Covert Human Intelligence Sources (Criminal Conduct) Bill

House of Lords

Report Stage

Briefing and Endorsed Amendments

January 2021

For further information contact

Tyrone Steele, Criminal Justice Lawyer
email: tsteele@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This briefing addresses JUSTICE's serious concerns with the Covert Human Intelligence Sources (Criminal Conduct) Bill (the "Bill"), which amends Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The Bill would create an unprecedented power for public bodies (from law enforcement to the Food Standards Agency) to authorise covert operatives to commit criminal offences with impunity. Far from being highly trained in espionage, these individuals are usually ordinary members of the public, many of whom are seasoned, serious criminals. With immunity from prosecution, we are concerned that they may commit crime without restraint. Worse, the authorisation to commit crime may be wrongly given in the first place, creating victims of what may be serious crime. All the more concerning is that the Bill could authorise children and vulnerable individuals to commit criminal conduct, who may find the boundaries incredibly hard to understand. The authorisation could thrust them into dangerous or abusive situations.[1]

3. JUSTICE considers that the Government has failed to provide ample justification or evidence for many of the measures set out in the Bill, nor demonstrated the need for such an intrusive power. We are therefore not satisfied that the legitimate concerns expressed by Peers on all sides of the House have been answered. As such, JUSTICE maintains that the Bill, unamended, must fail, given the risk of serious violations of the European Convention on Human Rights, which could set the UK apart from accepted international human rights norms. JUSTICE therefore calls for divisions on the following amendments:
    a. Delete provisions granting immunity;
    b. Prohibit the use of CHIS as agents provocateurs;
    c. Prohibit CCAs for children, vulnerable individuals, and victims of trafficking; and
    d. Mandate prior judicial authorisation for CCA applications by Judicial Commissioners.

[1] This briefing follows on from our prior briefings to the House of Lords for the Bill's Second Reading and Committee Stage - https://justice.org.uk/justice-submits-a-briefing-and-suggested-amendments-to-the-lords-on-the-covert-human-intelligence-sources-criminal-conduct-bill-for-committee-stage/

Delete Provisions Granting Immunity

Endorsed Amendment

Amendment 1
Page 1, leave out line 17

and

Amendment 2
Page 1, line 19, at end insert—
"(3A) In section 27(1) of that Act (lawful surveillance etc.), at the beginning insert "Save for criminal conduct authorised under section 29B,".
(3B) After section 27(2) of that Act, insert—
"(2A) If a person acts in accordance with a criminal conduct authorisation under section 29B, the nature of that authorisation and compliance with it shall be considered and deemed relevant to—
(a) any decision as to whether prosecution for a criminal offence by that person is in the public interest;
(b) any potential defences to charges of such criminal conduct; and
(c) any potential civil liability on the part of that person, and the quantum of any damages.""

Briefing

4. As it stands, the Bill would grant immunity for any criminal act a CHIS may commit pursuant to a criminal conduct authorisation ("CCA"), as their conduct would be lawful for all purposes. This would afford CHIS, who are often ordinary un-trained members of the public, or even seasoned criminals, full protection from the consequences of any such conduct.

5. At first, the Government maintained that this was simply legislating for the status quo, despite evidence to the contrary in the form of the Security Services' Guidelines ("the Guidelines"), which have been in force since 2011. The Guidelines clearly state 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. The authorisation will be the*

Service's explanation and justification of its decisions should the criminal activity come under scrutiny by an external body."[2] Upon scrutiny, the Government has now conceded that the creation of immunity is a deliberate policy decision,[3] noting that the intention is to align the proposed CCA-granting process with other pre-existing investigatory powers, as contained in RIPA.[4]

6. JUSTICE echoes the grave concerns of many Peers, and notes that the risks of immunity are substantial. First, it could weaken a CHIS' incentive to exercise their responsibility carefully, in the absence of any legal limit. Second, it would deny victims access to civil or criminal remedies, as well as to the Criminal Injuries Compensation Authority, given CCAs render related conduct as lawful for all purposes.

