



The Covert Human Intelligence Sources Act 2021 - A dangerous affront to our civil liberties?

Susan Wright, Garden Court Chambers (Chair)

Jacob Bindman, Garden Court Chambers

Tim Baldwin, Garden Court Chambers

Laura Lazaro Cabrera, Privacy International

Kate Wilson, Activist



GARDEN COURT CHAMBERS



24 May 2021



@gardencourtlaw

Covert Human Intelligence Sources (Criminal Conduct) Act 2021

Jacob Bindman, Garden Court Chambers

24 May 2021



GARDEN COURT CHAMBERS



@gardencourtlaw

Outline of the CHIS Act 2021

- CHIS Act 2021 amends the Regulation of Investigatory Powers Act 2000 (“RIPA”) to allow Government agencies, ranging from the Intelligence Services to the Food Standards Agency, to authorise someone they are deploying as a CHIS to commit crimes “in the course of, or otherwise in connection with, the conduct of a Covert Human Intelligence Source” (s.29B RIPA 2000).
- A Criminal Conduct Authorisation (“CCA”) can only be granted if 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 wellbeing of the United Kingdom.
- It must also be proportionate to what is sought to be achieved by that conduct (s.29B(4)(b) RIPA)



Effect of a Criminal Conduct Authorisation

- Covers any criminal activity by or in relation to the CHIS, provided it is for the purposes of, or in connection with, the operation or investigation specified.
- Also covers activities that involve criminal conduct in the course of or otherwise in connection with the conduct of a CHIS and are specified in the authorisation (s.29B(8) RIPA).
- Result is that crimes committed by those in charge of the CHIS (handlers, authorising officers etc.) are authorised along with those directly committed by CHIS him/herself.
- Authorised criminal conduct will be “lawful for all purposes”.



Key Issues and Lack of Safeguards

- “lawful for all purposes” - full immunity (civil and criminal)
- No prescribed limit on what criminal conduct can be authorised (only limiter is the Human Rights Act)
- Low threshold for CCA – “prevention of disorder” (effect on the right to protest/challenge the Government etc)
- Incredibly wide range of agencies can issue a CCA – Department for Health and Social Care, Gambling Commission etc
- No requirement for Judicial authorisation for a CCA – intercept warrants etc. require judicial authorisation before they are granted
- Lack of redress – Investigatory Powers Tribunal the only option. 12 month time limit on claims & partly secret tribunal.



Why now?

- The “Third Direction Case” – *Privacy International & Ors v Secretary of State for Foreign and Commonwealth Affairs*
- Investigatory Powers Tribunal (IPT) held by 3-2 majority that a policy authorising the commission of crimes by agents working for the Security Service (MI5) was lawful. Judgment highlighted problems of having no legislation explicitly dealing with this issue and Government were concerned it may not survive an appeal.
- Court of Appeal upheld decision of IPT in March 2021 (*Privacy International v SSFCO* [2021] EWCA Civ 330). Two issues in the case:
 - Did Security Services Act 1989 (SSA 1989) give the Security Service the power to authorise criminal conduct by its agents?
 - Prior to the SSA 1989, was such a power derived from the Royal Prerogative?



The CoA Judgment

- Security Services Act 1989 is silent in relation to authorising criminal conduct. Simply says there shall “*continue*” to be a Security Service and “*The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*” (Prior to 1989 the Security Service’s governing directive referred to protection from things “which may be judged to be subversive to the State”).
- Court held the power to authorise criminality could be implied from the object and purposes of the SSA 1989. MI5 had always engaged in such activity and Parliament must have intended for it to continue.
- Prior to the SSA 1989, such activity was authorised by prerogative power which can be used to sanction illegality in certain circumstances such as times of war which, the Court found, could be equated to the national security threats MI5 have to deal with.



The Immunity Issue

- Decision that Security Service acting lawfully rested heavily on fact the SSA 1989 and the guidance on criminal conduct by agents did not grant immunity (civil or criminal). Having gone through the history of such activity and the purpose of the Security Service the Court said:

*“All this, in our opinion, further points strongly to the Security Service having, and always having had, the power, by its officers, to run agents who participate in criminality, whether possible or actual, in order to fulfil its function to protect the public: **provided that there is no immunity from criminal sanction.**”*
(§86) (emphasis added)

*“it is very difficult to see how “fundamental rights” will necessarily be “overridden” if the 1989 Act is to be interpreted as permitting the continuation of the “authorisation” of undercover agents to participate in criminality in the sense which we have explained, namely **without granting immunity from criminal or civil sanction**”* (§94)



The Scope of Criminal Conduct Issue

Sir John Donaldson MR in *Spycatcher* case had said:

“Even in the context of the work of the Security Service which, I must stress, is the defence of the realm, there must be stringent limits to what breaches of the law can be considered excusable. Thus I cannot conceive of physical violence ever coming within this category. Or physical restraint, other than in the powers of arrest enjoyed by every citizen or under the authority of a lawful warrant of arrest. But covert invasions of privacy, which I think is what Mr. Wright means by “burglary,” may in some circumstances be a different matter.” (§189)

Court in *Third Direction* case found Security Service Guidance did not just allow for any crime to be authorised:

“contrary to the submission of Mr Jaffey, there is indeed a limit to what criminality may be authorised, having regard to the necessity, public interest and proportionality requirements... There is also the very real practical limit on such decision making arising from the known risk of prosecution and from which, as the Guidance makes absolutely clear, there is no immunity, whether for handler or agent.”



