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JUVENILE INFORMERS: IS IT APPROPRIATE TO USE CHILDREN AS COVERT HUMAN INTELLIGENCE SOURCES?

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ABSTRACT. *Recently, attention has been given to the question as to whether children should be used as covert human intelligence sources (CHIS), aka informers. Being a CHIS is a risky endeavour, particularly when the person is deployed against serious crime, for example, gang violence. Questions arise over the propriety of using adolescents as CHIS, and whether the regulation of covert sources serves to minimise the risk to them. This article considers the regulatory environment. It concludes that the use of juveniles as CHIS can be justified, but that additional safeguards must be put in place to ensure their safety.*

KEYWORDS: *covert surveillance, informers, regulatory oversight, police, children.*

I. INTRODUCTION

Late 2018 saw the use of juveniles as informers (more properly known as Covert Human Intelligence Sources (CHIS)) become a political issue. The Secondary Legislation Scrutiny Committee of the House of Lords suggested the whole House needed to consider carefully a statutory instrument that proposed changes to the authorisation process for juvenile CHIS.[1] Later, a Motion to Regret was presented to the House by Lord Paddick, a former senior police officer.[2] This motion was an opportunity for the House of Lords to discuss issues wider than the statutory instrument, and led to several peers expressing dismay at the use of juveniles as CHIS. At the same time, *Just for Kids*, an NGO that provides legal representation and support for children seeking to secure their rights, sought to challenge the legality of the use of juveniles as CHIS. The High Court rejected the

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[1] Secondary Legislation Scrutiny Committee, *35th Report of Session 2017–19* (HL Paper 168) 4.

[2] HL Deb. vol. 793 col. 435 (16 October 2018).

challenge,[3] but the case demonstrated that some in society were concerned about juveniles acting as CHIS.

During the Motion to Regret debate, there was a sense of almost puzzlement from the Government: "[Juvenile CHIS] is not a new concept. The 2000 order and the various iterations of the CHIS code of practice have governed the use of juvenile CHIS for almost two decades, ensuring that where it is necessary to authorise juveniles as CHIS, an enhanced authorisation and risk assessment is applied."[4]

This is a pertinent point. Juveniles have been used as sources for a long time. For instance, a police study undertaken in 1996 noted that 82 per cent. of police respondents had used a juvenile as an informant.[5] Their historical use means the furore that accompanied the 2018 legislative changes was odd. It was as though Parliament had only just discovered that juveniles were being used, even though it expressly approved their use 18 years earlier.

The purpose of this article is not simply to critique the 2018 amendments. This piece will also analyse the justification for using juvenile sources and assess the extent to which they are protected. The article concludes that Parliament is right to be concerned about their use, but with appropriate safeguards juvenile sources can be useful in combatting crime. The current legislative framework cannot be considered appropriate, and changes will be suggested, including greater involvement of the judiciary.

II. The Use of Juveniles as Sources

When introducing the 2018 legislative amendments, the Government issued an explanatory memorandum that stated "there is increasing scope for juvenile CHIS to assist in both preventing and prosecuting … offences".[6] This telling comment reaffirms that juveniles were already being used as sources, and demonstrates that the Government intended for them to be used more frequently. This section of the article will define CHIS and also discuss why, and how, juveniles are being used as CHIS, highlighting some of the difficulties associated with their use.

The Regulation of Investigatory Powers Act 2000 (RIPA 2000) defines a CHIS as someone who:

[3] *R. (Just for Kids Law) v Secretary of State for the Home Department* [2019] EWHC 1772 (Admin), [2019] 4 W.L.R. 97.
[4] HL Deb. vol. 793 col. 443 (16 October 2018).
[5] S. Balsdon, *Improving the Management of Juvenile Informants* (London 1996), 12.
[6] *Explanatory Memorandum to the Regulation of Investigatory Powers (Juveniles) (Amendment) Order 2018*, para. 7.2, available at http://www.legislation.gov.uk/uksi/2018/715/pdfs/uksiem_20180715_en_001.pdf (last accessed 5 August 2020).

(a) establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
(b) covertly uses such a relationship to obtain information or to provide access to any information to another person; or
(c) covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.[7]

While this statutory text is not particularly easy to read, it is clear that a CHIS is someone who establishes or cultivates a relationship covertly to obtain or disclose information. This would inevitably cover those who would previously be called an "informer" or "informant"[8] to use the polite language, or a "grass" or, more colloquially, "snitch". However, a CHIS is not just the traditional informer, and the definition also includes the undercover police officer,[9] and potentially those who act as "test purchasers" for state agencies.[10] That said, the "informer" is undoubtedly the most common type of source.

It appeared to take some members of the House of Lords by surprise that juveniles act as informers, but it should not. Although there is a tendency of some to think of children as innocents,[11] the reality is that juveniles are readily involved in the criminal justice system. In the year ending 31 March 2018, over 65,000 children were arrested by the police on suspicion of committing a criminal offence, with 42,000 being either cautioned or prosecuted.[12] Increasingly, we see stories of juvenile gangs that are involved in murder, violence, drugs and prostitution,[13] and so it is not just trivial crime.

One of the earliest studies in England and Wales on the use of juvenile sources found that using juveniles is sometimes the only way to obtain intelligence. The report found that using undercover police officers to investigate drug dealing in schools or teenage discos is not possible, and, therefore, using a juvenile informer was the best way of gaining intelligence that could be used to tackle the crime.[14] The same is likely to be true today. The issue of "County Lines gangs" has captured attention in recent years.[15] Such gangs rely on juveniles, and only a juvenile may be able to infiltrate them. Of course, that raises considerable risks, and this is something examined below.

[7] Regulation of Investigatory Powers Act 2000, s. 26(8).
[8] R. Billingsley, "Editor's Introduction" in R. Billingsley (ed.), *Covert Human Intelligence Sources: The "Unlovely" Face of Police Work* (Hook 2009), xiii.
[9] J. Lennon, "A Defence Perspective" in Billingsley, *Covert Human Intelligence Sources*, 32.
[10] Home Office, *Covert Human Intelligence Sources: Revised Code of Practice* (2018), 11.
[11] S. Case, *Youth Justice: A Critical Introduction* (Abingdon 2018), 32.
[12] Ministry of Justice, *Youth Justice Statistics 2017/18* (2019), 5.
[13] J.A. Densley and A. Stevens, "'We'll Show You Gang': The Subterranean Structuration of Gang Life in London" (2015) 15 Criminology & Criminal Justice 102.
[14] Balsdon, *Juvenile Informants*, 14.
[15] A.G. Williams and F. Finlay, "County Lines: How Gang Crime Is Affecting Our Young People" (2019) 104 Archives of Disease in Childhood 730.