7. JUSTICE recommends that the Bill's provisions relating to immunity be deleted, and replaced with a provision that would grant (i) a justification for a CHIS to commit criminal conduct and (ii) a public interest defence.[5] This would reflect the status quo, per the Guidelines, and provide a more appropriate balance between the necessity of certain law enforcement operations versus the public's legitimate expectation that CHIS, who are authorised to commit what would otherwise be criminal offences, are deterred from acting with abandon, and where necessary, held accountable for their actions.

8. The Government remains unwilling to adopt this amendment, maintaining that it is unreasonable for Authorising Authorities to task CHIS, yet leave them open to the possibility of prosecution.[6] For this reason, Ministers claim agencies have struggled to recruit and retain CHIS as they have not been able to offer them legal protection.[7]

9. However, JUSTICE considers the creation of CCAs as an excessive response to this supposed issue.[8] Instead of creating certainty for a CHIS, immunity risks placing those

---

[2] Guidelines on the use of Agents who participate in Criminality (Official Guidance), March 2011 - https://privacyinternational.org/sites/default/files/2020-07/DOC%207%20Tab%2012.pdf

[3] HL Deb (11 November 2020) Vol. 807, Col. 1045. Available here.

[4] *Ibid* and HB Deb (24 November 2020) Vol. 808, Col. 171. Available here.

[5] For JUSTICE's full briefing on these amendments, please see: https://justice.org.uk/wp-content/uploads/2020/11/JUSTICE-CHIS-Criminal-Conduct-Bill-Briefing-House-of-Lords-Committee-Stage.pdf, pages 4-6.

[6] HL Deb (24 November 2020) Vol. 808, Col. 171. Available here and HL Deb (11 November 2020) Vol. 807, Col. 1115. Available here.

[7] HL Deb (24 November 2020) Vol. 808, Col. 171. Available here.

[8] JUSTICE is not aware of any evidence, in the form of statistics or other data, that would allow a proper assessment of the significance of CHIS retention. When challenged, the Government failed to respond

individuals in more precarious situations, particularly where those individuals, who are often seasoned criminals or untrained, sometimes vulnerable, members of the public, might misunderstand, or fail to act within such parameters. This risk is particularly profound with respect to children and vulnerable individuals, who may be placed at even higher risk of exploitation, intimidation or manipulation from their handler. JUSTICE has heard from Neil Woods, a former undercover operative and CHIS handler. He informed us of the severe manipulation that occurred when trying to recruit CHIS and the emotional burden it put on him as a professional. Because of this experience, he expressed concern at the effect this would have on a child or vulnerable person. Far from creating greater certainty for CHIS, as the Government has claimed, [9] the Bill would instead create significant grey areas, where a CHIS could shoulder the blame for inadequate or improper CCAs.

10. With respect to redress in situations where members of the public are harmed by CCA-related conduct, the Government's response has been ad hoc and contradictory. It asserts that compensation is available for victims, where (i) a CCA is improperly granted or (ii) a CHIS acts outside the bounds of their CCA. The Government assures that CCAs will be tightly bound, so the circumstances in which compensation would be required are inconceivable. This is problematic in two key respects. First, there is no recourse – civil, criminal or from the Criminal Injuries Compensation Authority - for victims of properly granted CCAs, regardless of how egregious the offence. It is not difficult to envisage scenarios where this is unconscionable; for instance, where a CHIS is authorised to exceed the speed limit, and by accident kills an innocent bystander. Second, where a CHIS exceeds their CCA, even where there might be confusion as to its limits, they shall benefit from no protection whatsoever. The sole beneficiary of this policy is the State, and not the CHIS acting in good faith, as it can delegate espionage-related activities while shielded from any negative repercussions which may follow.

