Covert Human Intelligence Sources (Criminal Conduct) Act 2021

Revised Code of Practice

Home Office

Consultation

Second Response

April 2022

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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 response addresses JUSTICE's concerns with the draft revised Code of Practice (the "**Draft Code of Practice**")[1] issued pursuant to the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (the "**Act**"), and its corresponding consultation (the "**Consultation**").[2] The Act created a new mechanism which certain Public Bodies can use, called Criminal Conduct Authorisations ("**CCAs**"). CCAs render crimes that Covert Human Intelligence Sources ("**CHIS**") commit lawful for all purposes.

3. This response follows on from the significant work that JUSTICE has undertaken in relation to the Act as it progressed through Parliament between 2020 and 2021. We remain opposed to the granting of legal immunity to CHIS who commit crimes, and consider that children and vulnerable individuals should never be deployed in this way.[3]

4. This is because the granting of CCAs inherently means that the Government is content to create victims of crime, many of whom may be incidental or completely unrelated to the investigation at hand. Indeed, the children used as CHIS are likely to be victims themselves, given the Government's acknowledgement of their role in 'county lines' operations.[4] The Government recognises the importance of placing victims at the heart of criminal justice processes. The Draft Code of Practice must be aligned to this aim, and ensure appropriate safeguards and measures are in place.

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[1] Home Office, 'Covert Human Intelligence Sources: Draft Revised Code of Practice', (December 2021).

[2] Home Office, 'Regulation of Investigatory Powers Act 2000: consultation on revised Covert Human Intelligence Source code of practice', (Updated 22 December 2022).

[3] Our previous briefings and legal analysis of the Act are available on our website. *See* JUSTICE, 'Briefings on the Covert Human Intelligence Sources (Criminal Conduct) Bill', (November 2020 – February 2021).

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

JUSTICE's Concerns with the Consultation Process

5. The Consultation was published on 13th December 2021, with a deadline of 6th February 2022, a total of eight weeks. However, the opportunity for many relevant organisations to respond was restricted by two factors. First, much of the period took place through the festive break, where many staff understandably took annual leave and/or had their offices closed. Second, the Government imposed further restrictions as a result of the Omicron variant of the Coronavirus disease. This was highly disruptive, compounded by the number of individuals who fell ill, including our own staff as well as those at other organisations. The time available to respond was therefore naturally truncated.

6. This may have been manageable where the Consultation was proactively promoted. However, this does not appear to have been the case. Despite our active engagement in the parliamentary process, we did not receive any notification of this Consultation. We have also approached other relevant organisations, including those who briefed during the Act's passage through Parliament. All were equally unaware of this Consultation. This has resulted in JUSTICE having to submit our first response shortly after the Consultation formally closed. At a minimum, we would have expected all who might have an interest in the Consultation's subject matter, especially those with whom the Home Office has engaged previously, to be invited to submit responses.

7. These procedural deficiencies mean that we are concerned that the Home Office will not have benefited from a sufficiently broad range of expertise and views. This is essential, not only for the legitimacy of the process, but also for creating well-evidenced and robust policy on a topic of immense importance. The rule of law depends on legislation and policies benefiting from proper scrutiny. We are not confident that this can be said of this Consultation. Our concern is further compounded by the fact that a failure to seek the views of such organisations was raised as a criticism of previous consultations, including that of the previous Code of Practice.[5] As a result, on 1 March 2022, JUSTICE and the Centre for Women's Justice wrote to the Home Office, encouraging the Government to adhere to both the spirit, as well as the letter, of the Government's Consultation Principles.[6] This means ensuring that every consultation receives the broadest level of engagement

[5] HL Deb (16 October 2018) Vol. 793, Col. 443. Available here.

