

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS (JUVENILES)
(AMENDMENT) ORDER 2018

2018 No. 715

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The instrument makes amendments to the Regulation of Investigatory Powers (Juveniles) Order 2000 (S.I. 2000/2793) (“the 2000 Order”), strengthening the protections which are applicable to juvenile covert human intelligence sources (“CHIS”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Part 2 of the Regulation of Investigatory Powers Act 2000 (RIPA) and the CHIS code of practice together set out the legal framework and safeguards which apply in relation to the authorisation of all CHIS. A set of enhanced safeguards, specifically applicable to the authorisation of CHIS who are under the age of 18, were put in place by means of the 2000 Order. That Order was made using the powers in sections 29 and 43 of RIPA, which enable the Secretary of State to make orders specifying additional requirements that must be satisfied for the use or conduct of CHIS, prohibiting certain conduct or uses of a CHIS and setting out a shorter duration for certain types of authorisation. Those same powers are being used to make necessary amendments to the 2000 Order, clarifying safeguards and extending the length of authorisations.
- 4.2 Prior to the legislative scheme being put in place relevant public authorities were able to use CHIS, including juvenile CHIS, to support investigations. RIPA provides a clear and transparent framework for the authorisation of covert investigative powers such as CHIS.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England, Wales and Northern Ireland.
- 5.2 The territorial application of this instrument is England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

What is being done and why

7.1 The purpose of this Order is to amend the special provisions for the authorisation of CHIS who are under the age of eighteen, contained in the 2000 Order.

7.2 Given that young people are increasingly involved, both as perpetrators and victims, in serious crimes including terrorism, gang violence, county lines drugs offences and child sexual exploitation, there is increasing scope for juvenile CHIS to assist in both preventing and prosecuting such offences. They may have unique access to information about other young people who are involved in or victims of such offences. For example, it can be difficult to gather intelligence on gangs without penetrating their membership through the use of juvenile CHIS. As well as provide intelligence dividend in relation to a specific gang, juvenile CHIS can give investigators a broader insight into, for example, how young people in gangs are communicating with each other.

7.3 Much as investigators would wish to avoid the use of young people in such a role, it is possible that a carefully managed deployment of a young person could contribute to detecting crime and preventing offending. In particular their use could be of importance in preventing offending against or safeguarding other young people, for example, in county lines drugs gangs often young or vulnerable people are coerced into offending and being able to disrupt such activity could protect large numbers of young people.

7.4 Although statistics on the number of CHIS authorisations (published annually by the Investigatory Powers Commissioner – and previously the Surveillance Commissioner) do not distinguish between different age groups, we know from discussions with investigators that juvenile CHIS are authorised in very small numbers.

7.5 The 2000 Order provides:

7.5.1 For all sources under the age of 18:

- A limit on the duration of authorisations to one month (rather than the 12 month duration which is applicable to persons aged over 18);
- A requirement that the use of such CHIS may not be authorised unless the public authority has made a risk assessment. The Juveniles Order provides that the risk assessment must take into account the risk of any physical injury or psychological distress to the source arising in the course of or as a result of the conduct being authorised. This assessment must be taken into account by the person granting the authorisation and that person must ensure that any risks are justified and that those risks have been explained to and are understood by the source. The risk assessment must also be updated before any authorisation is renewed.

7.5.2 Additional requirements which apply for all sources under the age of 16:

- A prohibition on a source being tasked in relation to a parent or person with parental responsibility;

- A requirement for an appropriate adult to be present at all meetings between the source and the public authority tasking them.
- 7.6 The distinction between under 16s and those aged between 16 and 18 reflects the fact that a child becomes increasingly independent as they get older and that parental authority reduces accordingly. Regardless of age, investigators are required to comply with their safeguarding duties in terms of assessing the risk to individual young people and ensuring that those in the 16 to 18 age group are not deployed unless they are sufficiently mature to understand the nature of the requirements being placed on them. Although there is no statutory requirement for those over the age of 16 to be accompanied to meetings, the decision of whether or not to inform a parent or guardian of a source over the age of 16 is taken on a case by case basis.
- 7.7 In addition to the requirements and safeguards set out in RIPA, the 2000 Order and the code of practice, relevant public authorities may also put in place further internal guidance to support their staff in the operation of CHIS. For example, the internal guidance that the police follow in deploying juvenile CHIS contains detail on how to safeguard and promote the wellbeing of the juvenile CHIS, including how to assess their maturity and capacity to give informed consent, a requirement to ensure that the handlers are properly trained to deal with young people, and requirements to consider all aspects of safeguarding the young person. This includes including giving particular care to planning for the safety of the young person and maintaining that level of safety throughout the duration of the deployment. In addition, the guidance makes clear that for young people in the 16 to 18 age group the decision on whether to inform the parent or involve an appropriate adult should be taken on a case by case basis.
- 7.8 Over the past 18 months the Government has been conducting a review with operational partners of the CHIS authorisation legal framework, to consider whether it is working as effectively as it could. The Regulation of Investigatory Powers (Juveniles)(Amendment) Order 2018 (S.I. 2018/715) will amend the 2000 Order and is part of a wider package of changes being made to the covert investigatory powers regime (see also the draft Regulation of Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018). As a result, the changes being made to the 2000 Order should be read alongside the draft CHIS Code of Practice which has been laid before Parliament. The Code is being updated to, among other things, take account of the changes the Government is proposing to the safeguards around juvenile CHIS.

