

# BIG BROTHER WATCH

BRIEFING: COMMITTEE STAGE 15TH OCTOBER 2020

## COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL

- 1. We urge Members to vote against the Covert Human Intelligence Sources (Criminal Conduct) Bill (“CHIS Bill”). The Bill is unnecessary, unconscionable and unconstitutional.**
- 2. We urge the Government to withdraw the Bill** to allow for due consideration of the evidence and findings of the Mitting Review, or at the very least to make substantial amendments to the Bill to meet the concerns outlined in this summary briefing.

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- 3. The Bill is being unacceptably rushed through Parliament.** It was introduced into the House of Commons on the 24 September 2020 and is scheduled to complete passage in the Commons on the 15<sup>th</sup> October.<sup>i</sup>
- 4. An unnecessarily broad range of public authorities would be able to authorise criminal offences** - from MI5 and police forces to the Department of Health and even the Food Standards Agency. The Bill seeks to amend Part II of the Regulation of Investigatory Powers Act 2000 (RIPA) to authorise agents (“CHIS”) to commit offences under a new process of ‘Criminal Conduct Authorisations’.
- 5. Offences could be committed even in the interests of “economic wellbeing”** - an excessive purpose that is susceptible to interpretations implicating legitimate trade union activity.
- 6. The claim in the Explanatory Notes that the Bill puts “existing practice on a clear and consistent statutory footing” is wrong.** The Bill would in fact ‘legalise’ even serious crimes by covert agents, rendering authorised criminal offences ‘lawful for all purposes’. This would bypass the independent decision-making of prosecutors as to whether the prosecution of a CHIS is in the ‘public interest’, as is currently the case.
- 7. The Bill would end the separation of powers.** When CHIS criminality has taken place, the independent assessment of prosecutors is essential in determining whether prosecution of a CHIS is in the public interest. But this Bill would not only bypass prosecutors entirely, it would give state agencies the

unprecedented power to declare serious breaches of UK law 'lawful for all purposes', merely provided the agent was authorised under a 'Criminal Conduct Authorisation'.<sup>ii</sup> As such, the Bill would dramatically erode the separation of powers and deprive independent prosecutors of their ability to prosecute serious criminal conduct where it is in the public interest to do so.

- 8. There is no prohibition on the powers in the Bill being used to authorise children to commit serious crimes as CHIS.**
- 9. Unlike the US<sup>iii</sup> and Canada<sup>iv</sup>, the Bill places no express limits on the types of crimes that can be authorised – not even murder, torture, or sexual offences.**

The Government claims that to set express, public limits on the crimes covert agents can commit would enable the groups they infiltrate to set 'tests' to determine whether they are a CHIS. However, the Government also argues that the Human Rights Act provides limits by precluding torture or murder – so it is unclear why the Government refuses to exempt such unconscionable offences on the face of the Bill. Former Director of Public Prosecutions Lord Ken Macdonald expressed scepticism that "crooks need a checklist in a statute to know that an undercover police officer won't kill to order" and advised that "Ministers should peel their eyes away from The Sopranos."<sup>v</sup>
- 10. The Government wrongly claims the Human Rights Act is a sufficient safeguard,** because the Government has also taken the (fundamentally wrong) position that the HRA does not apply to CHIS crimes. It claimed in the IPT that "the state, in tasking the CHIS... is not the instigator of that activity and cannot be treated as somehow responsible for it...it would be unreal to hold the state responsible."<sup>vi</sup> This worrying position is repeated in the Human Rights Memorandum published with the Bill, which claims "there would not be State responsibility under the [ECHR] for conduct where the intention is to disrupt and prevent that conduct, or more serious conduct, (...) and/or where the conduct would take place in any event."<sup>vii</sup> On this analysis, an informant could be authorised to actively participate in a shooting on grounds that the perpetrator intended to disrupt crime or that the shooting 'would take place in any event'. This cannot be right.
- 11. The Bill would provide the power to authorise CHIS to commit crime outside the UK as well.** Section 27(3) of RIPA states that conduct authorised under Part 2 of that Act, to which this Bill relates, "includes conduct outside the United Kingdom". This would leave it open to authorities including MI6 and the MOD to authorise CHIS to commit potentially very serious crimes abroad. It took nearly two decades to reveal the UK's involvement in torture and rendition overseas during the "war on terror", with much of what took place still not fully known. It

is highly likely that criminal conduct overseas authorised under this Bill would not be revealed for many years, if ever. Furthermore, given the Government has sought to limit the extra-territorial application of the ECHR and HRA, it would likely argue that where a CHIS gets involved in even serious abuses such as torture or murder abroad, human rights protections would not apply.