[6] Cabinet Office, 'Consultation principles: guidance', (Last updated 19 March 2018).

from relevant stakeholders, in an open and transparent manner.[7] On 28 March and 4 April 2022 respectively, the Home Office responded, refusing to reopen the consultation but inviting JUSTICE to provide additional comments by 11 April 2022. This submission sets out our further comments on the Draft Code of Practice. We continue to invite the Home Office to specify the types of organisations that responded to the Consultation so as to give confidence that a broad range of views have been considered, especially from those who represent children and victims.

Compensation for Victims

8. The Government claims that it is "*determined to improve the service and support that victims receive – from the moment a crime is committed right the way through to their experience in the courtroom"*, and that it wants *"to guarantee that victims are at the heart of the criminal justice system*".[8] Yet, the Draft Code of Practice makes no mention of victims' rights, nor the entitlement of victims of crimes committed through a CCA to compensation pursuant to the Criminal Injuries Compensation Authority. This is provisioned at section 5 (*Criminal injuries compensation*) of the Act.

9. This is disappointing and must be rectified. This is especially so in light of the 'SpyCops' scandal where an undercover officers engaged in sexual relationships with numerous women. In one case, Kate Wilson, one of at least 10 women who Mark Kennedy (an undercover police officer) had sexual relationships with, later brought - and won - a case at the Investigatory Powers Tribunal.[9] The Tribunal found that the Police had violated five articles of the ECHR; "*a formidable list of […] violations*". It concluded that the case is not just about "*a renegade police officer who took advantage of his undercover deployment to indulge his sexual proclivities, serious though this aspect of the case unquestionably is*". Rather, "*the authorisations under [the Regulation of Investigatory Powers Act 2000] were fatally flawed and the undercover operation could not be justified as 'necessary in a democratic society' ... reveal[ing] disturbing and lamentable failings at the most fundamental levels.*"[10]

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[7] JUSTICE and the Centre for Women's Justice, 'Letter to the Rt. Hon Damian Hinds MP re the Covert Human Intelligence Sources (Criminal Conduct) Act Draft Code of Practice Consultation' (1 March 2022).

[8] Ministry of Justice, 'Delivering justice for victims: A consultation on improving victims' experiences of the justice system', (December 2021), p.3.

[9] BBC, 'Deceived activist Kate Wilson wins tribunal against Met Police', (30 September 2021).

[10] Wilson v Commissioner of the Police of the Metropolis and the National Police Chiefs' Council IPT/11/167/H, at para [17].

10. JUSTICE considers that the Draft Code of Conduct should proactively encourage Public Bodies to inform victims of actions committed through CCAs of their potential entitlements. A failure to ensure that victims have proper recourse to compensation could leave the UK in violation of Article 13 of the European Convention on Human Rights (the "**ECHR**"), which guarantees a right to an effective remedy before a national authority. Victims should not suffer additional loss due to the operational decisions of State bodies which are outside their control. We therefore recommend the inclusion of a detailed section that requires Public Bodies to inform CHIS' victims of their rights and entitlement to compensation.

Agents Provocateurs

11. 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.[11] 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 Kennedy (noted above) and that the Crown Prosecution Service had failed to disclose this at their trial.[12] 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*".[13]

12. 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 – regardless of whether they were legitimately authorised or not. Historic events in Northern Ireland, such as the murder of Pat Finucane in which there had been "*shocking levels of state collusion*", further demonstrate this danger.[14] During the passage of the Act, the Government dismissed such concerns, stating that "*they are examples from the past*".[15] However, the Undercover Policing Inquiry continues to hear evidence (seven

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[11] Rob Evans, The Guardian, 'UK political groups spied on by undercover police – search the list' (13 February 2019).

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

[13] *Ibid*, paragraph 18.

[14] BBC, 'Pat Finucane murder: 'Shocking state collusion'', says PM' (12 December 2012).

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

years after its establishment in 2015), and many victims await resolution.[16] Yet, in the absence of clear guidelines and prohibitions, JUSTICE fears that similar egregious instances are inevitable.

