section 26 of the 2000 act, a person is a CHIS if they establish or maintain a personal or other relationship with an individual for the covert purpose of:

a) using such a relationship to obtain information or to provide access to any information to another person; or
b) disclosing information obtained using such a relationship or because of the existence of a relationship.[2]

The Government has contended that CHIS are a "core part" of security, intelligence, and policing work. It has also argued that the role of a CHIS is "crucial" in preventing and safeguarding victims from serious crimes, such as child sexual exploitation, drugs and firearms offences and terrorism. As part of this, a CHIS participates in criminal conduct, which the Government has described as an "essential and inescapable feature of CHIS use", to gain the trust of those under investigation. This enables CHIS to work at the "heart of groups" that would cause the UK harm to find information and intelligence which other investigative measures may not detect.[3]

In its revised code of practice for CHIS, the Home Office has noted that although the 2000 act does not require public authorities to seek or obtain authorisation for the use or conduct of a CHIS, it is "advisable" that they do so.[4] In addition, public authorities must ensure that all use or conduct is:

- necessary and proportionate to the intelligence dividend that it seeks to achieve; and
- in compliance with relevant articles of the European Convention on Human Rights (ECHR), particularly articles 6 and 8.[5]

In a factsheet published ahead of the bill's introduction in the House of Commons, the Government has detailed the work of intelligence sources to prevent terrorism and other serious crimes:

- 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 3,000 kilograms of Class A drugs, safeguard over 200 people, and take almost 60 firearms and 4,000 rounds of ammunition

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[1] Home Office, *Explanatory Memorandum to the Covert Human Intelligence Sources (Criminal Conduct) Bill*, 23 September 2020, p 3.
[2] Regulation of Investigatory Powers Act 2000, section 26.
[3] Explanatory Notes, p2.
[4] Home Office, *Covert Human Intelligence Sources: Draft Revised Code of Practice*, September 2020, p 12.
[5] ibid.

off the street.

- In the last year, Metropolitan Police CHIS operations have led to 3,500 arrests, recovery of over 100 firearms and 400 other weapons, seizure of over 400 kilograms of Class A drugs, and over £2.5 million cash.
- Between 2017–19, CHIS for Her Majesty's Revenue and Customs (HMRC) have prevented hundreds of millions of pounds of tax loss. HMRC has anticipated that one case alone will prevent loss of revenue to the Treasury, estimated to exceed £100 million.[6]

1.2 Review into the death of Patrick Finucane

On 12 February 1989, Patrick Finucane, a practising lawyer, was murdered in his home in North Belfast. Gunmen from the paramilitary group the Ulster Defence Association reportedly carried out the attack.[7]

In December 2012, Sir Desmond de Silva QC published his findings into a review examining the role played by agents and employees of the state in the murder of Patrick Finucane. Sir Desmond found that the evidence relating to the murder had left him in "no doubt" that agents of the state were "involved in carrying out serious violations of human rights up to and including murder". However, he also noted that despite the "different strands of involvement by elements of the state", he was "satisfied" that they were not linked to a state "conspiracy" to murder the lawyer.[8]

Summarising his findings, Sir Desmond also clarified that his review had "not concluded" that the running of agents within terrorist groups was an "illegitimate or unnecessary activity". In contrast, he stated that the "principal lesson" to be learned from his report was that "agent-running must be carried out within a rigorous framework". Such a framework would need to be structured to ensure "adequate oversight and accountability".[9] Concluding, Sir Desmond stated that:

> It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist groups are rigorously pursued. Perhaps the most obvious and significant lesson of all, however, is that it should not take over 23 years to properly examine, unravel and publish a full account of collusion in the murder of a solicitor that took place in the United Kingdom.[10]

In response to Sir Desmond's findings, the then Prime Minister, David Cameron, made a statement in the House of Commons on 12 December 2012. In his statement, Mr Cameron outlined that the findings revealed the "extent of collusion" in areas such as identifying, targeting, and murdering Mr Finucane, which he described as "totally unacceptable".[11] Consequently, Mr Cameron made the following apology:

> So on behalf of the Government—and the whole country—let me say once again to the

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[6] Home Office, *Covert Human Intelligence Sources (Criminal Conduct) Bill Factsheet*, 1 October 2020, p 1.

[7] BBC News, 'Q and A: The murder of Pat Finucane', 7 October 2019.

[8] Sir Desmond de Silva QC, *The Report of the Patrick Finucane Review*, December 2012, p 23.

[9] ibid, p 29.

[10] ibid.

[11] Statement by the then Prime Minister, David Cameron, on the 'Patrick Finucane Report', HC *Hansard*, 12 December 2012, col 297.