Contrast with CHIS ACT 2021

- Act goes much further than MI5 guidance. Safeguard of potential threat of prosecution or civil action now entirely removed – how will fundamental rights be effectively enforced? How will victims know they are victims?
- Use of CCAs goes far beyond ‘national security’ imperative at heart of Third Direction case. Undercover Policing Inquiry revelations & Kate Wilson’s landmark IPT case.
- Authorising Officers left to determine what does/does not breach the Human Rights Act
- Extreme difficulty faced by those who were victims of authorised activity, not just unauthorised. Government presupposes authorised activity will never breach fundamental rights. Ignores substantial breaches of HRA since 2000.



CHIS ACT 2021: Code of Practice route for challenges?

Tim Baldwin, Garden Court Chambers

24 May 2021



GARDEN COURT CHAMBERS



@gardencourtlaw

Where to start? Only s 9 and 10 in force

- Inserts a Section 29B into the Regulation of Investigatory Powers Act 2000 that creates a 'Criminal Conduct Authorisation' (CCA), break the law;
- Inserts a Section 29C into the Regulation of Investigatory Powers Act 2000 that implements safeguards in instances where the covert source is under the age of 18 'juvenile criminal conduct authorisation' (JCCA);
- Inserts a Section 29D into the Regulation of Investigatory Powers Act 2000 that implements safeguards in instances where the covert source is a vulnerable adult.
- Expansion of bodies authorised;
- Disallowing criminal injuries compensation for conduct authorised under a CCA or a JCCA;
- Making it a requirement of the authorisation or cancellation of a CCA to give notice of the changes to a judicial commissioner;
- Amending the Investigatory Powers Act 2016 to give oversight of the CCA process to the Investigatory Powers Commissioner.



Code of Practice

- In January 2021 the Home Office produced Cover Human Intelligence Sources; Draft Revised Code of Practice. Described as Final
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949806/Covert_Human_Intelligence_Sources_Draft_Revised_Code_of_Practice_FINAL.pdf
- It replaces the Code from August 2018
- And at paragraph 1.2 it states “This version of the code reflects changes in the authorisation of CHIS made by the CHIS (Criminal Conduct) Act 2020”
- Although the date is wrong it is clear this draft Code was designed in anticipation of the 2021 Act being passed in 2020.
- At paragraph 1.5 it refers to examples provided being illustration, on interpretation and guidance only.



Particular issues from the Code

- Code issued under s 71 of RIPA 2000 and for use under s 29 of RIPA 2000 and use of authorisations under 29B. S 71(3) RIPA representations and laying before Parliament s71(4)-(9)
- Under the definition of a CHIS at paragraph 2.5:
“Any Police Officer deployed as a ‘relevant source’ in England and Wales will be required to comply with and uphold the principles and standards of professional behaviour set out in the College of Policing Code of Ethics.”
- Paragraph 2.14 *et seq* identifies the circumstances for authorisation and use, 2.17 gives an example of establishing use
- Paragraph 2.26 *et seq* identifies when human source becomes a CHIS
- Paragraph 3.2. *et seq* “necessity and proportionality” at 3.5



CCAs and the Code

- Paragraph 3.7 public authorities necessity and proportionality
- Paragraph 3.14 extent of authorisation
- Collateral intrusion paragraph 3.16 *et seq*
- Community Impact Assessments 3.25 – 3.26: Particular sensitivities in the local community
- Use of CHIS by Local Authorities paragraph 3.37
- Particulars issues;
 - Para 4.1 Vulnerable individuals and Annex A
 - Para 4.2 – 4.7 Juvenile sources Annex A and enhanced risk assessments
- Scotland para 4.8 – 4.9
- International – CHIS can be authorised inside and outside UL para 4.10
- Paragraph 4.15 onward: Online covert activity.
- Part 5 of the Code Authorisation criteria and procedure
- Part 6 CHIS CCAs criteria and procedure



Chapter 9 Safeguards

- Includes privileged and confidential information
- Dissemination para 9.4
- Use of material as evidence para 9.5 – 9.8
- Reviewing authorisation para 9.9 onwards
- Destruction
- Protection of the identity of a CHIS para 9.22
- Confidential and privileged material 9.26 onwards
- Legal privilege 9.49 onwards and authorisations to access 9.54 to obtain, provide and disclose matters subject to legal privilege, lawyers material at 9.66 onward
- Reporting to the commissions 9.72



Senior responsible officers and Oversight

- Chapter 10
- Senior responsible officer, 10.1
- Oversight by Commissioner 10.2
- Complaints Chapter 11



Role of risk and impact assessments

- How is compliance with the Code of Practice enforced
- Particular concern about use of vulnerable adults and juveniles
- Annex A
- How would anyone ever know?
- Errors 8.8 – 8.16
- Serious errors 8.17 – 8.20 s 231 of 2016 Act
- Role of Investigatory Powers Tribunal – Complaint
- Oversight by the courts?



Thank you

020 7993 7600

| info@gclaw.co.uk

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



GARDEN COURT CHAMBERS