13. The Draft Code of Practice currently makes no mention of the risk of CHIS acting as agents provocateurs. In order to ensure that there is no doubt as to the unacceptable nature of this practice, we suggest express clarification, through including a prohibition on Public Bodies using CHIS in this way, instead focusing solely on disrupting serious criminal conduct and not legitimate political, protest and/or trade union activity.

Chapter 4 – Special considerations for certain authorisations

14. The Draft Code of Practice sets out the way in which children are deployed as CHIS. We note that children are referred to as "*juveniles*", in line with the Act. As a general point, we disagree with this terminology and consider that it risks obfuscating (and undermining) the vulnerability, needs, and specific status of children as being in need of protection and welfare, as prescribed by both domestic and international law.[17]

15. Paragraph 4.2 notes that vulnerable individuals "*should only be authorised to act as a CHIS in most exceptional circumstances*". Paragraph 4.4 states that "*Juvenile sources should only be authorised to act as a CHIS in exceptional circumstances*". Paragraph 4.11 then states that:

    "*A Criminal Conduct Authorisation can only be granted in relation to a juvenile source in exceptional circumstances. The meaning of exceptional circumstances in this context is set out in section 29C of the [Regulation of Investigatory Powers Act 2000]. In the context of participation in criminal conduct, such exceptional circumstances will only exist where there is no reasonably foreseeable harm to the juvenile as a result of the authorisation, and where the authorisation is believed to be compatible with the best interests of the juvenile.*"[18]

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[16] https://www.ucpi.org.uk/

[17] Section 11 of the Children Act 2004; UN Convention on the Rights of the Child.

[18] Section 29C(3)(b) of the Regulation of Investigatory Powers Act 2000 provides that:

"*there are exceptional circumstances such that—*

(i) it is not reasonably foreseeable in the circumstances as the person believes them to be that any harm to the juvenile source would result from the grant of the authorisation, and

(ii) the person believes the authorisation would be compatible with the need to safeguard and promote the best interests of the juvenile source".

16. The Draft Code of Practice therefore provides for three different tests for "*exceptional circumstances*". Given the inclusion of the word "*most*", the test could also be interpreted as being more stringent for vulnerable individuals as opposed to children. JUSTICE considers that these tests should be harmonised, with the most robust definition applying to both categories of CHIS given their vulnerability and the grave risk that deployment could pose to their mental and physical wellbeing.

17. Paragraph 4.3 references the protections to which children who are tasked as CHIS are entitled. It refers to the Regulations of Investigatory Powers Act (Juveniles) Order 2000 (the "**Order**"). JUSTICE notes that the protections set out in the Order are inconsistent with those provisioned in the Draft Code of Practice. For example, the Order makes no reference to the "*exceptional circumstances*" test which is present in the Draft Code of Practice. In light of the requirements of the Act, it is clear that the Order needs to be updated to take into account the new provisions and the safeguards included in the Draft Code of Practice. A failure to do so risks exposing children to unnecessary harm and fails to provide them with the legal protections and safeguards which they deserve. We call for a new Order to be laid before Parliament urgently, and in any event no later than the coming into force of the new Draft Code of Practice.

18. Paragraph 4.6, in line with the Act, specifies that children under 16 may not be used as CHIS to spy on their parents or guardians. Those above 16, however, may do so. This is inappropriate, and risks placing children at significant risk of harm. Although permitted by the Act, we consider that the Draft Code of Practice must, at a minimum, firmly dissuade Public Bodies from doing so.

19. The Act provides that children under 16 are entitled to an appropriate adult at meetings when tasked as a CHIS. However, those between 16 and 18 do not benefit from this safeguard. Instead, paragraph 4.8 provides that:

    "*The need for an appropriate adult to be present at meetings where the juvenile CHIS is 16 or 17 years of age when the meeting takes place should be considered on a case-by-case basis following an assessment of the maturity of the juvenile and their ability to give informed consent. The rationale for any decision not to have an appropriate adult present should be documented by the Authorising Officer*"

20. Children (including those over the age of 16) are inherently vulnerable in nature and possess a well-evidenced propensity to be unduly influenced by those who are in positions of authority. For example, children frequently plead guilty notwithstanding the evidence or

potential defences.[19] It is right that the law recognises this and provides specific procedures within the framework of the youth justice system to ensure that their rights are appropriately safeguarded.