How often are juvenile CHIS used? The potential harm to juvenile sources means that some believe "governments adopt an extremely conservative approach to the use of juveniles as informants, thereby severely limiting and closely regulating their use".[16] In England and Wales, it was, until recently, almost impossible to know whether that was true. The traditional approach has been neither to confirm nor deny the use of any source,[17] with the police and others doing all they can to ensure that the tactics of using covert resources are kept hidden.

A retrospective analysis by Lord Justice Fulford, the then Investigatory Powers Commissioner,[18] identified that, between January 2015 and October 2018, 14 juveniles were used by the police as CHIS.[19] Certainly, that would seem to suggest that in England and Wales there is a general reluctance to use juveniles as CHIS. That said, we do not know how frequently those 14 sources were used (as the statistic provides the number of juveniles, rather than the number of authorisations). Furthermore, the explanatory memorandum quoted from above shows the intention to increase the number of juvenile sources.[20] In contrast, the use of adult sources has been dropping in the past decade,[21] although there continue to be approximately 3,000 authorisations per year. For the reasons set out below, it is unlikely that the use of juvenile sources will ever become routine. Similarly, they will not be exceptional either. Therefore, it is important that the law adequately protects them from harm.

A. The Legal Framework

Historically, there were no regulations governing informers, and indeed they were barely acknowledged.[22] A Home Office Circular of 1969 established procedures for the use of informers[23] and this was followed by the establishment of the National Guidelines on the Use and Management of Informants, created by the Association of Chief Police Officers in 1996.[24] The principal regulation in law was through the discretion of judges to exclude unfair evidence.[25] The existence of informers was not acknowledged and public interest immunity was routinely sought, to protect both

[16] A.L. Dennis, "Collateral Damage – Juvenile Snitches in America's Wars on Drugs, Crime, and Gangs" (2009) 46 Am.Crim.L.Rev. 1145, 1149.
[17] A.A.S. Zuckerman, "Public Interest Immunity: A Matter of Prime Judicial Responsibility" (1994) 57 M.L.R. 703.
[18] Sir Adrian was replaced by Sir Brian Leveson, the former President of the Queen's Bench Division, in October 2019.
[19] HL Deb. vol. 793 col. 447 (16 October 2018).
[20] *Explanatory Memorandum*, 1.
[21] Investigatory Powers Commissioner's Office, *Annual Report 2017* (HC 1780, 2018), 15.
[22] P. Neyroud and A. Beckley, "Regulating Informers" in R. Billingsley, T. Nemitz and P. Bean (eds.), *Informers: Policing, Policy, Practice* (Abingdon 2001), 164.
[23] R. Billingsley, "Introduction" in Billingsley et al., *Informers*, 11.
[24] A rare public mention of these standards is to be found in Balsdon, *Juvenile Informants*, 5.
[25] Most commonly now exercised through the Police and Criminal Evidence Act 1984, s. 78.

the tactic and the source themselves, as acknowledging a source existed could, in some instances, reveal their identity.[26]

RIPA 2000 was a response to the passing of the Human Rights Act 1998. The European Court of Human Rights (ECtHR) has consistently held that covert law enforcement powers contravene Article 8 unless a statutory basis can be shown to justify them.[27] The Human Rights Act 1998 provided that public bodies could only act in a way compatible with their obligations under the ECHR.[28] The absence of a statutory basis to use covert techniques was likely to result in the police being found to have acted contrary to Article 8. Police powers needed a statutory footing, and the use of informers was finally recognised in legislation, although referred to as CHIS.

Along with the definition of CHIS, RIPA 2000 provides additional procedural requirements. A source requires two authorisations: one for "use" and one for "conduct".[29] The Act does not define the terms, but the Code of Practice explains them. "Use" is where a public authority intends to deploy people as CHIS.[30] "Conduct" is the tasking, namely when CHIS are asked to establish or maintain personal or other relationships to obtain or disclose information.[31] Typically, an authority for "use" will last longer than for "conduct". Sources will invariably be used for more than one operation, with their authority for "use" continuing. However, their "conduct" is task-specific, and their authorisation for "conduct" is cancelled when their deployment concludes.[32] This promotes good practice and the continual management of a source.

RIPA 2000 creates three levels of operators. While not named in the Act, they are known as:

- **Source Handler**. This is the person who has day-to-day responsibility for dealing with the source on behalf of the public body.[33]
- **Source Controller**. This is a person who has general oversight of the use of the source, and other sources.[34]
- **Authorising Officer**. This is the senior officer who has the right to authorise the use or conduct of the source. Within the police, this will ordinarily be a superintendent, although a higher rank is required for some authorities.[35]

[26] Zuckerman, "Public Interest Immunity", 720.
[27] See, most notably, *Malone v United Kingdom* (1984) 7 E.H.R.R. 14 and *Halford v United Kingdom* (1997) 24 E.H.R.R. 523.
[28] Human Rights Act 1998, s. 6(1).
[29] Regulation of Investigatory Powers Act 2000, s. 29(1).
[30] Home Office, *Revised Code of Practice*, para. 2.7
[31] Ibid., at para. 2.8.
[32] Neyroud and Beckley, "Regulating Informers", 167.
[33] Regulation of Investigatory Powers Act 2000, s. 29(5)(a).
[34] Ibid., s. 29(5)(b).
[35] Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003, SI 2003/3171, art. 4 and pt. I of the Schedule.

Ordinarily at each level the operator will become more senior in rank, although this is police customary practice, not a legal requirement.[36]

The authorising officer can only approve the use or conduct of a source where it is necessary on one of the statutory grounds (which includes "for the purpose of preventing or detecting crime or of preventing disorder"[37]) and where he is satisfied that it is proportionate to do so.[38] The officer must also be satisfied that:

- the handler and controller are in place;
- a record exists of all actions in respect of the source; and
- the record conforms to the standards set out in the relevant statutory instrument.[39]

B. Special Rules for Juveniles

Special rules exist for the use of juvenile sources, that is to say, sources younger than 18. These are set out in the Regulation of Investigatory Powers (Juveniles) Order 2000,[40] the amendment of which led to the 2018 parliamentary debate about the appropriateness of using juvenile sources.