Prohibit the Use of CHIS as *Agent Provocateurs*

Endorsed Amendment

Amendment 11
Page 3, line 2, at end insert "; and

with any detail on lost intelligence-gathering opportunities. While this would, in any case, never provide justification for immunity, it is concerning that the Government is unable to evidence this supposed operational necessity.

[9] HL Deb (11 November 2020) Vol. 807, Col. 1045. Available here.

(d) is not carried out for the primary purpose of—
(i) encouraging or assisting, pursuant to sections 44 to 49 of the Serious Crime Act 2007, the commission of an offence by, or
(ii) otherwise seeking to discredit,
the person, people or group subject to the authorised surveillance operation."

Briefing

11. Under Clause 29(B)(5) of the Bill, an Authorising Authority could invoke a CCA for reasons of (i) national security; (ii) preventing or detecting crime, or preventing disorder, or (iii) in the interests of the economic well-being of the UK. JUSTICE considers that these criteria to be vague and unduly broad, allowing for the disproportionate use of such power. Within this context, the Bill would place no barrier against the use of agents provocateurs, which are already the source of much controversy and anguish for individuals and groups targeted.

12. It is perfectly foreseeable that a CHIS, with the benefit of a CCA, could either provoke or encourage criminal activity that otherwise would not take place. This risk is not merely hypothetical, and has occurred within more than one thousand political or trade union groups since 1968.[10] For instance, in July 2011, the Court of Appeal quashed the convictions of 20 climate change activists, following revelations that their protest group was one of a number that had been infiltrated by an undercover police officer named Mark Kennedy and that the Crown Prosecution Service had failed to disclose this at their trial.[11] Among other things, the Lord Chief Justice found that Kennedy "*was involved in activities which went much further than the authorisation he was given, and appeared to show him as an enthusiastic supporter of the proposed occupation of the power station and, arguably, an agent provocateur*".[12] The Bill, as drafted, would not prohibit CHIS, armed with CCAs, acting as *agent provocateurs* within the groups which they could target.

13. In such scenarios, due to the secrecy that would be attached to CHIS' use of CCAs, the public would likely never know the extent of the State's involvement in potentially politically charged incidents. Historic events in Northern Ireland, such as the murder of Pat Finucane

[10] Rob Evans, '*UK political groups spied on by undercover police – search the list*' (The Guardian, 13 February 2019) - https://www.theguardian.com/uk-news/ng-interactive/2018/oct/15/uk-political-groups-spied-on-undercover-police-list

[11] *R v Barkshire and others* [2011] EWCA Crim 1885.

[12] *Ibid*, paragraph 18.

in which there had been "*shocking levels of state collusion*", further demonstrate this danger.[13] JUSTICE believes that it is unacceptable to permit interference with legitimate political or trade union activities.

14. The Government, for its part, dismisses these concerns, stating that, "*they are examples from the past*."[14] Yet, in the absence of concrete legislative measures to address this concern, JUSTICE fears that the same mistakes are inevitable. This amendment seeks to ensure that this is not the case.

Prohibit CCAs for Children, Vulnerable Individuals and Victims of Trafficking

Endorsed Amendment

Amendment 12

Page 3, line 2, at end insert—

"( ) A criminal conduct authorisation may not be granted to a covert human intelligence source under the age of 18."

and

Amendment 13

Page 3, line 2, at end insert—

"(8A) A criminal conduct authorisation may not be granted in relation to a covert human intelligence source who is—

(a) a vulnerable individual, or

(b) a victim of modern slavery or trafficking.