**12. The Bill's proposed authorisation and oversight arrangements are notably weaker than those for lesser covert interference** such as phone tapping, despite involving potentially far more harmful conduct.

**13. The Bill bars victims of CHIS abuses from seeking redress** through the courts, by protecting those who commit authorised crimes from civil liability forever. We note that this Bill is passing through the Commons in the same week that survivor of a long-term undercover police relationship, Kate Wilson, is bringing a claim in the IPT.

**14. CHIS crimes have perpetuated conflict and rights abuses.** The consequences of using paramilitary informants outside of the law during the Northern Ireland conflict "needlessly intensified and prolonged" the conflict.<sup>viii</sup> Security force intelligence practices of facilitating and even directing serious crimes by informants fuelled the conflict, damaged the rule of law, and have left a poisoned legacy. In 1989, Belfast lawyer Pat Finucane was shot fourteen times in front of his family. It emerged that the Loyalist group responsible had been infiltrated by British intelligence. Following a review of the killing in 2012, then-Prime Minister David Cameron admitted there had been "shocking levels of state collusion" in Mr. Finucane's murder.<sup>ix</sup> Further, the ongoing 'Spy Cops' scandal revealed widespread involvement of police officers committing serious sexual assaults as part of their undercover work, and subsequent investigations. 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".<sup>x</sup>

**15. This would roll back key reforms of the Northern Ireland peace process.** The independence of decision making by the DPP has been a cornerstone of the justice reforms of the Northern Ireland peace process. The Criminal Justice Review that flowed from the Good Friday Agreement recommended that legislation should "confirm the independence of the prosecutor."<sup>xi</sup> This Bill risks reversing reforms in one of the most controversial areas of prosecutorial policy. Furthermore, Scotland has maintained for hundreds of years an independent criminal justice system, which risks being bypassed by the authorisation process in the Bill.

## International divergence

**16.** The UK's approach stands in contrast to that of other countries, including the US and Canada - two of UK's closest 'Five Eyes' intelligence partners.

**17.** Canadian Parliament prohibited the following offences:

- a) causing, intentionally or by criminal negligence, death or bodily harm to an individual;
- b) wilfully attempting in any manner to obstruct, pervert or defeat the course of justice;
- c) violating the sexual integrity of an individual;
- d) subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of the Convention Against Torture;
- e) detaining an individual; or
- f) causing the loss of, or any serious damage to, any property if doing so would endanger the safety of an individual.<sup>xii</sup>

**18.** Canada's intelligence service can only use their authorisation process to give agents a defence to prosecution, rather than any blanket immunity.<sup>xiii</sup>

**19.** The FBI has for many years run agents using guidelines introduced in 2006 that expressly ban certain criminal conduct. According to guidelines issued by the US Attorney General, the FBI may never authorise an informant to "participate in any act of violence except in self-defense".<sup>xiv</sup>

**20.** The oversight powers in the Bill are far weaker than those operated by the UK's intelligence partners. For example, the FBI releases details of the number of crimes committed by its agents;<sup>xv</sup> Canada publishes the nature of CHIS acts committed annually.

i <https://services.parliament.uk/bills/2019-21/covert-human-intelligence-sources-criminal-conduct.html>

ii Explanatory Notes: Covert Human Intelligence Sources (Criminal Conduct) Bill as introduced in the House of Commons on 24 September 2020 (Bill 188), paragraph 23.

iii <https://www.csmonitor.com/USA/Justice/2013/0604/Whitey-Bulger-trial-and-the-FBI-How-have-rules-about-informants-changed>

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

v <https://www.thetimes.co.uk/article/government-must-not-give-green-light-to-lawbreaking-fpp3kwrhz>

vi As stated by Government at the public hearings in the 'Third Direction' case before the Investigatory Powers Tribunals 5-6 November 2019.

vii [https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf) paragraph 16

viii In relation to the Stevens Investigations see:  
<https://www.theguardian.com/uk/2003/apr/17/northernireland.northernireland2>

ix <https://www.theguardian.com/uk/2012/dec/12/david-cameron-pat-finucane-murder>

x [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](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)

xi Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162-3 see also <https://www.legislation.gov.uk/ukpga/2002/26/section/42>

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

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

xiv <https://fas.org/irp/agency/doj/fbi/chs-guidelines.pdf>

xv <https://www.newyorker.com/magazine/2015/09/21/assets-and-liabilities> ; <https://www.dailydot.com/irl/fbi-informants-otherwise-criminal-activity-report-foia/>