A source under the age of 16 cannot be tasked to gather information about their parent or someone holding parental responsibility for them.[41] Where the source is under 16, an appropriate adult has to be present at all meetings between the police and the source.[42] A specific risk assessment is required before any juvenile source can be authorised.[43] Due to the sensitivities of using a juvenile source, the authorising officer must be more senior in rank. For instance, for the police, the officer must hold the rank of at least assistant chief constable.[44]

Under the original instrument, an authorisation lasted no more than one month,[45] in contrast to 12 months for adult sources. The Regulation of Investigatory Powers (Juvenile) (Amendment) Order 2018[46] amended the maximum duration for juvenile sources to four months.[47] The extent to which the extension is desirable is considered below.

[36] J. Potts, "Debriefing: A New Way Forward?" in Billingsley, *Covert Human Intelligence Sources*, 139.
[37] Regulation of Investigatory Powers Act 2000, s. 29(2)(a) when read in conjunction with s. 29(3)(b).
[38] Ibid., s. 29(2)(b).
[39] Ibid., s. 29(2)(c) when read in conjunction with s. 29(5).
[40] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793.
[41] Ibid., art. 3.
[42] Ibid., art. 4.
[43] Ibid., art. 5.
[44] A.A. Gillespie, "Juvenile Informers" in Billingsley, *Covert Human Intelligence Sources*, 112, discusses the historical position of the legislation.
[45] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 6.
[46] Regulation of Investigatory Powers (Juveniles)(Amendment) Order 2018, SI 2018/715.
[47] Ibid., art. 3.

III. The Propriety of Using Juvenile CHIS

Speaking in the House of Lords, Lord Haskel stated: "[p]erhaps it is because many of us are parents that we wondered why juveniles were being used in covert activity in the first place."[48] Baroness Hamwee said: "I am prepared to acknowledge that there is a place for some use of juveniles. The police go into schools to recruit underage children to buy from off-licences. I am slightly queasy about that."[49] There is a question whether such test purchasers are indeed CHIS,[50] but it seems to appeal to what most of us would like juvenile CHIS to be. "Nice" children who will be recruited by "nice" police officers from "nice" schools to go into "dodgy" shops to expose the illegal sale of alcohol. The risks in such an operation are minimal, and the children are seen to be doing their civic duty by exposing breaches of licensing laws.

The problem with such logic is that operations like this rarely assist in tackling serious crime. Informers, including juveniles, are rarely upstanding members of the citizenry.[51] Informers, including juvenile sources, are likely to be either involved in, or on the periphery of, crime. That is why they can provide information that the police could not otherwise obtain. This makes people like Lord Haskel and Baroness Hamwee uncomfortable, but it is important to be clear about who a typical CHIS is.

A. Recruitment

In the US, where law enforcement routinely uses juvenile sources, the vast majority of juveniles are recruited after their arrest.[52] According to 1996 research, a majority of English respondents stated that they "recruited [juvenile informants] after dealing with them as prisoners".[53] This is unlikely to have changed. As noted previously, most sources are involved in, or on the periphery of, criminality, and arrest is one of the few times when the police will be able to speak to such persons without that discussion being seen by others.

Recruiting sources at the time of arrest raises several issues. For example, Dennis has suggested that recruiting a juvenile after they break the law could prevent them from learning accountability,[54] because the juvenile may begin to believe that they can trade their criminality for information. Osther suggests that the use of juvenile sources is "patently in conflict

[48] HL Deb. vol. 793 col. 437 (16 October 2018).
[49] HL Deb. vol. 793 col. 441 (16 October 2018).
[50] A.A. Gillespie and D. Clark, "Using Juvenile Test Purchasers" (2002) 7 J.Civ.Lib. 3. The Licensing Act 2003, s. 154(2) also arguably establishes an alternative basis for the legality of using juvenile CHIS in such operations.
[51] R. Billingsley, "Informers' Careers: Motivations and Change" in Billingsley et al., *Informers*.
[52] M. Dodge, "Juvenile Police Informants: Friendship, Persuasion, and Pretense" (2006) 4 Youth Violence and Juvenile Justice 234, 240.
[53] Balsdon, *Juvenile Informants*, 16.
[54] Dennis, "Collateral Damage", 1171.

with the founding rehabilitation principles of … juvenile justice".[55] The justice system has traditionally tried to divert children from criminality,[56] and yet using a source inevitably means that the police are facilitating continued engagement with criminals, and in certain situations ignoring the source's criminal behaviour.[57]

Targeting an arrested juvenile also raises issues of power imbalance. A US study suggested that pressure from police officers was a key factor in why a juvenile chose to become a source.[58] This carries the risk that the pressure may be inappropriate. Officers who spoke to Dodge denied coercing juveniles, but admitted referring to the fact that helping the police by providing information would allow the source to avoid custody.[59] Of course, in America, the police and prosecutors can directly influence sentencing. The police in England and Wales cannot guarantee a particular sentence. However, it is clear that the courts will discount sentences, sometimes heavily, to reward informers for cooperating with the police, something informers are aware of.[60]

Studies in America have identified inappropriate pressure, including threats to influence pre- and post-trial decisions (including bail), or to arrest a sibling.[61] There has long been a suspicion that the police in England and Wales use undue pressure to recruit adult sources.[62] What of juveniles? It is notable that when specifically asked whether law enforcement put pressure on a juvenile arrested for a crime to become a CHIS, a Home Office minister could only say: "it would be unwise for me to stand at the Dispatch Box and say that was the case, because I simply do not know."[63]

A letter addressed to Lord Paddick[64] states that non-published national guidance recognises that it is unwise to recruit a child as a source before a final decision concerning the disposal of the child's offending. This correspondence is not particularly reassuring. First, it is simply guidance, and, it is not clear whether the police can deviate from it. If the Government wanted there to be no recruitment of sources before the disposal decision (to minimise pressure), it could have included this in the Code of Practice, which has statutory backing. Secondly, it is unclear what happens when a child offers to become a source before the disposal decision. It may

[55] D.G. Osther, "Juvenile Informants–A Necessary Evil" (1999) 39 Washburn L.J. 106, 114.
[56] Case, *Youth Justice*, 154.
[57] M. Maguire and T. John, "Covert and Deceptive Policing in England and Wales: Issues in Regulation and Practice" (1996) 4 Eur.J.CrimeCr.L.Cr.J. 316, 317, 320.
[58] Dennis, "Collateral Damage", 1154.
[59] Dodge, "Juvenile Police Informants", 240.
[60] K. Hyland, "Assisting Offenders" in Billingsley, *Covert Human Intelligence Sources*.
[61] Dennis, "Collateral Damage", 1155.
[62] C. Dunnighan and C. Norris, "A Risky Business: The Recruitment and Running of Informers by English Police Officers" (1996) 19 Police Studies 1.
[63] HL Deb. vol. 793 col. 446 (16 October 2018).
[64] Letter from Baroness Williams of Trafford to Lord Paddick, 25 October 2018 (obtained by the author through a freedom-of-information request).

seem that the police approach sources, but in reality many sources approach the police offering to help.[65] One reason to offer assistance is to gain a more favourable decision on disposal. Assuming that this happens, juveniles are not diverted away from crime. Thirdly, even when the decision is made to approach the child after disposal, the decision to recruit the child as a source afterwards may have influenced the disposal decision. Accordingly, the recruitment can be pitched as "we did this for you, how about you do this for us?", which could pressurise the child. They may feel obliged to become a source to seek favourable treatment by the police.