(8B) In subsection (8A)—

a "vulnerable individual" is a person who, by reason of mental disorder or vulnerability, other disability, age or illness, is or may be unable to take care of themselves, or to protect themselves against significant harm or exploitation;

a "victim of modern slavery or trafficking" is a person who the relevant investigating authority believes is or may be a victim of trafficking as defined by section 2 of the Modern Slavery Act 2015 (human trafficking), or exploitation as defined by section 3 of

[13] 'Pat Finucane murder: *'Shocking state collusion', says PM*' (BBC, 12 December 2012) - https://www.bbc.co.uk/news/uk-northern-ireland-20662412

[14] HL Deb (1 December 2020) Vol. 808, Col. 650. Available here.

that Act (meaning of exploitation)."
and

Amendment 24

Page 3, line 16, at end insert—
"29C Criminal conduct authorisations: granting to children and vulnerable sources
(1) This section applies when the source is—
(a) under the age of 18,
(b) a vulnerable individual, as defined in subsection (5), or
(c) a victim of modern slavery or trafficking, as defined in subsection (6).
(2) No criminal conduct authorisations may be granted for a source to whom subsection (1) applies unless the authorising officer believes that exceptional circumstances apply that necessitate the authorisation.
(3) Where a criminal conduct authorisation is granted for a source to whom subsection (1) applies, the arrangements referred to in section 29(2)(c) of this Act must be such that there is at all times a person holding an office, rank or position with a relevant investigating authority who has responsibility for ensuring that an appropriate adult is present at all meetings between the source and a person representing any relevant investigating authority.
(4) In subsection (3) "appropriate adult" means—
(a) the parent or guardian of the source;
(b) any other person who has for the time being assumed responsibility for his or her welfare; or
(c) where no person falling within paragraph (a) or (b) is available and deemed appropriate, any responsible person aged 18 or over who is neither a member of nor employed by any relevant investigating authority.
(5) A "vulnerable individual" is a person who by reason of mental disorder or vulnerability, other disability, age or illness, is or may be unable to take care of themselves, or unable to protect themselves against significant harm or exploitation.
(6) A "victim of modern slavery or trafficking" is a person who the relevant investigating authority believes is or may be a victim of trafficking as defined by section 2 of the Modern Slavery Act 2015 (human trafficking), or exploitation as defined by section 3 of that Act (meaning of exploitation).
(7) The "exceptional circumstances" in subsection (2) are circumstances—
(a) where authorisation of the criminal conduct authorisation is necessary and proportionate considering the welfare of the covert human intelligence source;
(b) where, if the covert human intelligence source is under 18, the relevant investigating

authority has determined in its assessment that the criminal conduct authorisation remains compatible with and does not override the best interests of the covert human intelligence source;
(c) where all other methods to gain information have been exhausted; and
(d) where the relevant investigating authority has determined in its assessment that the source to whom subsection (1) applies will not be at risk of any reasonably foreseeable harm (whether physical or psychological) arising from the criminal conduct authorisation.
(8) Where a person grants a criminal conduct authorisation to anyone specified in subsection (1), that person must give notice of that authorisation to the Investigatory Powers Commissioner.
(9) A notice under subsection (8) must—
(a) be given in writing;
(b) be given as soon as reasonably practicable, and in any event within seven days of the grant; and
(c) include the matters specified in subsection (10).
(10) Where a person gives notice under subsection (8) in respect of the granting of a criminal conduct authorisation, the notice must specify—
(a) the grounds on which the person giving the notice believes the matters specified in section 29B(4) are satisfied;
(b) the conduct that is, or is to be, authorised under section 29B(8); and
(c) the reasons for believing that "exceptional circumstances" as set out in subsections (2) and (7) apply."

