



Home Office

Regulation of Investigatory Powers Act 2000:

Government response to Home Office
consultation on the draft revised Covert
Human Intelligence Sources: code of
practice

October 2022

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Ministerial Foreword

The Covert Human Intelligence Sources: Code of Practice (CHIS Code) is primarily intended to guide those public authorities that exercise powers and perform duties under the Regulation of Investigatory Powers Act 2000 (RIPA). The CHIS Code sets out the processes and safeguards governing the use of covert human intelligence sources (CHIS) by public authorities, including the police and security and intelligence agencies. It gives detail on how the powers should be exercised and duties performed, including examples of best practice. It is intended to provide additional clarity and to ensure the highest standards of professionalism and compliance with the relevant legislation. This, in turn, helps to maintain public trust and confidence in the use of these powers.

The last update to the CHIS Code was brought into force by the Investigatory Powers Act (Codes of Practice and Miscellaneous Amendments) Order 2018. The draft revised CHIS Code of Practice has been updated to take account of the introduction of Criminal Conduct Authorisations (CCAs) and associated changes made to RIPA by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (CHIS Act), providing guidance on the authorisation of participation in criminal conduct by CHIS. The draft revised CHIS Code also makes minor changes in respect of the process for the use and conduct of CHIS and sets out additional safeguards relating to authorisations in respect of children and vulnerable adults.

Throughout the passage of the Covert Human Intelligence Sources (Criminal Conduct) Bill (the CHIS Bill) that became the CHIS Act, and in formulating the draft revised CHIS Code of Practice, the Home Office listened and invited views from Parliamentarians, legal representative bodies, other professional bodies, and special interest groups, to give opportunity for input from a variety of sources. Additionally, on 13th December 2021, the government published a consultation on the draft revised CHIS Code which ran for eight weeks, concluding on 6th February 2022. I am grateful for all the responses that the Home Office received. We have given careful consideration to all the responses submitted. In particular, we recognised the sentiments on the importance of having adequate safeguards and oversight in relation to the process for authorising participation in criminal conduct, the use of children and vulnerable adults as CHIS, and the independent oversight provided by the Investigatory Powers Commissioner (IPC). That is why we have included further guidance in the draft revised CHIS Code on the use and management of CHIS.

Having considered these responses, we have made changes in the draft revised CHIS Code to provide greater clarity, and we are satisfied that draft revised Code provides appropriate guidance on the statutory safeguards and oversight. The draft Regulations (cited as the Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022) together with the draft revised CHIS Code will now be subject to Parliamentary scrutiny through the established processes as prescribed by the relevant legislation to be debated in both Houses of Parliament.

The IPC continues to oversee the use of the powers to which this Code applies, and adherence to the practices and processes described in it. The government will also continue to keep under review the operation of the CHIS Code.

The Rt. Hon Tom Tugendhat MBE MP

Minister of State for Security

Executive Summary

It is important to note that the draft revised CHIS Code does not change our policy or the legislative provisions concerning CHIS. The amendments made to it are primarily intended to reflect the changes made to the Regulation of Investigatory Powers Act 2000 by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021.

As part of our wider engagement on the preparation of this draft revised CHIS Code we carried out a public consultation between December 2021 and February 2022. We have since given careful consideration to the responses received and have made further amendments to the draft revised Code. Comments mainly focussed on the adequacy of safeguards and oversight on the “use and conduct” of CHIS, and the process of granting, renewing, and cancelling Criminal Conduct Authorisations (CCAs). Additionally, helpful feedback was received on the provisions concerning authorisations in respect of children (sometimes called “juveniles” in the legislation) and vulnerable adults, particularly in respect of their participation in criminal conduct. In response, we have added further clarity on the enhanced safeguards and oversight regime for the authorisation of vulnerable adults and juvenile sources. The government takes both these safeguards and oversight seriously: they are important features of the wider framework regulating the use of these powers, as reflected in the draft revised CHIS Code.

Background

Regulation of Investigatory Powers Act 2000 – Covert Human Intelligence Sources

Covert Human Intelligence Sources (CHIS) are informants (“agents”) and undercover officers who help to secure the prosecution and disruption of criminal activity by providing information about, or access to information about, criminal and terrorist groups. CHIS play a crucial part in preventing, detecting, and safeguarding the public from many very serious crimes including terrorism, drugs and firearms offences, and child sexual exploitation and abuse.