21. As such, JUSTICE considers that this test for the assessment of the need of an appropriate adult is unduly restrictive. Indeed, it appears to mirror the test for Gillick Competence, which applies when determining if a child is able to consent to their own medical treatment without parental involvement.[20] This is inappropriate, and misunderstands the purpose of appropriate adults. The role of an appropriate adult is to help ensure that the child's views are considered, and to explain what is happening to them in a way that they can understand. It is not to substitute, or supplement, a deficiency in the child's "*ability to give informed consent*". In such a scenario, it is clear that the child should not be deployed at all in the first place.

22. Moreover, the Minister Baroness Williams noted that most children deployed as CHIS were 17 years old.[21] This means, in practice, most child CHIS will not benefit from an appropriate adult. The Draft Code of Practice should be amended to make clear that it is necessary for all children to benefit from the presence of an appropriate adult before deployment.

Chapter 6 – CHIS Criminal Conduct Authorisations

23. The Draft Code of Practice, at paragraph 6.1, sets out the test for when a CCA is "*necessary*".[22] Paragraph 6.6 goes on to note that:

> "*Authorisation is strongly advised where a public authority intends to task a CHIS and the activity tasked is expected to amount to participation in criminal conduct. Where there is any doubt or ambiguity around whether the proposed conduct or use of the CHIS would, or would not, involve a crime, Authorising Officers should consider whether a Criminal Conduct Authorisation is appropriate*".

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[19] *See* R Helm, 'Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection', Journal of Law and Society, Volume 48, Issue 2, pp. 179-201.

[20] Gillick v West Norfolk and Wisbech AHA [1985] UKHL 7.

[21] HL Deb (16 October 2018) Vol. 793, Col. 447. Available here.

[22] "*Under section 29B (5) of the 2000 Act, an authorisation for the criminal conduct of a CHIS may be granted by the Authorising Officer where they believe that the authorisation is necessary:*

• *in the interests of national security:*

• *for the purpose of preventing or detecting crime or of preventing disorder; or*

• *in the interests of the economic well-being of the United Kingdom.*"

24. JUSTICE considers that this is far too speculative, and that Authorising Officers should be advised to issue CCAs only where there is no alternative for achieving the operation which Authorising Officer has tasked the CHIS to undertake. The first sentence should make clear that this should only be done where there is no other way of achieving the CHIS' objective. This would serve to reiterate the test in the Act, which provides that the Authorising Officer "*must take into account… whether what is sought to be achieved by the authorised conduct could reasonably be achieved by other conduct which would not constitute crime*".[23]

25. Paragraphs 6.7 and 6.8 contain typographical errors. The second sentence of each paragraph should read "*The Criminal Conduct **Authorisation***", and not "*The Criminal Conduct **Authority***" (emphasis added).

26. Paragraph 6.15 states that:

    > "*As for use or conduct authorisations (see paragraph 5.8) an Authorising Officer must not authorise their own activities, including criminal conduct. They should also where possible be independent of the investigation*".

27. JUSTICE considers that Authorising Officers should, as a matter of best practice and proper decision-making, always be independent of the investigation. This paragraph should make clear that such independence is integral. The use of the words "*where possible*" are therefore not strong enough and should be supplemented or substituted with a clarification that this is always a requirement, unless there are exceptional circumstances.

28. Paragraphs 6.16 to 6.21 concern the role and oversight of Judicial Commissioners into the actions of CHIS. Paragraph 6.20 notes that "*there is no requirement to wait for comments from a Judicial Commissioner before commencing the activity*". While this is compliant with the Act, JUSTICE considers that this does not encourage best practice among Authorising Officers and Public Bodies. Instead, where there is doubt, concern, or expectation that the CCA will grant immunity to what would otherwise amount to serious criminal offences, it would be reasonable to request engagement with the Investigatory Powers Commissioner and/or the Judicial Commissioners as appropriate to ensure such CCA remains lawful.