Not every source is recruited as a result of undue pressure. In most situations, the police probably act correctly. However, the secrecy that accompanies covert policing means that providing evidence of this can be difficult. The presence of an appropriate adult may reassure people that the police are following the proper practice, but, as will be seen, considerable doubt exists as to the usefulness of the appropriate adult. Greater scrutiny of authorisations could include detail on the recruitment of the source.

B. Familial Informing

As noted above, a source under the age of 16 cannot be used against a parent or person holding parental responsibility for him. The phrasing of this prohibition raises questions about the extent to which juvenile sources can be used against members of their family.

The reference to "parent" and "parental responsibility" recognises that not all parents have parental responsibility. While a child's mother automatically accrues parental responsibility upon the birth of the child, the father does not.[66] Similarly, a parent could lose parental responsibility, most commonly when the parent's child is adopted.[67] In neither situation would the absence of parental responsibility matter, as the rule is clear that it applies to the child's parent. The term "parent" is not itself defined, and it must, therefore, be restricted to a natural parent, meaning that step-parents and foster-parents are not within the prohibition, save where they have parental responsibility for the child.

The reference to parental responsibility recognises that people other than natural parents can gain parental responsibility. The classic example is a grandparent who has a Child Arrangement Order that provides for the grandchild to live with grandparents,[68] but it can also include a step-parent who has been granted parental responsibility by the Family Court.[69] How are the police to know whether a person has parental responsibility or

[65] J. Bukley, "Managing Information from the Public" in Billingsley, *Covert Human Intelligence Sources*, 103.
[66] Children Act 1989, s. 2(2).
[67] Adoption and Children Act 2002, s. 46(2).
[68] Children Act 1989, s. 8(1) when read in conjunction with s. 12(2).
[69] Children Act 1989, s. 4A.

not? They would generally know who a parent is, but it is possible for a child to live with someone who does not have parental responsibility for the child. There is no register of those who hold parental responsibility, particularly when it was acquired through private law proceedings. The local authority would not necessarily know either, meaning that the police are probably reliant on asking the source themselves, although it is questionable whether they will know the intricacies of parental responsibility.

The prohibition on recruitment only applies to sources under the age of 16. There is no prohibition on a 16- or 17-year-old informing on their parent, or a person with parental responsibility. *Just for Kids* suggested this was an unnecessary interference with parental rights. Supperstone J. rejected this argument, noting that additional safeguards had to be put in place in such cases.[70] In fact, the safeguards go beyond parents and encompass other family members. The authorising officer must "know whether the relationship to which the conduct or use would relate is between the source and a relative, guardian or person who has for the time being assumed responsibility for the source's welfare, and, if it is, has given particular consideration to whether the authorisation is justified in the light of that fact".[71]

The officer applying for the relevant authority is thus under a duty to disclose the fact that the target is a relative or person who has assumed responsibility for the source, and the authorising officer must give specific consideration to whether such authorisation is justified. This special consideration must be in respect of two matters: the increased risk of harm that a source may be exposed to when targeting the source's family; issues about compatibility with Article 8 of the ECHR.

On the first point, the risk of harm to the child will be greater when the operation is against a relative, particularly where the child resides with that person. The police are unlikely to be able to extract a juvenile before an attack etc. even when tasked against someone within the wider family.

In terms of compatibility with Article 8, the primary purpose of RIPA 2000 is to provide the legal basis for an interference with an individual's private and family life. Any such interference must also be necessary and proportionate to the pursued aim (presumably, the prevention and detection of crime, or national security). The ECtHR, is slow to accept state interference in the family.[72] Therefore, the authorising officer must consider the proportionality of such a deployment very carefully. The closeness of the relationship (e.g. to parent, sibling, nephew etc.) will be of particular importance. The nature of the crime will inevitably feature in the analysis, as will the potential for obtaining the information from other means. Only

[70] *R. (Just for Kids Law) v Secretary of State* [2019] EWHC 1772 (Admin), [2019] 4 W.L.R. 97, at [87].
[71] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 5(c).
[72] R. (Just for Kids Law) v Secretary of State [2019] EWHC 1772 (Admin), at [87].

when seeking to combat the most serious crimes could it be justified to task a juvenile against a close relative.

A difficulty is that, as will be seen in more detail below, there is no external verification of the authorising officer's decision (subject to retrospective auditing by the Investigatory Powers Commissioner's Office). Later in this article, it will be argued that there should be greater involvement of the judiciary in the scrutiny of authorities, and judicial involvement would bring increased confidence that the use of a juvenile source against the source's family is proportionate and justified.

C. Harm

A particular concern in respect of juvenile CHIS is the extent to which their use exposes them to harm. Lord Haskel was concerned that their activities "put them in danger of violence and sexual assault, and all sorts of associated mental, physical, psychological and educational problems".[73] Balsdon notes that more than half of the respondents (serving police officers) whom he interviewed were concerned about the risk of using juveniles, with some suggesting that it is inappropriate for juveniles to be used to combat serious or organised crime.[74]

Being an informer is undoubtedly risky, something that the Court of Appeal has noted: "There may be risks to the CHIS or his family from third parties if his identity becomes known . . . If [the source's] identity became known, he or his family might in some cases be exposed to serious injury or death and in less extreme cases to other disturbing forms of harassment."[75]

Rosenfeld et al. noted that sources themselves were aware that there was a risk of serious repercussions if people became aware of their activities.[76] Historically, informers have been subject to extreme violence, including being murdered by gangs.[77] The law has recognised this by establishing a duty of care between police and sources, even though the courts are reluctant to recognise actions in tort for the operational decisions of the police.[78]