Briefing

15. It is unfortunately well established that children, vulnerable individuals and victims of trafficking are engaged as CHIS by a range of public authorities, and JUSTICE, alongside Just for Kids Law, are calling for the complete prohibition on their use.[15]

16. Despite a lack of information on how and when child CHIS' are engaged, we have been informed that their tasking is rare, with only seventeen confirmed instances between

[15] JUSTICE has set out its recommended amendments concerning children and vulnerable individuals in a joint briefing with Just for Kids Law and the Children's Right Alliance for England - https://justice.org.uk/wp-content/uploads/2020/12/JFKL-JUSTICE-CHIS-Criminal-Conduct-Bill-Joint-Briefing-on-Children-and-Vulnerable-People-HoL-Committee-Stage-Final-.pdf

January 2015 and December 2018.[16] Notwithstanding this small number, the Government continues to stress that the use of children as CHIS is necessary to prevent operations such as county lines[17] and claim that a total prohibition would place them at greater risk of being increasingly exploited by criminal gangs.[18]

17. The Minister for Security acknowledged the domestic and international obligations to safeguard the welfare of children[19] in the House of Commons, stating that "*all public authorities that task juvenile CHIS must have regard to their safety, welfare and wellbeing*".[20] The Code of Practice further states that "*[j]uveniles should only be authorised to act as a CHIS in exceptional circumstances*".[21]

18. It is, nevertheless, difficult to envisage how public authorities would fulfil their welfare obligations if they are complicit in authorising, and thereby encouraging children to commit criminal offences, no matter how 'exceptional' their use might be. Such activities can be incredibly damaging to the welfare of children and vulnerable individuals. We have heard from Neil Woods, a former undercover police officer with experience of being – and handling – CHIS, of the great emotional strain that maintaining deception can incur.

19. This could lead to severe long-term damage to a CHIS's mental health. This assessment is echoed by Dr. Eileen Vizard CBE, a child psychiatrist at University College London, who further expressed her concerns that the deployment of children as a CHIS could incur significant lasting physical and emotional damage to the child. By encouraging children to commit crimes, she explained that the State could in fact engender the creation of new criminals by placing them in criminogenic environments, where they would be exposed to morally hazardous situations and learn patterns of behaviour which ought to be discouraged, not promoted. In addition, she explained that children are not

---

[16] Home Office, 'Juvenile CHIS factsheet' (7 December 2020) - https://www.gov.uk/government/publications/covert-human-intelligence-sources-draft-code-of-practice/juvenile-accessible-version

[17] HL Deb (11 November 2020) Vol. 807, Col. 1112. Available here.

[18] HL Deb (3 December 2020) Vol. 808, Col. 938. Available here.

[19] Section 11 of the Children Act 2004 mandates that public authorities promote and safeguard the welfare of children. In addition, Article 3 UN Convention on the Rights of the Child further provides that:

> "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*."

[20] James Brokenshire MP, in HC Deb (15 October 2020). vol. 682, col. 584. Available here.

[21] Code of Practice, paragraph 4.3.

sufficiently mature to evaluate the consequences of their actions, and it would be difficult for them to act consistently within the framework of a CCA, which could further exacerbate any risk to their wellbeing. In sum, the cohort of children that are likely to be engaged as CHIS are inherently vulnerable, and due attention must be given to their specific welfare needs, which would likely be heightened through being tasked as a CHIS.

20. There are further significant concerns as to whether children and vulnerable adults can give informed consent to being a CHIS at all. We have heard that vulnerable adults, such as trafficking victims are often used to being in situations of extreme pressure and psychological control with all decision-making stripped from them. It is fundamentally harder for such victims to feel a sense of choice and not be vulnerable to pressures from authoritative bodies like the police – especially when they may still be living in an exploitative environment as a CHIS.[22]

21. It is therefore troubling that the Bill enables the granting of CCAs to children, vulnerable individuals and victims of trafficking, which could place them in dangerous or abusive situations. JUSTICE believes that CCAs for each of these groups should be expressly excluded from the Bill, as this could risk serious violations of both domestic and international law with respect to their rights.