The Regulation of Investigatory Powers Act 2000 (RIPA) introduced a regulatory framework to govern the use of a number of covert investigatory powers and to ensure that the techniques used by public authorities are compliant with UK’s obligations under the European Convention on Human Rights (ECHR). RIPA incorporated several important safeguards against the arbitrary or excessive use of powers, including a strict authorisation framework and provision for independent oversight and review of the use of the powers.

Part II of RIPA governs the use of CHIS by public authorities. Under RIPA, a person is a CHIS if a public authority tasks them to establish or maintain a relationship with someone else for the covert purpose of obtaining or disclosing information. RIPA provides the regulatory framework to govern the authorisation and use of CHIS, ensuring they are used by public authorities in a way that is compatible with the UK’s obligations under the ECHR.

Covert Human Intelligence Sources (Criminal Conduct) Act 2021

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (CHIS Act) provides a statutory basis to authorise CHIS to participate in criminal conduct where it is necessary and proportionate to do so. Participation in criminality by CHIS has been accepted in the UK courts (and around the world) for many years. This is not a new capability. It is essential that CHIS can build credibility and gain the trust of those under investigation. Participation in criminal conduct will only be authorised where it is necessary and proportionate to do so, having regard to the UK’s obligations under the European Convention on Human Rights.

RIPA is supplemented by several statutory codes of practice, including the CHIS Code of Practice (CHIS Code) which provides comprehensive guidance and best practice on the use of CHIS. The CHIS Code is intended to guide law enforcement agencies, the security and intelligence agencies and other public authorities who exercise such powers. It sets out additional guidance as to how the powers already in primary legislation should be exercised and the duties performed. The draft revised CHIS Code provides more detailed guidance to public authorities on use of the powers, as well as to reinforcing the safeguards already provided for in RIPA.

Devolved Administrations

Throughout the passage of the CHIS Bill that became the CHIS Act and preparation of the draft revised CHIS Code, the Home Office consulted the devolved administration of Scotland, Wales, and Northern Ireland.

In respect of Scotland, the new power in RIPA to authorise participation in criminality is of limited effect. The authorisation and use of CHIS in Scotland is primarily governed by the Regulation of Investigatory Powers (Scotland) Act 2000, which was not amended by the CHIS Act. As such, the Scottish version of the CHIS Code has not been revised.

As a result, Chapter 4 the draft revised CHIS Code sets out guidance for circumstances where all or some of the CHIS conduct to be authorised is likely to take place in Scotland: CCAs may not be granted where all or some of the conduct to be authorised is likely to take place in Scotland, unless the authorisation is for the purpose relating to a reserved matter (within the meaning of the Scotland Act 1998).

Where there are limits on the application of the draft revised CHIS Code to Scotland and Northern Ireland (or alternative domestic provision), this is stated in the Code.

Public Consultation of the draft revised CHIS Code

In accordance with RIPA, the codes of practice issued under it – including the CHIS Code - may be revised, for example to take account of changes in policy or because of new and emerging technology. The government (as statutorily required) published a draft revised CHIS code before laying it in Parliament.

The draft revised CHIS Code was laid alongside the Covert Human Intelligence Sources (Criminal Conduct) Bill (CHIS Bill) during its passage through Parliament. During the passage of the CHIS Bill, the Minister of State for Home Affairs, The Rt Hon Baroness Williams of Trafford, made clear that the government would hold a public consultation on the draft revised CHIS Code, followed by a debate and vote in both Houses of Parliament.

On 13th December 2021, the Home Office launched a public consultation for a period of eight weeks to seek views on the changes to the draft revised CHIS Code that concluded on 6th February 2021. The Home Office has now analysed and given careful consideration to all consultation responses received, and a summary of those considerations are provided in the 'Overview of the Consultation Responses' section of this document.

As well as the formal public consultation, the draft revised CHIS Code has been prepared with input from the independent Investigatory Powers Commissioner (IPC), the intelligence services, law enforcement agencies, and other public authorities. With regards to issues surrounding the use of children and vulnerable adults as CHIS, the Home Office proactively sought views from interest groups such as Just For Kids Law, The National Society for the Prevention of Cruelty to Children (NSPCC), the Centre for Women's Justice, JUSTICE and The Children's Commissioner for England (and their devolved equivalents) on the CHIS Act and the related draft revised CHIS Code.

The government will publish the latest version of the draft revised CHIS Code on the Gov.uk website. This is to ensure that it is readily accessible when it comes into force.

Overview of the Consultation Responses

Table of Respondents

The following table lists the responses that we received during the consultation.