Juveniles are not exempt from reprisals. In the US, there have been several cases of violence against juveniles who inform, including examples where gangs have killed those suspected of being informers.[79] The situation in England and Wales is unclear. Gang violence is now widespread, with fatal stabbings in London becoming a frequent occurrence. Gangs rely on

[73] HL Deb. vol. 793 col. 438 (16 October 2018).
[74] Balsdon, *Juvenile Informants*, 15.
[75] *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] Q.B. 579, at [61]–[62].
[76] R. Rosenfeld, B.A. Jacobs and R. Wright, "Snitching and the Code of the Street" (2003) 43 Brit.J.Criminol. 291, 306.
[77] S. Hewitt, *Snitch! A History of the Modern Intelligence Informer* (London 2010), 10.
[78] R. Billingsley, "Duty of Care for Informers" (2005) 78 The Police Journal 209.
[79] Dennis, "Collateral Damage", 1152; Dodge, "Juvenile Police Informants", 236.

violence to establish their reputations and to ensure their criminal activities can continue without interference.[80] So-called county lines gangs are importing violence into the suburbs.[81] Those who seek to leave gangs are often subject to extreme violence,[82] and so it is not hard to imagine how gangs would react to a CHIS amongst them.

A common thread throughout the literature is that juveniles can heighten their own risk. There is a statutory duty to restrict the identity of sources to those that need to know,[83] but juvenile sources may often unmask themselves. Dodge notes that many sources consider themselves to be a "kid spy" and will often brag about the fact that they are assisting the police.[84] Balsdon echoes this, noting that some officers did not like using juveniles as sources because of this: "They can't keep their mouth shut. I would say I have had the opportunity to recruit juvenile informants in the past but they would have told their mates they were a Special Agent . . . I don't think at 15 or 16 they can quite grasp the position they could get themselves into."[85]

The maturity of sources and their ability to appreciate their exposure to harm must be considered when deciding whether to use them. Notably, the authorising officer must satisfy herself that the risks to the source "have been properly explained to and understood by the source".[86] The emphasis should be on "understood". It is not enough that an explanation of the risks is given, with a source signing a bit of paper acknowledging this. The authorising officer should be convinced that the individual understands the risks, including of letting anyone know that he is a source. The threshold should be high and not judged simply on the seriousness of the offence. For example, sources may be deployed to do something relatively trivial, but if they go to a school that has significant gang activity, members may turn against them if they are revealed to be informants. The risks to a source go beyond the operation, and the police should ensure that the source understands the risk, making clear that the source should not tell anyone about being a source.

An assessment of risk is necessary for the use of any source as the police have a responsibility to secure "the source's security and welfare".[87] The use of a juvenile source requires a fuller risk assessment to be completed, focusing not only on quantifying the physical risk, but also considering any risk of psychological distress.[88] The moral risks to the juvenile also need to

[80] J.A. Densley, "It's Gang Life, But Not as We Know It: The Evolution of Gang Business" (2014) 60 Crime & Delinq. 517, 530.
[81] J. Spicer, "'That's Their Brand, Their Business': How Police Officers are Interpreting County Lines" (2019) 29 Policing and Society 873.
[82] Williams and Finlay, "County Lines", 731.
[83] Regulation of Investigatory Powers Act 2000, s. 28(5)(e).
[84] Dodge, "Juvenile Police Informants", 238.
[85] Balsdon, *Juvenile Informants*, 13 (reporting what an informant handler told him).
[86] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 5(b).
[87] Regulation of Investigatory Powers Act 2000, s. 26(5)(a).
[88] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 5.

be assessed,[89] which is an admission that encouraging a juvenile to be a source may not be in the juvenile's best interests. This will be particularly true of those children who are only on the periphery of a gang.

Ultimately, the police need to decide whether the risk(s) is or are manageable. This may include, for example, placing the source into a witness protection programme after the source's deployment ends.[90] The consequences of that for a juvenile could be significant, not least because of the obstacles it would pose to remaining in contact with friends and family. The risk to a potential source is a factor taken into account, but proportionality means weighing up this risk against the operation's importance. For example, in 2002, it was reported that the police used a juvenile source to infiltrate a terrorist organisation in Northern Ireland.[91] As terrorist organisations routinely tortured and killed informers,[92] the use of a source under such circumstances would be extreme. However, where it is the only way that information can be obtained to stop a terrorist attack, the risk may be justifiable. As will be seen, the absence of external approval means that questions remain about whether the police can properly balance these competing interests.

IV. Safeguarding Sources

Although there are undoubtedly concerns about using sources, there can be circumstances when the use of juvenile sources would be appropriate. The deployment of a source is sometimes the only way of tackling crime. Where youth groups perpetrate crime, using an undercover police officer is unlikely to be possible. Technical forms of surveillance can be difficult where the targets are mobile, or where it would be difficult to access the premises to install surveillance devices.

While all sources require safeguarding, Dennis notes that due to their immaturity, juvenile sources require additional protection.[93] What procedures are in place to safeguard juvenile sources, and are they adequate?

One thought may be the statutory requirement on public-sector agencies to have regard to the "need to safeguard and promote the welfare of the children".[94] Realistically, however, this duty goes no further than that required by RIPA 2000 itself.[95] Before a juvenile source can be authorised, a risk assessment must be produced that demonstrates the "nature and

[89] Gillespie, "Juvenile Informers", 118.
[90] For a discussion, see P. Bean, "Informers and Witness Protection Schemes" in Billingsley et al., *Informers*.
[91] Gillespie, "Juvenile Informers", 119.
[92] K. Sarma, "Informers and the Battle against Republican Terrorism: A Review of 30 Years of Conflict" (2005) 6 Police Practice and Research 165, 167.
[93] Dennis, "Collateral Damage", 1148.
[94] Children Act 2004, s. 11.
[95] *R. (Just for Kids Law) v Secretary of State* [2019] EWHC 1772 (Admin), [2019] 4 W.L.R. 97, at [58].

magnitude of any risk of physical injury" and "the nature and magnitude of any risk of psychological distress to the source".[96] The risk assessment will inevitably consider the welfare of the child.

The main issues in respect of safeguarding are:

(1) specialist training;
(2) parental consent;
(3) the use of an appropriate adult;
(4) whether there should be judicial approval of the use of sources;
(5) the review and termination of operations.