Finucane family, I am deeply sorry.[12]

Mr Cameron also outlined that since 1989, successive governments had taken many steps to improve the oversight, procedure, and rules of intelligence work. This included the creation of RIPA that established a framework for the authorisation of the use and conduct of agents. In addition, he said that the activities of individual agents "are now clearly recorded along with the parameters within which they must work".[13]

1.3 Undercover Policing Inquiry

In 2015, the then Home Secretary, Theresa May, announced that there would be a judge-led inquiry into undercover policing. The inquiry would consider the deployment of police officers as sources by the Metropolitan Police's Special Demonstration Squad, the National Public Order Intelligence Unit and by other police forces in England and Wales. The inquiry would also review the contribution that undercover policing made to tackling crime, how it was and is currently supervised and regulated, and its effect on individuals involved. It would also examine whether the state had wrongly convicted people in cases involving undercover police officers. Any such cases would be referred to a separate panel for consideration.[14]

The decision to conduct a review was in response to an independent review by Mark Ellison QC,[15] which had revealed "serious historical failings" in undercover policing practices.[16] Opening statements for the Undercover Policing Inquiry (UCPI) are scheduled to take place on 2 November 2020, with evidence hearings beginning on 11 November 2020.[17]

1.4 Third direction case

In June 2017, Privacy International and Reprieve began a legal challenge against the Security Service (MI5) on the basis that its 'third direction' policy, known as the security service guidelines, was unlawful and secret.[18] In response to the legal proceedings, the Government published a redacted version of the guidelines on 1 March 2018. The policy revealed that although neither RIPA nor the code of practice authorised CHIS to participate in criminal activity, the nature of the work of agents meant that "it may sometimes be necessary and proportionate" to do so to:

- secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality; or
- ensure the agent's continued safety, security, and ability to pass such intelligence.[19]

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[12] Statement by the then Prime Minister, David Cameron, on the 'Patrick Finucane Report', HC *Hansard*, 12 December 2012, col 297.

[13] ibid, col 298.

[14] Home Office, 'Home Secretary announces statutory inquiry into undercover policing', 12 March 2015.

[15] Home Office, 'The Ellison Review', 6 March 2014.

[16] ibid.

[17] Undercover Policing Inquiry, *Ninth Update Note*, July 2020, p 1.

[18] Privacy International is a charity which focuses on the right to privacy, whilst Reprieve is a non-profit organisation which focuses on human rights. Privacy International, 'Third Direction challenge', accessed 19 October 2020.

[19] Privacy International, *Guidelines on the Use of Agents Who Participate in Criminality (Official Guidance)*, March 2011, p 2.

The guidelines also stated that an authorisation has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Instead, the authorisation would be the explanation and justification of the service's decisions should such criminal activity come under scrutiny by an external body, for example, the police or prosecuting authorities. In addition, the guidelines noted that the authorisation process and associated records may form the service's representation to the prosecuting authorities that prosecution is "not in the public interest".[20]

In April 2018, the Committee on the Administration of Justice and the Pat Finucane Centre joined the legal case.[21]

Investigatory Powers Tribunal

In December 2019, the Investigatory Powers Tribunal declared in a majority 3-2 decision that the guidelines did not breach human rights nor grant immunity to those who participated in serious criminal activity. The tribunal also found that there was an "implied power" in the Security Service Act 1989 for the Security Service to "engage in the activities which are the subject of the policy under challenge".[22] In the judgment, the tribunal stated the following on human rights:

> The Convention [European Convention of Human Rights] rights issues do not arise as a matter of substance in this challenge to the policy of the Security Service.[23]

Regarding immunity for MI5 agents committing criminal activity, the tribunal concluded that:

> We emphasise again that it is not the effect of either the respondents' [MI5's] submissions or the judgment of the majority in this tribunal that the Security Service has the power to confer any immunity from the ordinary criminal law of this country (or the civil law).[24]

However, in the first dissenting opinion to the judgment, Charles Flint QC stated that although he had "accept[ed] the operational necessity" for MI5 to run agents who may need to participate in serious criminal activity,[25] he was unable to find that the 1989 act provides "any legal basis for the policy under challenge".[26]

In the second dissenting opinion, Graham Zellick QC also agreed that the 1989 act did not grant the power to operate such a policy.[27]

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[20] Privacy International, *Guidelines on the Use of Agents Who Participate in Criminality (Official Guidance)*, March 2011, p 2.

[21] Privacy International, 'Third Direction challenge', accessed 19 October 2020. The Committee on the Administration of Justice and the Pat Finucane Centre are human rights organisations based in Northern Ireland.