Nature of response	Number of responses
Members of public	0
Legal representatives	1
Oversight bodies	0
Public authorities	0
Other bodies	9

In total, we received 10 separate responses to the public consultation from 9 respondents. The Home Office has carefully considered all comments and suggestions made. The primary focus was on the special considerations on the use of children and vulnerable individuals as CHIS, and the safeguards and oversight for Criminal Conduct Authorisations (CCA).

The responses demonstrated a focus on the need to provide public authorities with the clearest possible guidance to support the decision making for the authorisation of the use and conduct of CHIS as well as ensuring adequate safeguards and oversight for the authorisation of CCAs.

We are grateful to all those who took time to respond and share their views of the draft revised Code. The following section highlights the main issues and themes that were raised by those who responded, although it is not an exhaustive commentary on every response received. We have carefully considered all the responses and have made changes to the draft revised CHIS Code where appropriate. The key changes we have made in response to the consultation are also set out in the section below.

Summary of the Consultation Responses

We have summarised some of the main responses that we received following the formal public consultation, which we have grouped into key themes.

The use of children as CHIS

A number of respondents raised concerns about the use of children as CHIS and felt that the potential harm and exploitation that a child may face in being a CHIS outweighs any potential benefits. Other related concerns included that the draft revised CHIS Code does not sufficiently address the perceived power imbalance between the child and the relevant public authority.

It was also felt that appropriate adults should be mandatory for 16- and 17-year-olds rather than their presence being determined on a case-by-case basis following an assessment of the maturity of the child and their ability to give informed consent.

Another concern with the draft revised Code was that it does not use the term 'child' or 'children' to refer to those under 18 but instead uses the term 'juvenile'. It was suggested that the term 'juvenile' is not in line with the Children Act 2004 or the United Nations Convention on the Rights of a Child and it was felt that the use of this term risks obfuscating the vulnerability and needs of a child.

Government response

Children are only authorised as CHIS in exceptional circumstances and the duty of care that is owed to children in this context is taken extremely seriously. To avoid any ambiguity on this, we have updated the guidance in respect of the enhanced safeguards in relation to juvenile sources to make it clear that children should only be authorised as CHIS in exceptional circumstances and to emphasise the importance of relevant public authorities having regard to their existing child safeguarding guidance, policies, and procedures.

Furthermore, we have added references to the safeguards as set out in the Regulation of Investigatory Powers (Juveniles) Order 2000 and sections 29C of RIPA. These safeguards include an enhanced risk assessment process for each child who is to be authorised as a CHIS, and a further risk assessment process for those who are authorised to participate in criminal conduct.

In response to the comment on appropriate adults, we have added in new wording to make it clear that 16- or 17-year-olds can request an appropriate adult if they would prefer to have an appropriate adult present in meetings (although it is not mandated).

We recognise the point made in regard to terminology and have changed 'juveniles' to 'child' or 'children' save for where the terminology for juveniles is used in the relevant legislation (e.g. Regulation of Investigatory Powers (Juveniles) Order 2000).

Exceptional circumstances test

It was pointed out that the draft revised Code contained multiple references to "exceptional circumstances" in relation to use and conduct authorisations for vulnerable adults and juvenile

sources and also Criminal Conduct Authorisations in relation to juvenile sources, and that this made this part of the draft revised Code unclear.

Government response

We have revised the text to provide clarity and have included references to the relevant legislation.

Compensation for victims

There was concern that the draft revised Code does not state how victims of crime, where the offence was authorised under a Criminal Conduct Authorisation, can receive compensation. It was proposed that this should be set out in the Code, stating that a failure to ensure that victims have proper recourse to compensation could leave the UK in violation of Article 13 of the ECHR, which guarantees a right to an effective remedy before a national authority.

Government response

Section 27A of RIPA makes clear that those who have been victims of criminal conduct authorised under a Criminal Conduct Authorisation are entitled to compensation notwithstanding that the criminal conduct may have been authorised by a CCA. Any person or organisation is able to make a complaint to the Investigatory Powers Tribunal (IPT) against a public authority if they suspect a public authority of using covert techniques against them, which will be independently considered by the IPT. Additionally, a person is also able to make a claim to the IPT under the Human Rights Act 1998 for any suspected breaches of human rights they believe has been committed against them in connection with conduct where Part II of RIPA is concerned.

However, to set out in the draft revised Code an obligation on public authorities to disclose to an individual that they had been a victim of criminal conduct authorised by a CCA would inevitably compromise the identity of the CHIS, putting the CHIS and possibly others in danger as well as compromising the use of CHIS as a capability in the longer term.

