

BIG BROTHER WATCH

BRIEFING: PING PONG STAGE 9TH FEBRUARY 2021

COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL

1. **We urge Parliamentarians to support Amendment B1 to Motion B, moved by Baroness Chakrabarti**, in order to support the prevention of the most egregious crimes such as rape and torture from being authorised under powers in the Bill.
2. **Unlike the USⁱ and Canadaⁱⁱ, the Bill places no express limits on the types of crimes that can be authorised – not even murder, torture, or sexual offences.** The Government has maintained a claim that to set express, public limits on the crimes covert agents can commit would enable the groups they infiltrate to set 'initiation tests' to determine whether they are a CHIS.ⁱⁱⁱ
3. **This approach stands in contrast to that of other countries, including the US and Canada** - two of UK's closest 'Five Eyes' intelligence partners. 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.^{iv}

Canada's intelligence service can only use their authorisation process to give agents a defence to prosecution, rather than any blanket immunity.^v

4. **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".^{vi} It evidently *is* possible to safely and successfully put explicit limitations on the authorised criminal conduct of CHIS – it is unjustifiable that the UK Government is unwilling to do so.
5. **It is contradictory for the Government to argue both that the limitations on CHIS criminal conduct authorisations sought by this motion amendment would put CHIS at risk of "initiation tests", and also that the very same limitations to CHIS criminal conduct authorisations already exist thanks to the Human Rights Act.** If the latter is true, it is unclear why the Government refuses to exempt such

unconscionable offences as murder and torture 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.”^{vii}

6. **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.”^{viii} 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.”^{ix} 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.
7. **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.

- i <https://www.csmonitor.com/USA/Justice/2013/0604/Whitey-Bulger-trial-and-the-FBI-How-have-rules-about-informants-changed>
- ii <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>
- iii HC Deb (27th January 2021), vol. 688, col. 425: [https://hansard.parliament.uk/commons/2021-01-27/debates/7F281927-5022-4EEF-BA93-3346DCBE174C/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/commons/2021-01-27/debates/7F281927-5022-4EEF-BA93-3346DCBE174C/CovertHumanIntelligenceSources(CriminalConduct)Bill)
- iv <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>
- v <https://laws-lois.justice.gc.ca/eng/acts/c-23/page-8.html#docCont>
- vi <https://fas.org/irp/agency/doj/fbi/chs-guidelines.pdf>
- vii <https://www.thetimes.co.uk/article/government-must-not-give-green-light-to-lawbreaking-fpp3kwrhz>
- viii As stated by Government at the public hearings in the 'Third Direction' case before the Investigatory Powers Tribunals 5-6 November 2019.
- ix [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