INSTITUTE for CONSTITUTIONAL and DEMOCRATIC RESEARCH

# RE: COVERT HUMAN INTELLIGENCE SOURCES (CRIMINAL CONDUCT) BILL 2019-2021

---

***INSTITUTE FOR CONSTITUTIONAL AND***

***DEMOCRATIC RESEARCH***

**BRIEFING**

---

## INTRODUCTION

1. The Bill amends the Regulations of Investigatory Powers Act 2000, to create a new power for government officials to authorise and confer immunity for criminal conduct by covert human intelligence sources ("**CHIS**").[1] In doing so it substantially expands the unaccountable and coercive power of the state. The executive has failed to justify the necessity of such power (which are unprecedented in advanced democracies).

***Key Points***

(1) The powers in the Bill are new. It is wrong to say they simply put existing practice on statutory footing. They are broader than any previously exercised (or approved by a court) and include a new power to confer legal immunity.

---

[1] The Bill has been analysed in detail by both the House of Commons Library and in a joint briefing by Reprieve, Privacy International, the Pat Finucane Centre, the Committee on the Administration of Justice, and Rights and Security International. I have reviewed both of these documents and agree with their conclusions. Rather than repeat their analysis, this briefing covers points not addressed in those documents.



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.

(2) The Bill removes the legal safeguards that usually apply to powers exercised by the executive.

(3) The Human Rights Act 1998 will not provide an appropriate safeguard.

(4) The Bill will likely put the UK in violation of international law.

## ANALYSIS

### Already Lawful?

2. In *Privacy International and others v Foreign Secretary and others* [2019] UKIPTrib IPT/17/86/CH ("**the Third Direction case**") the Investigatory Powers Tribunal determined that a the MI5 policy governing when officers can authorise criminality was lawful under the Security Services Act 1989. Three points arise from that case:

3. **The Bill creates a new power –** The Bill goes substantially further than the MI5 policy by providing immunity for criminal acts. If all the Bill did was to put the MI5 policy on statutory footing then it would be entirely unnecessary because, as the Tribunal found, that policy already has a statutory footing (the Security Services Act 1989). Rather, this Bill creates a new power, to confer immunity from criminal and civil prosecution for any offence. It gives the security services (and a range of other government agencies, including the Home Secretary) the power to determine when the law of the land applies and to whom.

4. This is offensive to the Rule of Law. In a democracy, that the law must apply equally to all. There is no democracy in the world in which the executive is empowered to disapply the law without stringent legal safeguards (none of which exists in the Bill).

5. **The Bill waters down the test for use of the power** – The MI5 policy required a two-stage test. The Bill waters down the first stage and removes the second:



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.

(a) The first stage of the MI5 test required the authorising officer to identify the information they hoped to obtain and be satisfied that it could not be readily obtained any other way. The Bill reduces this to a broad assertion that the criminal conduct is necessary for "national security", "the prevention or detection of crime", or "the economic wellbeing of the UK". These categories are so broad as to include almost anything. The Bill could, for example, be used to authorise CHIS to assault or entrap anti-fracking protestors on the basis that they were blocking development necessary to the economic wellbeing of the UK.

(b) The second stage of the MI5 policy test required the authorising officer to assess the harm to public interest and only authorise criminal conduct once satisfied that the benefit outweighed the harm. Under the Bill the officer is only required to "consider" the question of public interest balance. This means that the officer could authorise an offence even if they concluded that the broader public interest balance did not support authorisation.

6. **The Bill authorises serious crimes** - The MI5 policy explicitly envisaged use only for relatively low-level offences (such as membership of a prohibited organisation or handling stolen goods). The Bill empowers officials to authorise and confer immunity for any crime or civil wrong. This allows ministers and civil servants to authorise the rape, torture, murder, and assault of those they consider a risk to national security, relevant to the prevention or detection of crime, or a threat to the economic wellbeing of the nation. It is worth noting that security services have, in the past year, described Extinction Rebellion[2] as a threat to national security.