A. Specialist Training

Glasser suggests that officers who "handle" juvenile CHIS should have specialist training akin to social workers or teachers.[97] This happens routinely in England and Wales, with handlers, controllers and authorising officers receiving specialist training on child welfare.[98] The amount of training is not readily known. The training manuals are restricted to prevent the development of counter-surveillance techniques that could frustrate the work of the police. Secrecy breeds distrust, and, without any knowledge of the content of the training, it is difficult to identify whether it is perfunctory or challenging.

The establishment of the College of Policing does, at least, ensure that there is a national standard and potentially a single training provider. However, the secrecy inherent in covert tactics means relying on trust. Limited disclosure of material would perhaps be preferable. While it is legitimate to withhold the "tradecraft" aspects of training, it would be useful to publish outline syllabi or details of who creates and audits training materials. Similarly, detailing who delivers the training could show that many are experts in child welfare issues. It is also now possible to point to the judgment of the High Court in *Just for Kids*, where Supperstone J. was satisfied that the training was sufficiently detailed that engaging social workers or others in operations was not necessary.[99]

B. Parental Consent

A key issue in the debate surrounding juvenile sources is whether the parent of a juvenile must consent to the juvenile's use. The legislation is silent on this, and so the question remains live.

[96] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 5.
[97] S. Glasser, "Looking Out for the Little Guy: Protecting Child Informants and Witnesses" (2018) 26 J.L. & Pol'y 677, 699.
[98] *R. (Just for Kids Law) v Secretary of State* [2019] EWHC 1772 (Admin), at [82].
[99] Ibid., at [83].

In the House of Lords debate, the Government placed great emphasis on the fact that a juvenile must have the "maturity and capacity to give informed consent",[100] and that "the law recognises that parental responsibility diminishes as a child matures".[101] Both statements are an oblique reference to *Gillick competence*,[102] namely the principle that children of sufficient age and understanding assume increasing responsibility for their own decisions, including about their welfare

There is no express impediment to using a source without parental consent, but is it implied? In *Re D (A Child)*,[103] the Supreme Court noted the courts have long recognised the authority of parents over their children,[104] but that they would not enforce such rights over a child that had reached the "age of discretion".[105] Parental rights in *Gillick* were considered to exist for the benefit of the child not the parent.[106] In other words, parental authority is about what a parent should do to benefit the child. The principal benefit will be protection. There are undoubtedly risks to juveniles used as sources, particularly in respect of organised crime, and so it can be questioned whether parents can protect their child if they are not aware that their child is a source.

The argument of the Government (and, presumably, police) is that, where children are of sufficient maturity, then they take responsibility for their actions. Who decides this? In the context of medical treatment (which is what *Gillick* involved), where there is a disagreement between the doctor, the parent and the child, a court is asked to adjudicate. That is unlikely to occur in respect of sources. Ultimately, it is the authorising officer who must be satisfied that the child is aware of the risks and, presumably, that the child is therefore of sufficient age and understanding. While the authorising officer should ordinarily not be directly involved in the operation,[107] it still has the appearance of the police, who wish to use the source, deciding whether or not they can use her. That is difficult to justify and means that there is no independent assessment of whether the child is capable of understanding the position. This will be revisited below when considering the greater involvement of the judiciary.

It is important not to focus solely on the issue of harm. Parents may not wish their child to act as a source for several reasons, including not approving of informers. Most sources are involved in, or are on the periphery of, crime, and the same is likely to be true of their families.

[100] HL Deb. vol. 793 col. 467 (16 October 2018).
[101] HL Deb. vol. 793 col. 445 (16 October 2018).
[102] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112.
[103] *Re D (A Child)* [2019] UKSC 42, [2019] 1 W.L.R. 5403.
[104] Ibid., at [2].
[105] Ibid., at [21]. *Gillick* arguably being the most explicit modern pronouncement of this.
[106] Ibid., at [74].
[107] Home Office, *Revised Code of Practice*, para. 5.8.

What should happen if the child wishes to act as a source, but the parent either does not consent or the child does not want the parent to be told? Balsdon argues that law enforcement interests should come first: "Parental agreement should not be a prerequisite and parents should only be informed with the juvenile's agreement … Parental agreement may be problematic if parents themselves are involved in criminal activity. They might naturally be opposed to their son/daughter providing information to the police even in circumstances not related to the parent's own criminal activity."[108]

In other words, do not ask the parents because there is a risk that they may say "no". If they are asked and say "no", can this be overruled by the child? The Government focuses attention on juveniles being *Gillick* competent, meaning they take responsibility for their actions. This is unsatisfactory. Juveniles may not fully understand the risks, casting doubt on whether they are ultimately *Gillick* competent. A court resolves any such conflict between a parent and child in the medical context. Here, there are no obvious legal proceedings, meaning that it is for the police to decide whether the child's decision to overturn parental refusal is correct. That is an obvious conflict of interest.

Even asking the parents places them in an invidious position, particularly when they (the parents) are not involved in crime themselves. If they consent to their child being a source, they are condoning their child being put at risk. If they do not give consent, they could be portrayed as not caring about crime and not fulfilling their civic (albeit not legal) duties.[109] How is a parent supposed to balance that risk? Also, why is it thought that a parent is the right person to judge that risk? While a parent can consider everyday risk, parents are unlikely to be familiar with risks to an informer, and so asking parents to consent is arguably as flawed as asking the child themselves.

C. Appropriate Adult

An appropriate adult must be present at all meetings between a source aged under 16 and the police.[110] This is supposed to be an independent voice that can ensure that the police take their responsibilities seriously. It is therefore somewhat odd that not every juvenile source is entitled to an appropriate adult. Does this underplay the risk to sources aged 16 or 17?

Speaking in the House of Lords, Baroness Williams stated that "16 and 17 year-olds can absolutely request that somebody be present … but it is not mandated".[111] They can ask, but the police can say "no". Also, how many 16 and 17 year-olds would know that they could ask? The police

[108] Balsdon, *Juvenile Informants*, 29.
[109] Dennis, "Collateral Damage", 1174.
[110] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 3.
[111] HL Deb. vol. 793 col. 445 (16 October 2018).

response is likely to be, "that only applies to those under 16". A potential source could, of course, refuse to cooperate, but the police can be persuasive when recruiting sources.

The Divisional Court was not persuaded that children aged 16 or 17 required an appropriate adult. Supperstone J. merely echoed the government line that there is nothing to stop an appropriate adult accompanying a source aged 16 or 17,[112] without saying how. There is nothing within the Code of Practice or statutory instrument that states that the police must consider an appropriate adult if requested. Again, they could refuse. Also, if the statutory instrument says nothing about the ability to ask for an appropriate adult, how is an (unaccompanied) 16- or 17-year-old supposed to know that they can ask for one?