22. At a minimum, the Government should provide in the Bill more robust 'exceptional' circumstances in which it would be appropriate for a child to be given a CCA, and how their welfare would be protected.[23] For this reason, the Government's amendments, tabled by Baroness Williams for the Bill's Report Stage, are deeply disappointing.[24] JUSTICE regrets to conclude that they would make no material difference to children tasked as CHIS. First, the amendments would make changes to secondary legislation, and provide no protections within the Bill itself. Second, despite some minor positive additions, the proposed safeguards simply mirror that which already exists in the Regulation of

[22] *See* Just for Kids Law and JUSTICE's Joint Briefing on the Covert Human Intelligence Sources (Criminal Conduct) Bill regarding children and vulnerable individuals - https://justice.org.uk/wp-content/uploads/2020/12/JFKL-JUSTICE-CHIS-Criminal-Conduct-Bill-Joint-Briefing-on-Children-and-Vulnerable-People-HoL-Committee-Stage-Final-.pdf

[23] The safeguards for the use of children as a CHIS are set out in the Code of Practice, which specifies that (1) an appropriate adult must be present at any meetings with a child under 16, and between 16-18 on a case by case basis, and (2) there must be an 'enhanced risk assessment'. We do not consider these 'safeguards' to be sufficient to mitigate against the risk of harm to a child sent out to commit a criminal act. See Section 4 of the Code of Practice - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920537/CHIS_Code_-_Bill_amendments.pdf

[24] *See* Amendments 26, 35, 38, 39, 40, 41, and 49.

Investigatory Powers (Juveniles) Order 2000 for children tasked as CHIS. Indeed, we note that the proposed definition of "exceptional circumstances" in which children may be deployed, is determined by "*the person granting or renewing the authorisation*" believing that "*the relevant risk is justified*". This supplementary test is effectively meaningless, and provides no further protection beyond what the Bill would already inadequately provide. Finally, we remain deeply concerned that the Government has failed to address Peers' significant concerns with respect to vulnerable individuals and victims of trafficking, since the Government has offered no provisions by way of adequate safeguards. For these reasons, the Government's proposal is insufficient and we call on Peers to support JUSTICE's endorsed amendment to better safeguard the welfare of children, vulnerable individuals and victims of trafficking.

Mandate Prior Judicial Authorisation for CCA Applications by Judicial Commissioners

Endorsed Amendment

Amendment 5

Page 2, line 8, at end insert—

"(1A) Authorisations granted under this section require judicial approval in accordance with section 29C."

Amendment 23

Page 3, line 16, at end insert—

"29C Approval for criminal conduct authorisations

(1) This section applies where an authorisation has been granted under section 29B.

(2) Unless the authorisation is an urgent authorisation, the authorisation has no effect until such time (if any) as a Judicial Commissioner has approved the grant of the authorisation.

(3) If the authorisation is an urgent authorisation

(a) it is effective when granted; but

(b) the authorisation ceases to have effect if it is not approved by a Judicial Commissioner in accordance with this section within 48 hours of being granted.

(4) A Judicial Commissioner may give approval under this section to the granting of an authorisation under section 29B if, and only if, the Judicial Commissioner is satisfied that—

(a) at the time of the grant the person granting the authorisation had reasonable

grounds to believe that the requirements of section 29B(4), and any requirements imposed by virtue of section 29B(10), were satisfied in relation to the authorisation;
(b) at the time when the Judicial Commissioner is considering the matter, there remain reasonable grounds for believing that the requirements of section 29B(4), and any requirements imposed by virtue of section 29B(10), are satisfied in relation to the authorisation; and (c) the authorisation granted does not authorise conduct that is incompatible with any Convention rights.
(5) A Judicial Commissioner may only give approval to the granting of an urgent authorisation if the Judicial Commissioner is also satisfied that at the time of the grant the person granting the authorisation had reasonable grounds to believe the authorisation must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised.
(6) In this section—
"Convention rights" has the meaning given in section 1(1) of the Human Rights Act 1998;
"Judicial Commissioner" has the meaning given in section 227 of the Investigatory Powers Act 2016; and
"urgent authorisation" means an authorisation under section 29B that the person granting it believes must be granted immediately to avoid loss of life or to avoid the investigation or operation referred to in section 29B(8)(c) being jeopardised (unless the need for the authorisation to be granted immediately has arisen as a result of fault by the authorising public authority)."