[22] Investigatory Powers Tribunal, *Privacy International and others v Secretary of State for Foreign and Commonwealth Affairs and others*, 20 December 2019, p 22, para 60.

[23] ibid, p 32, para 107.

[24] ibid, p 26, para 71.

[25] ibid, p 35, para 115.

[26] ibid, p 41, para 130.

[27] ibid, p 55, para 180.

He also contended that acceding to MI5's argument in the case would:

> […] open the door to the lawful exercise of other powers of which we have no notice or notion, creating uncertainty and a potential for abuse.[28]

In response to the tribunal, the four claimants announced that they would be appealing the judgment.[29]

2. Measures in the bill

The bill amends part II of the Regulation of Investigatory Powers Act 2000 (RIPA) to provide the security and intelligence agencies, law enforcement agencies and several public authorities a statutory power to authorise CHIS to participate in criminal conduct where "necessary and proportionate" to do so, for a limited set of specified purposes. Some public authorities use the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A) to authorise CHIS. Therefore, the bill also includes equivalent amendments to this act.

The Government contends that activity the bill would authorise is "not new activity", and that it would be a "continuation of existing practice that is currently authorised using a variety of legal bases".[30]

The bill is formed of seven clauses and two schedules.

2.1 Clause by clause

Clause 1 would amend section 26 of RIPA to introduce a new category of criminal conduct to which part II applies. Section 26 defines and describes the conduct that can be authorised under part II of RIPA. The types of activity the section covers are direct surveillance, intrusive surveillance and the conduct and use of CHIS. Therefore, clause 1 would add a new category of conduct to this list: "criminal conduct in the course of, or otherwise in connection with, the conduct of CHIS".

Clause 1 would also amend section 29 of RIPA to detail that a section 29 authorisation, which authorises the conduct or the use of a CHIS, can no longer be used to authorise any criminal conduct by CHIS. Consequently, a new section 29B would be inserted into RIPA providing a power for a "criminal conduct authorisation" to be granted. This new section has several components. It would:

- provide designated people with the power to grant criminal conduct authorisations;
- outline a definition of "criminal conduct authorisation";
- require that a section 29 authorisation for CHIS is either in place before a criminal conduct authorisation is granted, or granted at the same time as a criminal conduct authorisation;[31]

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[28] Investigatory Powers Tribunal, *Privacy International and others v Secretary of State for Foreign and Commonwealth Affairs and others*, 20 December 2019, p 55, para 181.

[29] Owen Bowcott, 'MI5 policy allowing informants to commit serious crimes ruled lawful', *Guardian*, 20 December 2019.

[30] Explanatory Notes, p 2.

[31] According to the bill's explanatory notes, the reason for that is that it is a "bolt-on provision" for criminal conduct, ensuring that other requirements and safeguards already set out in section 29 of RIPA will apply to authorisations granted under the new section. Explanatory Notes, p 5.

- set out the test that must be satisfied before an authorisation may be granted. This includes whether it is necessary on one or more of the three specified grounds: national security; preventing or detecting crime or preventing disorder; or the economic wellbeing of the country. The conduct must also be proportionate and must satisfy any requirements imposed by an order made by the secretary of state;
- detail further considerations for the person granting authorisation to consider when deciding whether an authorisation is "necessary and proportionate", where relevant. This includes under the requirements of the Human Rights Act 1998;
- specify the limits for the granting of authorisations;
- provide that an authorisation granted to a CHIS under section 29B ceases to have effect at the same time as the section 29 authorisation relating to that CHIS; and
- confer on the secretary of state a power to make secondary legislation to either prohibit the authorisation of specified conduct or to impose additional requirements that must be satisfied prior to an authorisation being granted.

The bill's explanatory notes also state that it would be possible for a section 29B authorisation to relate to more than one CHIS. In this case, an authorising officer would need to specify or describe in an authorisation each individual CHIS and the authorisation would have to relate to a particular investigation or operation. However, this authorisation could only be granted at the same time as, or after, a related section 29 authorisation had been granted.[32]

Clause 2 would amend section 30 of RIPA to make provision for certain public authorities to be able to grant criminal conduct authorisations. This would include amending section 30 of RIPA to:

- bring authorisations within the scope of the power conferred to the secretary of state, which enables the secretary of state to specify by order that certain people holding such offices within public authorities are designated to grant authorisations;
- ensure that where a criminal conduct authorisation is granted in combination with an authorisation to carry out "intrusive surveillance", it must be granted by the secretary of state;
- enable the secretary of state to restrict the authorisations that may be granted by individuals in public authorities or provide that authorisations given in such circumstances are granted by specific people within the public authorities;
- make provision for the public authorities that are granting authorisations (these are listed in new part A1 of schedule 1 to RIPA); and
- confer powers on the secretary of state to amend schedule 1 of RIPA. This would allow the secretary of state to add or remove public authorities from the schedule. The power to add public authorities to part A1 would be subject to the approval of Parliament by way of the affirmative procedure (clause 2 (8)).

