



Joint Briefing on the Covert Human Intelligence Sources (Criminal Conduct) Bill For Report stage, House of Lords (11 January 2020)

Summary

The Centre for Women's Justice, End Violence Against Women, the Faith and VAWG Coalition, FiLiA, the Latin American Women's Rights Service, Rights of Women, Standing Together and Women's Aid urge peers to resist the dangerous and unfettered powers outlined in this Bill, and to call for:

- Limits to the offences which can be authorised under the Bill (see the amendment to clause 1 laid by Baroness Massey of Darwen and Lord Dubs)
- The introduction of a robust oversight scheme (see the amendment to clause 1 laid by Lord Dubs and Baroness Massey of Darwen)
- Retained routes of redress for victim survivors, through criminal and civil justice processes (see the amendment to clause 1 laid by Baroness Chakrabarti, Baroness Ritchie Of Downpatrick and Lord Paddick)

The Bill

The Covert Human Intelligence Sources (Criminal Conduct) Bill, which has raised concerns on all sides of the House, seeks to introduce a statutory basis for undercover operatives to commit criminal offences in the course of their deployment.

This is not a new capability. An internal Security Service policy, shrouded in secrecy and revealed only by the 'Third Direction' case which challenged its lawfulness, previously guided such decisions. In December 2019 the Investigatory Powers Tribunal issued a divided ruling over the legality of the policy, with a 3-2 split of judges ruling in the Government's favour. There is ongoing legal action, with the ruling now subject to challenge before the Court of Appeal.¹

This Bill will enable an extensive list of thirteen state agencies² to authorise a Covert Human Intelligence Source (CHIS) to commit criminal offences if 'necessary' for: (a) the interests of

¹ <https://caj.org.uk/wp-content/uploads/2020/10/CHIS-Criminal-Conduct-Bill-Briefing-for-Second-Reading.pdf>

² Police forces, the intelligence services, the armed forces, revenue and customs, government departments including the Home Office, Ministry of Justice and Department for Health and Social Care, and other bodies including the Competition and Markets Authority, the Environment Agency, the Financial Conduct Authority, the Food Standards Agency and the Gambling Commission.

national security; (b) preventing or detecting crime or preventing disorder; or (c) in the interests of the economic well-being of the UK.

Severe concerns have been raised about the scope of the proposed legislation, including:

- The failure to place any limits on the types of criminal offence that may be authorised;
- The absence of judicial approval, with all authorisations to commit criminal offences being provided internally;
- The failure to ensure access to justice for victims

This briefing sets out our concerns with regard to these issues and the impact of this legislation on victims of violence against women and girls.

We also encourage peers to make reference to the powerful report from the Joint Committee on Human Rights (JCHR), which highlights further the dangers posed by this Bill.³ At the time of writing, the Government had not responded to the JCHR's report, with a response due by 10 January 2021.

Limits to criminal offending

The Bill does not define or limit what types of criminal offences might be authorised - unlike comparable legislation in Canada⁴ and the US.⁵ We are deeply concerned that the legislation will provide the undercover agents with a lawful basis to undertake serious forms of violence against women and girls – including rape, sexual violence and torture – without fear of prosecution.

There is a disquieting history of women's rights being abused in the course of covert intelligence operations. This Bill legislates for those who perpetrate violence against women in this context to be above the law, and will inevitably provide cover for future instances of offending which result in deeply traumatic consequences for the deceived.

For example, undercover officers in the Metropolitan Police's Special Demonstration Squad and the National Public Order Intelligence Unit were found to have committed serious sexual assaults during operations. An internal inquiry in 2014 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*" and that such activity indicated an "*abject failure of the deployment, a gross abuse of their role and position as a police officer, and an individual and organisational failing.*"⁶

The women who experienced such appalling violations of trust have stated that these relationships, based on deep-rooted deception, "*feel like rape*"⁷ – and that they have been abused not only by individuals, but by the government agencies which condoned these practices. At committee stage in the House of Lords, Lord Hendy drew attention to "*the systematic abuse of women, over 30 of whom were groomed into having sexual and intimate relationships with men with fake identities... This was not a tactic devised by a couple of rotten apples; it was conduct reported to those in charge and clearly authorised by them.*"⁸

The Government argue that the obligation on public authorities to comply with the Human Rights Act 1998 (HRA), which gives effect to the European Convention on Human Rights, will

³ <https://committees.parliament.uk/publications/3339/documents/32164/default/>

⁴ <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>

⁵ <https://fas.org/irp/agency/doi/fbi/chs-guidelines.pdf>

⁶ https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/priorities_and_how_we_are_doing/corporate/operation-herne---report-2-allegations-of-peter-francis-operation-trinity