Briefing

23. Section 29 of RIPA provides for a public authority to authorise the use of a CHIS in essentially the same manner as that proposed for the issuance of a CCA.[25] There would be no need for authorisation from a Judicial Commissioner[26] by way of warrant, nor approval from the Secretary of State.

[25] RIPA, s.29(4A), as amended by the Policing and Crime Act 2009, which further stipulates that there will at all times be two qualifying persons who will be responsible for overseeing the source, their activities and maintain a record of their use.

[26] The Investigatory Powers Commissioner is supported by Judicial Commissioners, who are serving or retired members of the senior judiciary in the UK. They provide independent authorisation of applications for the use of certain investigatory powers by public authorities.

24. There are obvious flaws in any authorisation procedure in which the main safeguard against a public body carrying out unjustified surveillance is a senior official from the same organisation. Even the most diligent official would struggle to remain objective, particularly if the organisation is under pressure to meet targets or achieve certain results. JUSTICE considers that there are already insufficient safeguards for the creation of CHIS under the present RIPA regime and judicial approval is essential for the exercise of this new, significant power.

25. The Government claims that prior judicial authorisation is not necessary because the "*use of CHIS requires deep expertise and close consideration of the personal qualities of that CHIS, which then enables very precise and safe tasking*". Ministers have also justified their approach on the basis of the live and complex changing human elements of CHIS operations.[27] They do not consider that prior authorisations strike the correct balance between safeguards and an operationally workable power.[28] Because of this, they believe authorisations are better left to public authorities' delegated Authorising Officer who are supposedly more equipped to deal with a CHIS.[29]

26. This argument, which prioritises operational need over independent assessment, is not convincing. There is a significant difference between authorising passive CHIS observation as opposed to proactive criminal conduct. Lord Macdonald, a former Director of Public Prosecutions, agrees, stating that:

> "*There is no comfort in allowing senior figures in the police or the intelligence agencies the power to sanction lawbreaking, without the need to first obtain independent warrants from judges or some other authority*."[30]

27. JUSTICE has previously recommended prior judicial authorisation for the use of powers under RIPA to provide an additional safeguard against their abuse.[31] The benefits of judicial authorisation were recognised by the European Court of Human Rights in the case

---

[27] HL Deb (11 November 2020) Vol. 807, Col. 1046. Available here.

[28] HL Deb (1 December 2020) Vol. 808, Col. 648. Available here.

[29] HL Deb (11 November 2020) Vol. 807, Col. 1046. Available here.

[30] Ken Macdonald, '*Government must not give green light to lawbreaking'*, The Times (5 October 2020) - https://www.thetimes.co.uk/article/government-must-not-give-green-light-to-lawbreaking-fpp3kwrhz

[31] JUSTICE, '*Freedom from Suspicion: Surveillance Reform for a Digital Age*', (2011), page 58 - https://www.statewatch.org/media/documents/news/2011/nov/uk-ripa-justice-freedom-from-suspicion.pdf

of *Szabó and Vissy v. Hungary*, where the Court held it offers "*the best guarantees of independence, impartiality and a proper procedure*". This is particularly pertinent with surveillance, which is "*a field where abuse is potentially so easy in individual cases*" that "*could have such harmful consequences for democratic society".* The Court concluded that *"it is in principle desirable to entrust supervisory control to a judge*".[32] Such scrutiny would be highly compelling for the potential use of CCAs.

28. Concerns about operational workability are also unmerited. We see no reason why Judicial Commissioners could not review CCAs. They are already well practised in making complex assessments of sensitive material, in an independent, detached manner and at short notice.

JUSTICE

7 January 2021

[32] *Szabó and Vissy v. Hungary* (Application no. 37138/14) [2016] ECHR, paragraph 77.