Lastly, clause 2 would insert a new part A1 into schedule 1 of RIPA, listing the public authorities able to grant authorisations.

[32] Explanatory Notes, p 6.

They are as follows:

- 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;
- the Financial Conduct Authority;
- the Food Standards Agency;
- the Gambling Commission; and
- the Serious Fraud Office.

Clause 3 would introduce schedule 1 to the bill, providing for corresponding amendments to be made to RIP(S)A.

Clause 4 would amend the Investigatory Powers Act 2016 (IPA) to detail the oversight arrangements that will apply to the public authorities' powers to grant authorisations. Consequently, clause 4 would amend section 229 of the IPA to insert a requirement for the Investigatory Powers Commissioner, when keeping matters under review in accordance with section 229, to pay attention to public authorities' power to grant authorisations under the new section 29B of RIPA or section 7A of RIP(S)A.

The clause would also amend section 234 of the IPA to require the commissioner to include information about public authorities' use of authorisations in its annual report. Information would include statistics on public authorities' use of the power, safeguards in authorisations and errors. According to the bill's explanatory notes, the requirement would be subject to existing protections in the IPA for information relating to matters such as national security and both the prevention or detection of serious crime.[33]

Clause 5 introduces schedule 2 to the bill. Schedule 2 contains consequential amendments to existing legislation. **Schedule 2** would amend section 31 of RIPA so that the power of the First Minister and Deputy First Minister of Northern Ireland to make an order under section 30 of RIPA applies only to authorisations under section 28 (directed surveillance) and section 29 (CHIS). However, it does not apply in relation to CHIS criminal conduct authorisations. The schedule would also amend other provisions to extend their requirements to section 29B authorisations, including section 33 on the rules for granting authorisations and section 45 regarding the cancellation of authorisations. Lastly, the schedule would amend Part 1 of schedule 1 to detail the relevant public authorities that can grant an authorisation.

[33] Explanatory Notes, p 8.

Clause 6 sets out that sections 6 and 7 of the act would come into force on the day the bill is passed. In addition, the other provisions of the act would come into force on a day chosen by the secretary of state through regulations. However, they may appoint different days for different purposes or areas. The clause would also provide for the secretary of state through regulations to make transitional or saving provisions in connection to any provision of the act coming into force.

Clause 7 contains miscellaneous provisions. These include that the act would apply to England, Scotland, Wales, and Northern Ireland.

2.2 Compliance with the European Convention of Human Rights

Alongside the bill, the Home Office published a human rights memorandum. In the memorandum, the Home Office outlined that the Government considers the bill to be compatible with the European Convention on Human Rights.[34] As part of this, the memorandum noted that section 6 of the Human Rights Act 1998 means that those authorising the use of CHIS "must ensure they are acting compatibly with convention rights". Therefore, the Government stated that nothing in the bill "detracts from that fundamental position" and that authorising authorities are not permitted by the bill to authorise conduct which would "constitute or entail a breach of those rights".[35]

Turning to safeguards, the Home Office noted that the statutory framework the bill would create would "provide for effective measures" to ensure that authorisations "do not in fact breach convention rights" and to "guard against the risk of abuse of a discretionary power".[36] This includes:

- the authorisation specifying the parameters of the authorisation, which will be "clearly communicated to the CHIS";
- the authorisation regime containing provisions to ensure authorisations are granted when necessary and proportionate to do so; and
- the implementation of further safeguards, such as providing training on the 1998 act to those involved with agent running and agent participation.[37]

The Home Office also stated 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".[38] However, it outlined the following convention rights likely to be of most concern to the Joint Committee on Human Rights in its scrutiny of the bill's human rights implications:

- Article 2: the right to life;
- Article 3: the prohibition of torture;
- Article 5: the right to liberty and security;
- Article 6: the right to a fair trial;
- Article 8: the right to respect privacy and family life; and
- Article 1 of Protocol 1: the protection of property.[39]

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[34] Home Office, *Covert Human Intelligence Sources (Criminal Conduct) Bill: European Convention on Human Rights Memorandum*, 23 September 2020, p 1.

[35] ibid, p 2.

[36] ibid.

[37] ibid, p 3.

[38] ibid.

[39] ibid, pp 3–4.