If, as the Government suggests, 16- and 17-year-olds can request an appropriate adult, then the Code of Practice should be amended to state that, while it is not mandatory, an appropriate adult should attend when requested by the source. That would be analogous to the position on legal advice for those kept in custody.[113] Of course, that does not address the point about knowing that the right exists. Two solutions could address this: require the police to supply a source with a copy of the Code of Practice or, more appropriately, a more intelligible summary of a source's rights (as the Code of Practice is written in legalese); or require the police to state that the right exists and ask the source if they want an appropriate adult. The authorising officer should be obliged to verify that this happened.

Who can be an appropriate adult? The 2018 statutory instrument changed the definition. The original wording defined an appropriate adult as:

(a) the parent or guardian of the source;
(b) any other person who has for the time being assumed responsibility for his welfare; or
(c) where no person falling within paragraph (a) or (b) is available, any responsible person aged eighteen or over who is neither a member of nor employed by any relevant investigating agency.[114]

The following definition has replaced this:

(a) the parent or guardian of the source; or
(b) any other person who has for the time being assumed responsibility for his welfare or is otherwise qualified to represent the interests of the source.[115]

[112] *R. (Just for Kids Law) v Secretary of State* [2019] EWHC 1772 (Admin), at [72].
[113] Police and Criminal Evidence Act 1984, s. 58. In a similar way to under section 58, the police could refuse a particular appropriate officer where a senior officer believes that it would compromise the investigation.
[114] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 4(3).
[115] Regulation of Investigatory Powers (Juveniles) (Amendment) Order 2018, SI 2018/715, art. 2(2).

At first sight, this would appear to involve several changes:

- parents do not appear to be the default appropriate adult;
- there is an undefined requirement that a person is "otherwise qualified"; and
- there is no requirement that an appropriate adult is independent of the investigating authority.

Each of these changes causes concern. First, under the original wording, parents appeared first, a person assuming responsibility came next, and then only when neither was available could someone else act. What "unavailable" meant was never explained.

The revised wording states that the appropriate adult should either be a parent or a person who has assumed responsibility for a source's welfare; and/or otherwise qualified. Again, there is no reference to whether the list is in order of priority. Thus, should the parents be approached first because they appear first? The Code of Practice clarifies this: "The appropriate adult should normally be the parent or guardian of the CHIS, unless they are unavailable or there are specific reasons for excluding them, such as their involvement in the matters being reported upon, or where the CHIS provides a clear reason for their unsuitability."[116]

Thus, the parent does appear to be the default, but there are exceptions to this rule. If the parents are involved, even tangentially, in matters that are under investigation, then this would be an obvious conflict of interest, and they should not be involved. The Code anticipates that the juvenile source can decide not to involve the source's parent, which links back to the point above that there is no legal requirement of parental consent. The Code is silent about the position when the police believe that parents will refuse consent to their child being a source. Presumably, in such circumstances, a parent would not be suitable as an appropriate adult.

Who then becomes the appropriate adult? Under the original wording, it would be a person who has temporarily assumed responsibility for the welfare of the child, but the legislation did not define who that was. Presumably, it could include situations where a person does not have formal parental responsibility. For example, where a 15-year-old mostly lives with the child's grandparent, it is possible that there has been no formal assumption of parental responsibility, but the grandparent has temporarily assumed responsibility for the child. Presumably, a similar conclusion would be reached in respect of any other family member. While other family members may not have the same parental rights and responsibilities, if the child is to be tasked against a member of the child's family, it is

[116] Home Office, *Revised Code of Practice*, para. 4.3.

unlikely that any relative would be considered an appropriate adult due to the risk that this would bring to both the source and the investigation.

Under the original 2000 statutory instrument, where neither the parent nor a person who has temporarily assumed responsibility for the child's welfare was available, any other responsible adult not employed by the relevant authority could become an appropriate adult. Again, there was no guidance in either the Code of Practice or statutory instrument about who that would be. In contrast, Code C of PACE (which governs the detention and questioning of suspects) expressly mentions a social worker as the next most suitable person where a parent is not available.[117]

The 2018 amendments changed the wording to someone who is "otherwise qualified to represent the interests of the source". During parliamentary debates, the Government gave the example of a social worker,[118] although other possibilities exist. The term "otherwise qualified" is nowhere defined. However, it would seem to be tighter than a "responsible person" in the old formulation. Local authorities are required to maintain a panel of appropriate adults for PACE 1984,[119] and this has led to organisations such as the National Appropriate Adult Network[120] to be formed, influencing national standards and providing training and advice both to appropriate adults, and those who use them. Thus, the use of an appropriate adult who is accredited by them would seem to meet the criteria for "qualified".

Californian law requires that a juvenile informant be allowed to consult a lawyer, to ensure that they understand the consequences of becoming a source.[121] Certainly, a lawyer would undoubtedly be someone "qualified", but it is unlikely that in England and Wales many lawyers would be consulted, not least because it would presumably need to be paid for privately, as it would not come within the duty solicitor scheme or legal aid. The position in California is perhaps different because recruitment of informers is invariably through "plea bargaining", and thus there is a need to ensure that the bargain is clear. The same is not true in England and Wales, and thus a legal representative is unlikely to be common.

The absence of a comprehensive definition is unhelpful because it leaves who is qualified open to question, particularly where a social worker is not available. It is submitted that "otherwise qualified" means an independent professional, and that a friend etc. would not ordinarily be appropriate (whereas they may well have met the previous test of a "responsible adult").

The third big change brought about by the 2018 amendments was the removal of the requirement that the appropriate adult is not an employee

[117] Home Office, *Code of Practice (Code C)* (2018), para. 1.7.
[118] HL Deb. vol. 792 col. 129GC (18 October 2018).
[119] Crime and Disorder Act 1998, s. 34(4).
[120] See https://www.appropriateadult.org.uk (last accessed 29 September 2019).
[121] Glasser, "The Little Guy", 697.

of the investigating agency. That change led to concerns that a police force could, for example, use a civilian employee to act as the appropriate adult. The High Court has been clear that this is not the case, with Supperstone J. ruling: "it seems plain that an employee of the investigating authority could not act as the appropriate adult [because] an individual can only act as an appropriate adult where they are 'qualified to represent the interests of the source'; an employee of the investigating authority would have a clear conflict of interest."[122]

This is an important point. It is easy to think "qualified" means formal qualifications, but it must be wider than this. Where there is a conflict of interest, then a person cannot act independently. That being the case, it seems odd to remove the express mention of independence from the instrument. Alternatively, the Code of Practice, which has the space to expand on procedure, could have included this explanation, but it does not. The ruling in the High Court is nevertheless welcome as it puts the matter beyond doubt.