[23] Section (1)(5) of the Act.

29. Paragraph 6.22 sets out the information that should be contained within an application for a CCA. JUSTICE considers that it should be made clear that this list is not exhaustive, and that Authorising Officers should be as comprehensive as possible, seeking to include all relevant information. In particular, the application should include the name of the individual making the request for the CCA, the Public Body, and any relevant information about the CHIS (e.g., including, but not limited to, age, vulnerabilities, and geographical location).

30. Paragraph 6.25 implies that CCAs may be given orally. JUSTICE considers that, in the absence of exceptional circumstances, this would amount to poor practice. This is because oral instructions may be unclear, and not allow for proper scrutiny after the fact, should any issues arise in the course of the investigation. The paragraph should be revised to make clear that CCAs should be in writing where possible. Any delay in recording the details of the CCA should also be explained.

31. Paragraph 6.30 states that:

    "*An authorisation should be cancelled as soon as reasonably practicable after the authorised conduct has been undertaken or if the conduct is no longer necessary or proportionate. The CHIS should be notified that their conduct is no longer authorised, and a full record should be kept of anything said to / by the CHIS on that issue.*"

32. The Draft Code of Practice should make it clear that where a CCA is cancelled, notification should be immediate. This is essential to ensure that any criminal offences that should not have taken place do not benefit from the immunity which the Act affords. JUSTICE therefore recommends the insertion of the word "*immediately*" into the second sentence.

33. Paragraph 6.43 sets out the information that applications for the renewal of a CCA must contain. This includes "*any significant changes to the information in the initial application*". JUSITCE considers that the word "*significant*" places too high a bar on the type of information that might have changed between the initial CCA and the application for its renewal. The Draft Code of Practice should proactively encourage Authorising Officers to be as forthcoming as possible about information that might have changed, since this may be of importance if an issue were to later arise. JUSTICE therefore recommends replacing the word "*significant*" with "*material*".

34. Paragraphs 6.45 to 6.49 concern the reporting of unauthorised CHIS criminality to the "*appropriate authority*" (presumably this is meant to include the Police, the Crown

Prosecution Service, Investigatory Powers Commissioner, and/or the Judicial Commissioners). Responsibility for this "*rests with the relevant public authority*". JUSTICE raises two concerns with this section. First, it should be incumbent on the Home Office to be clear about the procedures that each public authority should take in the face of their CHIS committing criminal offences. This should be clear on the face of the Draft Code of Practice. Second, paragraph 6.49 refers to the fact that "*must report relevant errors (for example where a CHIS is tasked to engage in criminal conduct*", giving the example of where no CCA is in place. The language belies the fact that, in reality, this would be the committing of a criminal offence; in all likelihood, a serious one. The Draft Code of Practice should make clear that where this occurs, Public Bodies must make a report immediately and without delay.

Chapter 8 – Record keeping and error reporting

35. Paragraph 8.11 defines a relevant error as "*an error by a public authority in complying with any requirements imposed by the Act which are subject to review by a Judicial Commissioner, and covert human intelligence source activity has taken place*". Paragraph 8.12 provides "*a non-exhaustive list of possible relevant errors by a public authority*".

36. JUSTICE considers that the Draft Code of Practice should, in line with our comments above, make clear that in such circumstances an "*error*" is, in reality, a (potentially very serious) criminal offence. The paragraph should also set out the obligation for the Public Body and the Authorising Officer to make a referral to the Police, the Crown Prosecution Service, Investigatory Powers Commissioner, and/or the Judicial Commissioners, as appropriate. A failure to do so risks victims of serious crime going without recourse, especially where they may not know or be aware of the assailant, and their potential entitlements to compensation from the Criminal Injuries Compensation Authority.

JUSTICE
11th April 2022