3. What response has there been to the bill?

The Government introduced the bill in the House of Commons on 24 September 2020. Following its introduction, the security and intelligence services, the police, and some public authorities have expressed support for the bill. However, many rights groups have been critical of aspects of it.

3.1 House of Commons bill stages

Second reading

Second reading took place in the House of Commons on 5 October 2020. Speaking for the Government, James Brokenshire described the bill as "looking to achieve just one thing", which is to "ensure" that intelligence agencies and law enforcement bodies are "able to continue to utilise a tactic that has been, and will continue to be, critical to keeping us all safe". Mr Brokenshire also stated that the bill was "important and necessary".[40]

In response, the Shadow Home Secretary, Nick Thomas-Symonds, agreed the work of CHIS should be on a "statutory footing" because that would "allow for the necessary and robust safeguards" that he said the Opposition would be pressing for. Mr Thomas-Symonds also noted several concerns with the bill.[41] These were as follows:

- First, the Government needed to be "clear" about what would be within the scope of the framework for the authorisations for participation in criminal conduct, such as in the interests of the economic wellbeing of the United Kingdom. Mr Thomas-Symonds raised concerns that trade unions could be targeted.[42]
- Second, that the Government needed to justify the powers and purpose for every agency and body listed in the bill.[43]
- Third, that there was a "real need for reassurance" from the Government that the "most heinous of crimes" would not be carried out by CHIS. In addition, Mr Thomas-Symonds noted that Labour would be pushing for safeguards, particularly in relation to rape and sexual violence, and safeguards on the risk of a disproportionate impact of CHIS on black, Asian and other ethnic minority communities.[44]
- Fourth, that, at present, there was "self-authorisation" in the bill and that Labour would "press" for prior judicial oversight.[45]
- Last, that although the Investigatory Powers Tribunal had the jurisdiction to determine complaints against public authorities' use of investigatory powers, it was "not the same" as a civil claim. Mr Thomas-Symonds noted that Labour would be "pressing" the Government on this in committee.[46]

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[40] HC *Hansard*, 5 October 2020, col 663.
[41] ibid, col 668.
[42] ibid, col 665.
[43] ibid, col 666.
[44] ibid.
[45] ibid, col 668.
[46] ibid, col 669.

Despite these concerns, Mr Thomas-Symonds stated that Labour would not be opposing the passage of the bill at second reading. Instead, Labour would seek to "improve" the bill in committee on the issue of safeguards and would "look to press" the Government on its position.[47]

Speaking on behalf of the Scottish National Party (SNP), Richard Thomson, the party's spokesperson for business and industry, contended that although there were "principles inherent to the bill" that the SNP could support, such as the law being broken, in certain circumstances, to prevent more serious harm from taking place, there were "outstanding concerns". He said this meant that the SNP could not support the bill at this stage. His concerns included: self-authorisation; the scope of the "illegality being authorised" or rendered lawful for all purposes; and a lack of redress for innocent people impacted by criminal conduct activities.[48]

The chair of the House of Commons Home Affairs Committee, Yvette Cooper, also raised concerns. She asked the minister to "look again" for potential amendments to the bill on authorisation and oversight, in addition to strengthening the measures on Investigatory Powers Commissioners.[49] In response, Mr Brokenshire stated that he believed the bill provided "strong oversight and governance" but said he would "continue to reflect" on the subject.[50]

Julian Lewis, the chair of the Intelligence and Security Committee of Parliament (ISC), welcomed the principles behind the bill to place existing powers to authorise criminal conduct, in certain circumstances, on to an "explicit statutory basis". Turning to CHIS participating in criminal activity, Mr Lewis called on MPs to "not seek too much specificity" in later stages of the bill's progression in Parliament about what criminality would meet the standards of necessity and proportionality. He argued that preventing agents undercover in a criminal enterprise from engaging in a "specified checklist of possible crimes" would make their "unmasking and potential execution very much more likely".[51] Mr Lewis also stated that the ISC would possibly be tabling at least one amendment relating to accountability and oversight by the ISC at a later stage in the bill's proceedings.[52]

Closing the debate, the Solicitor General, Michael Ellis, responded to some of the issues raised. Addressing concerns over safeguards and oversight, Mr Ellis stated that the code of practice set out that there "does need to be a reasonable belief that an authorisation is necessary and proportionate" before an authorisation is granted and that all authorising officers must be "appropriately trained". The Solicitor General also noted that the Investigatory Powers Commissioner could identify if any public body was failing to train its officers or assess them to a high standard. He also stated that the commissioner was independent of government and had powers to support its oversight functions, including the ability to inspect all public authorities able to grant criminal conduct authorisations at a frequency of its choosing.[53]