[2] Dodd, V., and Grierson, J., "Terrorism police list Extinction Rebellion as an extremist ideology", The Guardian, (10 January 2020); Clarke, L., "Extinction Rebellion 'flattered' by government claim that it poses cyber threat", NS Tech, (20 September 2020)



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.

## **The Bill Removes Legal Safeguards**

7. The Bill confers effective immunity from judicial review on use of the authorisation power. The officer authorising criminal conduct is only required to "believe" that it is necessary for the purposes of national security/prevention of crime/economic wellbeing. That belief is entirely subjective. The officer could be obviously wrong but, so long as they hold the belief sincerely, their authorisation will be *prima facie* lawful and is almost impossible to challenge in court.

## **The Bill is Unnecessary**

8. There are already legal procedures in place to ensure that CHIS are not prosecuted for engaging in criminal conduct in the public interest:

   (a) The Crown Prosecution Service can only bring a prosecution where to do so is in "the public interest". This means that, even where there is sufficient evidence for a conviction, prosecutors must not proceed if it is not in the public interest. In the case of CHIS, this system ensures that their actions are evaluated by an independent prosecutor and, where they were genuinely necessary, no prosecution will be brought.

   (b) A successful prosecution requires on evidence gathering and referral by the police and security services. Given that these are the very agencies that must authorise criminal conduct, it seems highly unlikely that they would do so and then go to the trouble of gathering sufficient evidence to prosecute and then referring the offence <u>that they themselves had authorised</u> to the CPS.

9. There is an argument for putting the MI5 policy on statutory footing if, by doing so, the power is confined within clear limits and exercisable only according to clearly defined



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.

rules. This Bill does the opposite. It makes the power operational in almost any circumstances and effectively removes any enforceable limits.

## Human Rights

10. It has been argued that public bodies' statutory duty to act in accordance with the European Convention on Human Rights [**s. 6 Human Rights Act 1998**] is sufficient to ensure the powers in the Bill are only exercised within legal boundaries. This is unlikely to be the case in practice. Bringing a successful HRA claim requires the claimant to have access to sufficient information. This includes the reasoning for the decision and evidence about its impacts. The government, as a rule, refuses to disclose this sort of information about CHIS.[3]

11. The government's assertions about this Bill directly contradict the submissions it has made in court. In the Third Direction case the government argued that offences committed by CHIS would not constitute the basis for a claim against the government under the HRA. This argument is part of a concerning trend in which the government says one thing in public but the opposite when the matter comes to court.[4]

## International Law

12. The Bill will likely lead to violations of international law. The powers in the Bill allow officials to authorise murder or assassination. The right to life[5] imposes a duty on public body to (*inter alia*):

[3] For example, it is currently fighting a request to disclose information relating to the security services actions around the Birmingham Pub Bombings in 1974.

[4] Recent examples include *Vince and others v Advocate General* [2019] CSIH 51, in which the government indicated in public that it would not comply with the European Union (Withdrawal) (No. 2) Act 2019 ("**the Benn Act**") but said the opposite in court. In *Montague v Secretary of State for International Trade* FTT EA20190154 the government claimed that it could not confirm or deny the genuineness of leaked records of trade negotiations with the USA. Just two weeks earlier ministers had confirmed their genuineness on national television.

[5] Universal Declaration of Human Rights, Art. 3; International Covenant on Civil and Political Rights, Art. 6; European Convention on Human Rights, Art. 2.



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.

(a) Take adequate positive steps to protect life (including during police operations) [***McCann v United Kingdom* 21 ECHR 97 GC**];

(b) Ensure adequate investigation of any violations of the right to life (particularly where state agents may have been involved) [***Finucane v United Kingdom* ECtHR App. No. 29178/95 (1 July 2003)**]

13. Similar rules apply in respect of the prohibition on torture, right to privacy, and other international law rights.

14. The Bill gives officials the power to explicitly violate these rights. Any use of the power will, therefore, almost certainly result in adverse judgments against the UK in international courts.

SAM FOWLES

Cornerstone Barristers o.b.o.

Institute for Constitutional and Democratic Research

11 October 2020
(updated 25 January 2021)



This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they meet our analytical standards.