Criminal Conduct Authorisations

A number of respondents viewed as ambiguous the wording in the draft revised Code in relation to circumstances when a public authority intends to task a CHIS and the activity tasked is expected to amount to criminal conduct. It was suggested that this could lead to inconsistencies in the test that is applied. Another suggestion on CCAs was that where the Authorising Officers are uncertain as to whether the conduct amounts to a criminal offence (and therefore whether a CCA is required), the Authorising Officer should seek legal advice.

It was also felt that there should be constant monitoring of the authorised conduct in order to establish when the criminal conduct has taken place so that the authorisation can be cancelled.

One response suggested that in the absence of exceptional circumstances, CCAs should not be given orally. Another point raised was that the Authorising Officer should only be able to grant a CCA once they have notified the Investigatory Powers Commissioner's Office (IPCO) and received comments back.

Government response

We have amended the text to make it clear that where a public authority is tasking a CHIS and that activity is expected to lead to criminal conduct, in every case, consideration must be given as to whether such conduct is necessary and proportionate. We have also added wording to indicate that an Authorising Officer should consider seeking legal advice when they are unclear as to whether the conduct they are tasking the CHIS to take part in would amount to criminal activity.

The level of monitoring of CHIS will depend on the circumstances. Public authorities have trained officers who are best placed to assess the level of monitoring required in any given case, and their arrangements will be subject to inspection by IPCO.

The draft revised Code is clear that CCAs should only be granted or renewed orally in urgent cases, and if granted or renewed orally, the CCA will only last for a period of seventy-two hours beginning when the grant of the authorisation or, as the case may be, its latest renewal takes effect. The draft revised Code provides that if a CCA is granted or renewed orally, the Authorising Officer should record the reasons why they consider the case to be so urgent that an oral instead of a written authorisation should be granted.

In urgent cases, it is not operationally practicable for Authorising Officers to wait for comments back from IPCO before authorising a CCA. However, as set out in Chapter 10 of the draft revised Code, the IPC's inspectors will be given full access to all CHIS and CCA records during the course of their routine inspections.

Unauthorised CHIS criminality

There was concern that the draft revised Code does not provide enough guidance on the process should public authorities become aware that a CHIS has been involved in unauthorised criminality.

Government response

In response to these concerns, we have provided further detail on how public authorities are expected to handle unauthorised CHIS criminality. We have reiterated for the purposes of the 'Unauthorised CHIS criminality' section in the draft revised Code that a CCA will always be accompanied by a s.29 authorisation and must have clear parameters. We have made it clear that public authorities must ensure that the CHIS fully understands the extent of the conduct authorised by the CCA and, where appropriate, must make the CHIS aware that criminal conduct which goes beyond the conduct authorised, or which is unrelated to the conduct authorised, will not be lawful and may result in criminal sanctions, including prosecution.

Furthermore, we have included new provisions in the draft revised Code which state that public authorities who grant CCAs are expected to have in place a policy or procedure for ensuring unauthorised criminality is handled appropriately (in circumstances where the public authority suspects there to be a criminal offence which goes beyond the authorisation). New guidance has also been added so that public authorities who authorise CCAs are aware that they should be able to explain and demonstrate to IPCO during their inspections how they handle CHIS unauthorised criminal conduct. Lastly, we have made clear that if a public authority discovers that a CHIS has engaged in unauthorised criminal conduct, it will be for that public authority to decide whether the

matter should be reported to an appropriate authority, and once a public authority has reported such matter (if they choose to), it will then be for that appropriate authority to decide what action should be taken.

Safeguards

It was suggested that the draft revised Code should make clear that legally privileged material requires enhanced consideration before authorisation is given which will allow the CHIS access to it. Another view provided was that 'medical information' and 'information pertaining to an individual's religious or political beliefs' should be added to the list of confidential or privileged material that requires enhanced consideration before authorisation.

Government response

Chapter 9 of the draft revised Code provides guidance for when a CHIS may come across or obtain confidential or privileged material, making it clear that extra care should be taken where, through a CHIS authorisation, it is possible that the CHIS may acquire knowledge of confidential or privileged material, including medical, journalistic or legal material.

In response to the suggestion referenced above, we have further strengthened the safeguards in the draft revised Code in respect of certain sensitive information (such as matters subject to legal privilege, applications to acquire material relating to confidential journalistic information and journalists' sources), resulting in more effective safeguards in this area. Medical information is already covered in the draft revised Code, falling under 'confidential personal information'. In relation to religious and political beliefs, such information will be lawfully handled in accordance with the Data Protection Act 2018.