Turning to concerns over criminal activity, Michael Ellis stated that CHIS would "never be provided with unlimited authority to commit all or any crime" or provided with authorisation that is "contrary" to the Government's obligations under the Human Rights Act 1998. Similarly, he rejected calls to

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[47] HC *Hansard*, 5 October 2020, cols 670–1.
[48] ibid, cols 672–5.
[49] ibid, col 661.
[50] ibid, col 662.
[51] ibid, col 672.
[52] ibid, col 671.
[53] ibid, cols 706–7.

create a specific list of prohibited activity in the bill, contending that it would place in the hands of criminals, terrorists and hostile states a checklist against which CHIS operatives could be tested.[54] In addition, the Solicitor General stated that it was "not the intention" of the bill to prevent trade union activity.[55]

The Solicitor General also addressed concerns surrounding the bill's impact on potential victims seeking redress. He stated that it was not the case that any or all CHIS conduct could be exempted from civil liability under the bill. Lastly, Michael Ellis discussed the need for public authorities such as the Food Standards Agency to have powers to authorise the conduct of criminal activity. He said that such authorities had "important investigative and enforcement responsibilities" and all authorities the bill covered would be subject to the same safeguards and oversight.[56]

Following second reading, a division took place for the bill to be read for a second time. This was agreed to by 182 votes to 20.[57] The bill was committed to a committee of the whole House. Although Labour had whipped for its MPs to abstain from voting at second reading, 20 of its MPs voted against the bill.[58]

Committee stage

On 15 October 2020, a committee of the whole House considered amendments to the bill. This included four amendments that were moved to a vote. All four amendments were rejected, with no changes made to the bill in committee.

A summary of the amendments voted on is detailed below:

Amendment 7: This amendment sought to insert a provision into clause 1 of the bill detailing that the granting of criminal conduct authorisations may not take place until a warrant had been issued by a judge.

Conor McGinn, the Shadow Home Office Minister, moved the amendment. Mr McGinn argued that the amendment to the bill would "provide reassurance" to those concerned that there was no independent judicial oversight of the authorisation process.[59]

Responding, James Brokenshire contended that the Government's priority was to provide public authorities with powers to keep the public safe, whilst ensuring there were "appropriate safeguards". Therefore, he did not believe that prior judicial approval "strikes that balance", and that it "risks the effective operation of that capability".[60] Mr Brokenshire further set out why the Government

[54] HC *Hansard*, 5 October 2020, col 708.
[55] ibid.
[56] ibid, col 710.
[57] ibid, cols 710–11.
[58] Dan Sabbagh, 'MI5 bill prompts rebellion by 20 Labour MPs against Starmer', *Guardian*, 6 October 2020.
[59] HC *Hansard*, 15 October 2020, col 606.
[60] ibid, col 610.

disagreed with prior judicial approval:

> Any decision on how to use a CHIS has immediate real-world consequences for that covert human intelligence source and the people around them. This requires deep expertise and close consideration of the personal strengths and weaknesses of the individual, which then enables very precise and safe tasking. These are not decisions that have the luxury of being remade. It is even more critical than for other powers that these decisions are right and are made at the right time.[61]

Amendment 7 was defeated by 317 votes to 256.[62] The amendment was voted for by MPs from Labour, the Liberal Democrats, the Scottish National Party, Plaid Cymru and the Alliance Party of Northern Ireland. It was also voted for by David Davis (Conservative MP for Haltemprice and Howden) and three independent MPs.[63]

Amendment 8: This amendment sought to insert a new subsection (8A) into clause 1, outlining that nothing in subsection 8 on the conduct authorised by an authorisation justified the following:

- causing, intentionally or by criminal negligence, death, or bodily harm to an individual;
- wilfully attempting to obstruct, pervert or defeat the course of justice;
- violating the sexual integrity of an individual;
- subjecting an individual to torture or treatment within the meaning of the convention against torture;
- detaining an individual; or
- causing the loss of, or any serious damage to, any property if doing so would endanger an individual's safety.

