

Covert Human Intelligence Sources (Criminal Conduct) Bill

Children and Young People's Commissioner Scotland Briefing on the Legislative Consent Memorandum debate

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government

Summary

Scots law should not permit a child to be authorised as a covert human intelligence source (CHIS), under any circumstances. Given the additional vulnerability of children, the imbalance of power between children and the State, and the level of risk involved for a child in acting as a CHIS, permitting them to be used in this way is incompatible with the State's obligations to respect, protect and fulfill their human rights. The existing Scottish legislation that permits the use of children as CHIS should be repealed.

Providing consent for UK legislation that not only provides for a child to be used as a CHIS, but which seeks to 'authorise' them to commit criminal offences in the course of that work is incompatible with incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into domestic law.

The Scottish Parliament should refuse to provide legislative consent for this Bill, on the grounds that it represents a clear violation of children's human rights. The Parliament

should call on the Scottish Government to repeal existing provisions in Scots law and thereby ensure that no child can ever be authorised as a CHIS.

Detailed Briefing

The Covert Human Intelligence Sources (Criminal Conduct) Bill's ("the UK Bill") effect in Scotland would be to amend the Regulation of Investigatory Powers (Scotland) Act 2000 to create a new process of 'Criminal Conduct Authorisations' (CCA). These CCAs would constitute an express power for Police Scotland and a range of other public authorities, to authorise their agents and informants ("Covert Human Intelligence Sources" "CHIS") to commit criminal offences in the course of covert work. The Bill contains no express limitation on the nature of offences that might be authorised.

As the UK Parliament's Joint Committee on Human Rights points out in its legislative scrutiny report¹ the power to make CCAs engages a wide range of human rights.

"a) Authorised criminal offences have the clear potential to interfere with a wide range of qualified and absolute rights, including those guaranteed by the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA);

"b) Without effective safeguards, authorising criminal conduct risks violating the procedural obligation to carry out effective investigations, capable of leading to the punishment of those responsible, into deaths that involve the State (Article 2 ECHR) and into allegations of torture or mistreatment in breach of Article 3 ECHR;¹ and

"c) By removing criminal and civil liability, the Bill also threatens the right of victims to an effective remedy for a breach of human rights (Article 13 ECHR)."

We agree with these concerns, and there are clear human rights implications for any child who might be the victim of an 'authorised' offence committed by the State.

¹ https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/847/84704.htm#_idTextAnchor003

There are also specific issues raised by the inclusion of children as CHIS within the scope of the UK Bill, and it is important that these provisions are not considered in isolation from the wider statutory framework governing CHIS.

The use of children as Covert Human Intelligence Sources (CHIS) is currently permitted under Scots law, namely the Regulation of Investigatory Powers (Scotland) Act 2000, and the Regulation of Investigatory Powers (Juveniles) (Scotland) Order 2002. This legislation is supported by a Code of Practice produced by the Scottish Government. The UK Bill would therefore provide a power to Police Scotland and others to 'authorise' child CHIS to commit criminal offences in the course of their covert work.

We have very serious concerns about the law permitting use of children to conduct covert intelligence operations, in particular the risks to which they may be exposed, and the emotional and psychological impacts they may experience as a result. These concerns have been expressed repeatedly to the Scottish Government over the last three years.

In our discussions with the Scottish Government, we set out our view that neither the existing Scottish legislation, nor the Code of Practice, contain adequate human rights safeguards limiting the use of children as CHIS. In particular they do not reflect the Scottish Government's obligations under the UN Convention on the Rights of the Child as:

- There is no minimum age below which an individual cannot be recruited as a CHIS. The law therefore currently provides for a child of any age to be recruited.
- The legislation and Code of Practice fail to reflect the vulnerability of children who are exposed to criminal conduct, and the significant imbalance of power that exists between children and the State.

- The absence of any consideration of best interests in the legislation or Code of Practice means that this critical consideration is not part of the decision-making process, in contravention of Article 3 UNCRC.
- The legislation and Code of Practice fail to recognise that authorisation of a child as a CHIS engages their rights to respect for private and family life in terms of Article 8 ECHR and Article 16 UNCRC and do not provide a mechanism for the proportionality of interference in those privacy rights to be balanced and assessed.
- Where children in conflict with the law are authorised as CHIS, the result is that they will continue to be exposed to an environment that is not conducive to dignified treatment, rehabilitation or reintegration in terms of Article 40 UNCRC.

The provisions within the UK Bill therefore further exacerbate the existing human rights concerns around the use of children as CHIS and the UK Bill is similarly lacking in human rights based safeguards around the CCA process. The concerns set out above for CHIS authorisations equally apply to CCAs.

Amendments proposed by the UK Government do not begin to address these concerns. In particular the “after the event” oversight role of the Investigatory Powers Commissioner is insufficient to ensure children are protected from the human rights violations inherent in CCAs. The amendment passed by the House of Lords on 13 January which restricts use of CCAs for under 18s to “exceptional circumstances” does not go far enough to protect all children.

Scotland’s approach to youth justice involves early intervention, diversion and, most importantly, a recognition dating back to the Kilbrandon Report of 1964 that children involved in criminal behaviour, or in conflict with the law, are themselves highly vulnerable and in need of care and protection within a rights- respecting, child-friendly justice system. The UK Bill, and indeed the existing legislation, undercuts those important principles and undermines the Scottish Government’s policy approach to youth offending, and its compliance with international human rights law and standards.

Every child has the right to be protected from exposure to a criminal environment, and should never be encouraged/pressured into criminality by the State.

We note that in October 2018, the Centre for Youth and Criminal Justice (CYCJ) made a request under the Freedom of Information (Scotland) Act 2002 to Police Scotland. The response, which was issued on 8 November 2018, revealed that since the formation of Police Scotland in 2013, no authorisations of children as CHIS had been made by the police. While we welcome this response from Police Scotland, we remain concerned that Scots law currently permits children to be authorised as CHIS without adequate legal and procedural human rights protections being in place. We are concerned that as long as these provisions remain on the statute book, there is a chance they will be utilised, notwithstanding their incompatibility with children's human rights. The Scottish Government should not rely on Police Scotland's current policy to discharge its legal obligations to children. In fact, the lack of use of this power raises questions about its necessity, and justifies repeal of the provisions.

The Commissioner therefore calls on the Scottish Parliament to refuse to grant a Legislative Consent Motion for the UK Bill for as long as it would have the effect of permitting a child in Scotland to be used as a CHIS and to be authorised to commit a criminal offence. Instead, we ask the Parliament to call on the Scottish Government to repeal the existing Scottish legislation ensuring that whatever the content of the UK Bill, Scottish children are protected from the human rights violations inherent in CCA authorisations and covert human intelligence activities.

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Children and Young People's Commissioner Scotland

15 January 2021