Cancellations

One response suggested that public authorities should continue to monitor the CHIS after their deployment has ended as the Undercover Policing Inquiry (UCPI) has shown that in some cases undercover officers have continued to exploit their cover identity after the end of their deployment.

Government response

The Home Office recognises the concerns about the way in which undercover policing operated in the past, and it is for that reason that the UCPI was established. The UCPI's terms of reference require it to inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968. The UCPI's work is ongoing and so it would not be appropriate to comment further. Details of the UCPI's approach and work to date can be found on its website.

Furthermore, any person can claim to be or have been an agent or undercover officer, whether or not that is true. Where claims of this kind are part of a pattern of harassment or coercive behaviour, then there are routes available to victims to seek support and redress, such as independent charity Victim Support, and for offenders to be prosecuted.

Other changes made to the 2018 CHIS Code

Chapter 2 – Covert human intelligence sources: definitions and examples

- Under the ‘Scope of authorisations’ heading we have clarified that a CCA must have clear parameters set out for the CHIS, and the public authority must ensure that the CHIS understands the criminal conduct in which they are being tasked to participate.
- We have added a new paragraph to make clear that Authorising Officers should ensure that relevant applications, reviews, renewals and cancellations are correctly performed, and where a CHIS is subject to different Section 29 authorisations obtained by one or more public authorities, care should be taken to ensure that the authorisations do not conflict.

Chapter 3 – General rules on CHIS authorisation

- We have added guidance on the criteria for assessing whether a CCA is both necessary and proportionate; this includes listing the grounds on which an authorisation is necessary and the elements of proportionality that should be considered before granting an authorisation.
- We have adopted wording to clarify where the criminal conduct to be authorised is likely to result in an interference with a qualified Convention right under the ECHR in conjunction with the necessity and proportionality consideration.
- We have added further clarification on the use of multiple CHIS and the required documentation to ensure adequate records are kept for the length of deployment of each Relevant Source, in order to ensure compliance with the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013.
- We have provided further guidance on the process for operations or investigations involving multiple CHIS.

Chapter 4 – Special considerations for certain authorisations

- We have provided guidance on the use or conduct of CHIS and the authorisation process for when a CCA applies if the conduct is likely to take place in Scotland, considering both devolved and reserved matters.

Chapter 5 – Authorisation procedures for use or conduct of a CHIS

- We have provided further clarity on the authorisation process for the use or conduct of a CHIS, this includes the granting, renewal, and cancellation of such authorisations. We have also included examples to help practitioners understand how to calculate the period of total or accrued deployment of a Relevant Source and the cumulative authorisation period.

(New) Chapter 6 – Authorisation procedures for Criminal Conduct Authorisations

- A new chapter has been drafted to provide detail on the authorisation requirements for CCAs, including:
 - The authorisation criteria and procedures to be followed for reviewing, granting, renewing, and cancelling CCAs.

- The consideration that must be given, in every case, as to whether such conduct is necessary and proportionate, and where there is uncertainty, Authorising Officers should consider seeking legal advice.
- The information to be provided in an application for the authorisation of criminal conduct.
- The process for notifying CCAs to Judicial Commissioners. Where a public authority grants, renews or cancels a CCA, they must give notice to a Judicial Commissioner within seven days.
- The duration of authorisations, including a worked example to help practitioners understand how the durations of use or conduct and CCA authorisations work together.
- Changes made to the wording from 'significant' changes to 'material' changes, in relation to details that need to be recorded in an application for renewing an authorisation.

Chapter 8 – Record keeping and error reporting

- We have clarified, in the non-exhaustive list of possible relevant errors by a public authority, that a failure by a public authority to adhere to the obligations set out in the relevant statutory provisions would fall within the definition of a relevant error.

Chapter 9 – Safeguards (including privileged or confidential information)

- The chapters of the draft revised Code setting out the safeguards in respect of certain sensitive information (such as matters subject to legal privilege, applications to acquire material relating to confidential journalistic information and journalists' sources) have been strengthened further, resulting in more effective safeguards in this area.
- Guidance is provided on considering a CHIS's access to sensitive information when an Authorising Officer is reviewing CHIS authorisations and is considering whether CHIS activities (including criminal conduct) may result in obtaining particularly 'sensitive information' (for example legally privileged material).

Next Steps

The published revised CHIS Code of Practice must be laid before both Houses of Parliament, along with the draft Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022. Before the draft statutory instrument is made, it must be debated and approved by a resolution of both Houses. We will shortly lay the draft Regulations and the draft revised CHIS Code before Parliament to begin that process. We anticipate that the draft Regulations and the draft revised CHIS Code will come into force later this year.



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