Conor McGinn also moved amendment 8. Mr McGinn argued that the amendment sought to set specific limits on what would constitute criminal conduct in the bill to make "it clear that nothing […] justifies murder, torture, sexual violence and other serious offences that would harm people". As part of this, he contended that although the bill was "explicit" that the Human Rights Act was "applicable in all circumstances", Labour wanted the bill to "go further". Mr McGinn also spoke about similar legislation in Canada and the US, which has "clear limits" on what crimes their agents can become involved in. Therefore, he stated that the amendment would set out "clear legal limits" in the bill to ensure that "there can be no ambiguity".[64]

Addressing placing limits on certain crimes conducted by sources, James Brokenshire reiterated what he had stated at second reading. He said that placing such limits on these crimes risked "creating a specific list of prohibited activity" that would create a "checklist" for criminals, terrorists and hostile states. Turning to similar legislation in Canada and the US, the minister noted that neither country were signatories to the European Convention on Human Rights and that the UK was the only member of the Five Eyes intelligence group that was "bound" by the Convention and its obligations. Consequently, he said that the Government could not accept the amendment.[65]

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[61] HC *Hansard*, 15 October 2020, col 610.

[62] ibid, cols 616–9.

[63] ibid.

[64] ibid, col 607.

[65] ibid, col 613.

Amendment 8 was defeated by 316 votes to 256.[66] Similar to amendment 7, it was voted for by MPs from Labour, the Liberal Democrats, the Scottish National Party, Plaid Cymru and the Alliance Party of Northern Ireland. It was also voted for by David Davis.[67]

Amendment 16: This amendment sought to limit the authorities that can grant criminal conduct authorisations to the police forces, the intelligence services, the National Crime Agency and the Serious Fraud Office.

Alistair Carmichael, the Liberal Democrat home affairs spokesperson, moved amendment 16. During committee, Mr Carmichael said his amendment would seek to reduce the list of bodies able to grant authorisations. He contended that the need for extra bodies to be given authorisation under the provisions of the bill had "never been properly explained" by the Government and that their inclusion "demeans the seriousness of those acts, especially by the security services, the police and the Serious Fraud Office" that could be required to use them in "very difficult circumstances".[68]

Amendment 16 was defeated by 311 votes to 65.[69]

New Clause 4: This amendment sought to prevent criminal conduct authorisations from being applied to trade unions by limiting where authorisations could apply. Bell Ribeiro-Addy (Labour MP for Streatham) moved the amendment.

During committee, Ms Ribeiro-Addy stated that it was "important" to "explicitly remove" trade unions and blacklisting activity from the bill. She explained that MPs "cannot and will not simply accept the Government's assurances" that trade unions would not be targeted by CHIS activity, and that trade unions were "absolutely right" to be alarmed. She also noted that since 1968, over 3,000 trade unionists had been blacklisted, over 1,000 organisations had been "spied on" by undercover police, and tens of thousands of "ordinary" citizens had files held on them by Special Branch.[70]

Responding to the amendment, the minister noted that he wanted to "re-emphasise" what he had said at second reading. He stated the bill "does not prevent legitimate and lawful activity" by trade unions, which he argued was "precisely what trade unionism is all about".[71]

The amendment was defeated by 314 votes to 255.[72] As with amendments 7 and 8, this amendment was also voted for by MPs from Labour, the Liberal Democrats, the Scottish National Party, Plaid Cymru and the Alliance Party of Northern Ireland. It was also voted for by David Davis.

Report stage and third reading

Following the committee stage, the bill was reported without amendment. A division took place on the bill being read for a third time, which was agreed to by 313 votes to 98. Consequently, the bill

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[66] HC *Hansard*, 15 October 2020, cols 620–4.
[67] ibid.
[68] ibid, cols 572–3.
[69] ibid, cols 625–7.
[70] ibid, col 576.
[71] ibid, col 614.
[72] ibid, cols 628–31.

was read the third time and passed to the House of Lords.[73]

3.2 Other parliamentary reaction

The Intelligence and Security Committee of Parliament (ISC) welcomed the introduction of the bill. In a statement, it said that it "strongly support[s]" the principle behind the legislation. However, it also argued that such authorisations for conducting criminal activity detailed in the bill must be "properly circumscribed, used only where necessary and proportionate, compatible with the requirements of the Human Rights Act, and subject to proper scrutiny".[74]

Lord Macdonald of River Glaven (Crossbench), who served as director of public prosecutions from 2003–08, has expressed concerns that the bill "misses the chance" to set limits on what crimes could be authorised. Writing in the *Times*, Lord Macdonald argued that the bill should exclude "heinous acts", a provision which he explained was in a similar Canadian law. In addition, Lord Macdonald called for independent warrants to be issued by "judges or some other authority" prior to any crimes taking place, arguing that, under the bill, "it will be easier for a police officer to commit a serious crime than to tap a phone or search a shed".[75]

On 15 October 2020, Dan Carden (Labour MP for Liverpool Walton) and Margaret Greenwood (Labour MP for Wirral West) resigned from their respective opposition frontbench roles after the party had whipped for its MPs to abstain from voting at second reading in the House of Commons.[76] In a letter to Keir Starmer, the leader of the Labour Party, Mr Carden said that:

> On this occasion I am resolute that as a matter of conscience I must use my voice and my vote on behalf of my constituents to object to legislation that sets dangerous new precedents on the rule of law and civil liberties in this country.[77]

On the same day, Ms Greenwood published a statement on her personal Twitter account outlining that she had planned on voting against the bill at committee stage "as a matter of principle" and would therefore be resigning from her position on the Labour front bench.[78]

3.3 External reaction

MI5 and several law enforcement authorities have welcomed the bill. Ken McCallum, the director general of MI5, described the powers in the bill as "vital" so that MI5 can "continue to meet our duty to keep the public safe".[79] Similarly, Graham McNulty, the National Police Chiefs' Council's CHIS lead, stated that the bill would "ensure policing can continue to deploy this vital tactic against the most harmful offenders".[80]

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[73] HC *Hansard*, 15 October 2020, cols 632–4.

[74] Intelligence and Security Committee of Parliament, *Statement on the Covert Human Intelligence Sources (Criminal Conduct) Bill*, 24 September 2020, p 1.

[75] Lord Macdonald of River Glaven, 'Government must not give green light to lawbreaking', *Times* (£), 5 October 2020.

[76] Dan Sabbagh and Heather Stewart, 'Two Labour frontbenchers quit over failure to oppose MI5 bill', *Guardian*, 15 October 2020.

[77] Ronan Burtenshaw, 'Dan Carden Resigns from Labour Frontbench over CHIS Bill', *Tribune Magazine*, 15 October 2020.

[78] Margaret Greenwood, 'Personal Twitter Account', 15 October 2020 (accessed 19 October 2020).

[79] Home Office, 'New legislation protects national security capability to fight serious crime', 24 September 2020.

[80] ibid.

However, many rights organisations have expressed concern about the legislation. In October 2020, Reprieve, the Pat Finucane Centre, Privacy International and the Committee on the Administration of Justice—the four claimants in the 'third direction' case— published a joint response to the bill. In their response, the organisations noted that the bill represented a "belated recognition" that regulating the permitted conduct of CHIS "must be set up by a formal legislative footing". However, although welcoming legislation in this area, the organisations expressed "serious concerns" about the content of the bill.[81] These concerns were that the bill:

- places no express limits on the types of crimes which can be authorised, unlike similar arrangements in the United States and Canada. The organisations note that there is no express prohibition on authorising crimes which constitute human rights violations, such as murder, torture, kidnap, sexual offences or conduct that would interfere with the course of justice;
- relies on the Human Rights Act as a "safeguard", despite the ECHR memorandum for the bill revealing that the Government "does not believe" that the act "applies to abuses committed by its agents";
- renders authorised criminal offences committed by CHIS as "lawful for all purposes", which would "bypass the independent decision-making of prosecutors" as to whether the prosecution of a CHIS would be in the public interest;
- is "weaker" on its arrangements for authorisation oversight and post-operational accountability than for either phone tapping or searches by law enforcement, despite the conduct involved being "potentially far more harmful"; and
- bars survivors of abuses from such conduct, for example, the victims of the 'Spy Cops' scandal, from seeking redress through the courts and protecting those who commit authorised crimes from civil liability.[82]

In addition, Kate Wilson, who was in a false relationship with an undercover police officer for 12 years, criticised the bill. In an interview for the *Independent*, Ms Wilson stated that there was "nothing" about the authorisation process that gave her "confidence". Instead, she argued that "we have this very strange act that lumps together what a tax inspector can do alongside an MI5 agent, with civilian informants" and that the bill allowed the Government to "use the national security argument" to justify a "whole load of things where it's not in any way engaged". Consequently, Kate Wilson called for the bill to be delayed until the end of the UCPI and relevant court cases and argued that the Government should have approached women "deceived" by undercover officers and the family of Patrick Finucane.[83]

Read more

- House of Commons Library, *Covert Human Intelligence Sources (Criminal Conduct) Bill 2019–2021*, 2 October 2020
- Home Office, 'Covert human intelligence sources: draft code of practice', 1 October 2020; *Covert Human Intelligence Sources Bill Factsheet*, 1 October 2020; and *Covert Human Intelligence Sources: Draft Revised Code of Practice*, September 2020

[81] Reprieve, *Briefing for Second Reading of the Covert Human Intelligence Sources (Criminal Conduct) Bill*, October 2020, p 1.
[82] ibid.
[83] Lizzie Dearden, 'Mark Kennedy victim warns 'spy cops' law will not prevent future abuses by undercover agents', *Independent*, 17 October 2020.