Duration of Authorisations

- 7.9 The current time limit applied to authorisations means that, in practice, law enforcement agencies are required to submit an application for renewal of the authorisation within a very short time of its commencement if they wish it to continue. For example, if the requirement to obtain intelligence is ongoing, or if the juvenile CHIS has not been able to complete the tasking within the initial one month period, then an application for renewal has to be made. This is difficult to manage for the law enforcement agency, but also has an unintended consequence of requiring them to try and complete the tasking quickly in order to avoid the need for renewal, or in order to demonstrate the value of the deployment if renewal is likely to be required.
- 7.10 This pressure to obtain results can be unhelpful to the juvenile CHIS and also to the law enforcement agency, in so far as it can make the deployment more difficult to manage given the imperative to ensure the safety and welfare of the young person,

and could lead to the investigation progressing in a way that does not achieve the best long term result. In some circumstances this requirement can also act as a deterrent, with law enforcement avoiding the use of juvenile CHIS where immediate results might not be obtained even if a longer term, carefully managed deployment could provide significant operational dividend.

- 7.11 To address these issues the order will therefore increase the maximum length of a juvenile CHIS authorisation from one month to four months, to alleviate this pressure and enable the deployment of Juvenile CHIS to be conducted in a more measured way. This will be accompanied by a requirement (set out in the associated code of practice, drafts of which have been laid before Parliament, which will be brought into force by the Regulation of Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018) to review the authorisation at no less than monthly intervals, to ensure that it is maintained for no longer than necessary. These monthly reviews will take into account the operational case for maintaining the deployment and will also consider the impact on the mental and physical welfare of the young person.
- 7.12 Four months, coupled with reviews on at least a monthly basis, represented the right balance between senior oversight, operational effectiveness and the need to protect the juvenile concerned.
- 7.13 Extending the maximum length of the authorisation from one to four months will not automatically lead to longer deployments for young people, as there will still be a requirement to keep the need for the authorisation under review, and to cancel it when it is no longer needed – sections 5.20 and 8.9-8.11 of the code of practice provide detailed guidance on reviews.
- 7.14 The safety of the young person will remain paramount throughout the deployment and the activity will be discontinued if its duration is having an adverse impact on the young person. Paragraph 5.33 of the code of practice makes clear that the safety and welfare of the CHIS should continue to be taken into account after an authorisation has ended, with risk assessments continuing to be undertaken where necessary and practicable.

Requirement to be accompanied by an appropriate adult

- 7.15 The requirement relating to those under 16 being accompanied to any meetings by an appropriate adult is intended to ensure that juvenile CHIS are supported throughout any engagement with the public authority concerned. The Government has identified a weakness in the drafting of the 2000 Order which would have technically allowed investigators to use any available adult to act in this role, whether or not they know the young person or have any professional qualification or training to enable them to carry out the role effectively.
- 7.16 The Order will therefore amend the definition of an appropriate adult to prevent the role from being undertaken by a person who has no particular qualification for the role.
- 7.17 At the same time, the Government is also amending this provision to enable a suitably qualified person to act as appropriate adult in circumstances where the young person's parent is available but may not themselves be suitable to act (e.g. if they support the ideology or criminal intentions of those against whom the juvenile CHIS may be deployed).

- 7.18 Other safeguards contained in the 2000 Order will remain in place, including a requirement to conduct an enhanced risk assessment for the deployment of a juvenile CHIS, and a provision preventing a young person under the age of 16 from being deployed to gather intelligence against their own parent or guardian.

8. Consultation outcome

- 8.1 There is no requirement to consult publicly on changes to the 2000 Order. However, a range of interested intelligence and law enforcement agencies have been consulted through the Home Office CHIS Policy Working Group. This included representatives of the police, intelligence agencies, National Crime Agency, Crown Prosecution Service, College of Policing, the National Policing leads for CHIS and undercover policing, and representatives from the Investigatory Powers Commissioner's office. All those who use juvenile CHIS have a duty of care to the CHIS and duties to safeguard children and young people and this aspect has been taken into account as part of the consultation.
- 8.2 In addition to the cross government consultation on the changes to the 2000 Order, the government undertook a full public consultation (lasting for six weeks) on the revised CHIS code of practice. This code included guidance which specifically addresses the use of juvenile CHIS. While the draft version of the code did not, at the point of consultation, reflect the changes proposed to the 2000 Order, no concerns were raised about the use of juveniles as CHIS by any respondents to the consultation.

9. Guidance

- 9.1 The CHIS code of practice contains guidance about the deployment of juvenile CHIS. Public authorities may produce and maintain further detailed guidance on this issue. Additional guidance may be provided by the Investigatory Powers Commissioner, who has a statutory duty to oversee the authorisation of these techniques under the RIPA.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 This legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The government will keep under review the operation of this legislation, including through the independent inspection and oversight by the Investigatory Powers Commissioner.

13. Contact

- 13.1 James Dix at the Home Office Telephone: 020 7035 6816 or email: james.dix@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.