⁷ <https://www.bbc.co.uk/news/uk-wales-47240670>

⁸ [https://hansard.parliament.uk/Lords/2020-11-24/debates/5DB3DCC4-B6B1-45BC-9B2D-19EF301991DA/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/Lords/2020-11-24/debates/5DB3DCC4-B6B1-45BC-9B2D-19EF301991DA/CovertHumanIntelligenceSources(CriminalConduct)Bill), Column 165

be sufficient to prevent the powers contained in the Bill being used to authorise serious abuses of power. As a briefing⁹ by Reprieve, Privacy International, the Pat Finucane Centre and the Committee on the Administration of Justice (CAJ) makes clear, this is a false assurance. The HRA cannot be considered a sufficient safeguard given that the Government has repeatedly argued that the HRA does not apply to crimes committed by its covert agents.¹⁰ If the Government does intend for the HRA to protect the right to life and the right to freedom from torture, inhumane or degrading treatment in this context – as it should – it stands to reason that protection from these offences should be made robustly clear on the face of the Bill.

We urge peers to support the amendment to clause 1 laid by Baroness Massey of Darwen and Lord Dubs, which outlines clear limits on the criminal offences which can be authorised under this law. This must include a prohibition on the authorisation of crimes perpetrated against women and girls – including murder, grievous bodily harm, torture and sexual offences. We would also encourage peers to call for the prohibition on coercive and controlling behaviour.

Authorisation

We are concerned by the low threshold for authorising criminal offences – particularly where “*necessary to prevent crime or disorder*”. The Bill requires the criminal activity authorised “*must be proportionate to the aim to be achieved*”, but this will not be independently assessed or approved.

The Bill includes no system of warrants or independent judicial authorisation of crimes – which means the system by which serious crimes are approved is even weaker than current arrangements for interception (i.e. phone tapping or search warrants).

We are alarmed by the wide range of agencies who will be permitted to exercise these powers – which go far beyond the intelligence services and include the Home Office, Department for Health and Social Care, the Ministry of Justice and a range of government agencies.

We urge peers to support the amendments to clause 1 laid by Lord Dubs and Baroness Massey of Darwen, which require prior judicial approval for criminal conduct authorisations. We support recommendations for a robust oversight regime to ensure that crimes authorised are done so independently of the state agencies listed in the Bill, and that the use of these powers is monitored and reported on transparently. Any such process must consider the protection of the rights of women, with particular care taken to protect the rights of migrant women.

Access to justice

The Bill will make authorised criminal offences committed during undercover operations “lawful for all purposes”. As Reprieve, Privacy International, the Pat Finucane Centre, and the CAJ make clear¹¹, this effectively means that those committing authorised offences will have full civil and criminal immunity. The Bill will remove the ability to bring independent prosecutions where it is in the public interest to do so.

At report stage in the House of Lords, Baroness Jones of Moulsecoomb observed that:

“...the Bill hugely expands the state’s ability to authorise criminal conduct and grant legal immunity to criminals. It is worrying that criminal conduct will go unpunished because of the Bill, but also, as several noble Peers have already mentioned, that the

⁹ <https://caj.org.uk/wp-content/uploads/2020/10/CHIS-Criminal-Conduct-Bill-Briefing-for-Second-Reading.pdf>

¹⁰ <https://caj.org.uk/wp-content/uploads/2020/10/CHIS-Criminal-Conduct-Bill-Briefing-for-Second-Reading.pdf>

¹¹ <https://caj.org.uk/wp-content/uploads/2020/10/CHIS-Criminal-Conduct-Bill-Briefing-for-Second-Reading.pdf>

victims of these crimes will have no legal rights. They are left by the Government as collateral damage, which we have again seen in the spy cops inquiry. We have seen just how badly people have been harmed by undercover policing: innocent women's lives ruined, children fathered by police officers using fake identities who then run off and avoid all their parental responsibilities because they have another family elsewhere who they want to go back to, and people betrayed by state agents."¹²

In addition, the Bill would bar civil redress for victims of authorised crimes. Survivors of sexual assault by police officers have rightly sought justice for the abuses of power they have experienced – and some have received financial compensation as a result – but the Bill would deny victims from making civil claims. There is also a lack of clarity as to whether victims are barred from seeking compensation under the Criminal Injuries Compensation Scheme.

We urge peers to support the amendment to clause 1 laid by Baroness Chakrabarti, Baroness Ritchie Of Downpatrick and Lord Paddick, which preserves the current legal status quo whereby those authorised to engage in criminal conduct are not rendered immune from either civil or criminal liability. Instead, compliance with an authorisation will be relevant to any public interest consideration to prosecute, any existing legal defences, and any court considerations as to civil liability and/or damages. We call on the Government to ensure that victims of crimes committed by CHIS can continue to access criminal and civil redress, including access to the Criminal Injuries Compensation Scheme.

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¹² [https://hansard.parliament.uk/Lords/2020-11-24/debates/5DB3DCC4-B6B1-45BC-9B2D-19EF301991DA/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/Lords/2020-11-24/debates/5DB3DCC4-B6B1-45BC-9B2D-19EF301991DA/CovertHumanIntelligenceSources(CriminalConduct)Bill), Column 161