Both RIPA 2000 and the Code of Practice are silent as to the appropriate adult's role. In contrast, Code C to PACE 1984 details that the appropriate adult is there to advise the child, observe whether the police are acting appropriately and fairly, help the child communicate with the police and ensure that the child is aware of a juvenile's rights.[123] Similarly, the Crime and Disorder Act 1998 defines an appropriate adult as someone who "safeguard[s] the interests of the child"[124] (albeit in connection with children who are arrested or detained). Perhaps no definition is given in RIPA 2000 because the concept of an appropriate adult is so well-known to the law. However, the concept is not directly transferrable. The rights of a child detained or interviewed are set out in statute and (PACE) Codes of Practice. The same is not true for CHIS. Similarly, the respective roles of the police and suspect are obvious and well-known. The dynamic between source and handler is less certain. How confident can we be that the appropriate adult understands the role?

Questions have arisen over the years about the effectiveness of appropriate adults under PACE 1984. Lay appropriate adults, particularly relatives, have been criticised for being passive/acquiescent in interviews rather than proactively safeguarding the welfare of the child.[125] There is no reason to believe that the position would be any different for appropriate adults in respect of CHIS. Indeed, as the average person will not know much about covert surveillance and, in particular, the use of sources, the problem is worse in relation to CHIS.

[122] *R. (Just for Kids Law) v Secretary of State* [2019] EWHC 1772 (Admin), at [64].
[123] *Code of Practice (Code C)*, para. 1.7A.
[124] Crime and Disorder Act 1998, s. 34(4)(a).
[125] V. Kemp, P. Pleasence and N.J. Balmer, "Children, Young People and Requests for Police Station Legal Advice: 25 Years on from PACE" (2011) 11 Y.J. 28, 38.

Given this, should a parent be the preferred appropriate adult? Unless they have been a source themselves, why would a parent be able to assist the juvenile? An obvious solution would be to establish a cadre of specially trained appropriate adults, with a comprehensive understanding of how sources operate. An obvious pool to draw from would be social workers. That said, there has been concern that social workers are too close to the police to be effective appropriate adults for the purposes of PACE 1984.[126] The police and social services work closely in respect of many of their statutory duties; so there is a danger that they will not want to disrupt their working relationship by being seen as interfering in the interviews. Care, however, should be taken about perception. Social workers are a regulated profession, who are required to discharge their responsibilities in a professional manner. Also, there is some evidence that the mere presence of an appropriate adult can lead to the police behaving more fairly and transparently, meaning their actual relationship may be irrelevant.[127]

Appropriate adults can only be useful when they are aware of their role and, in particular, the risks inherent in running a source. Police officers who handle, control or authorise juvenile sources require specialist training, and so should appropriate adults. Realistically, this means that ad hoc appropriate adults such as parents may not be the best appropriate adults, as training them individually would be inefficient and risks disclosing tactics to those who may be close to crime. A better approach would be to engage social workers or other professionals. They would receive specialist training so that they can ensure the risks have been properly considered, explained and understood. Employing such sources would also make it easier for those involved in the scrutiny of operations to speak to such persons to reassure themselves that operations were occurring legitimately.

D. Judicial Approval

The use or conduct of a juvenile source is authorised internally. No external permission is required. In contrast, intrusive surveillance (surveillance using a device that takes place within residential premises or a private vehicle[128]) requires the prior permission of a judicial commissioner.[129] While there is scrutiny of CHIS, it is retrospective and will not be applied to every case. The Investigatory Powers Commissioner's Office (IPCO) has taken over from the Office of Surveillance Commissioners. The IPCO must "keep

[126] H. Pierpoint, "How Appropriate are Volunteers as 'Appropriate Adults' for Young Suspects? The 'Appropriate Adult' System and Human Rights" (2000) 22 The Journal of Social Welfare & Family Law 383, 387.
[127] S. Medford, G.H. Gudjonsson and J. Pearse, "The Efficacy of the Appropriate Adult Safeguard During Police Interviewing" (2003) 8 Legal and Criminological Psychology 253, 262.
[128] Regulation of Investigatory Powers Act 2000, s. 26(3).
[129] Ibid., s. 36.

under review (including by way of audit, inspection and investigation . . . the exercise of functions by virtue of Part 2 [of RIPA 2000])".[130]

The judicial commissioners must be serving or former senior members of the judiciary.[131] Their appointment is in consultation with, inter alia, the Lord Chief Justice. As with the senior judiciary, they can only be removed from office with the consent of both Houses of Parliament,[132] meaning that they hold security of office. While no longer serving as judges, it is clear that they are exercising judicial functions, and they would be expected to exercise judicial independence.

As part of their oversight, the Investigatory Powers Commissioner (IPC) employs inspectors who assist the commissioners in their work. These inspectors are invariably retired senior officers of police and equivalent law enforcement agencies. Alongside a judicial commissioner, they attend law enforcement premises and review a sample of authorisations. They write reports on each agency they visit and report any failings to the IPC.[133] Where an authorisation was deemed inappropriate, a more detailed investigation may occur, which could lead to public criticism of the organisation.

The IPC must prepare an annual report,[134] which details any issues that arose from the inspections. The report is addressed to the Prime Minister, who must publish it. The report is also laid before Parliament.[135] In combination with judicial independence, this means that the IPC should be able to discharge the IPC's duty of retrospectively considering the compliance of police and others with their legal obligations.

Retrospective analysis can only do so much. Law enforcement agencies are not always inspected annually, and not every case is examined. Thus, illegal or inappropriate use of sources may be missed. Sir Adrian Fulford, the then IPC, has stated that his inspectors specifically asked the authority if they had authorised any young person as a source since the last inspection.[136] There could be a considerable period between the authorisation and any subsequent review, meaning poor practice remains unchecked.

Californian law requires the approval of a judge before a juvenile is used as an informer.[137] Lord Judge, the final Chief Surveillance Commissioner,

[130] Investigatory Powers Act 2016, s. 229(3)(e).
[131] Ibid., s. 227(2).
[132] Ibid., s. 227(4). Limited reasons for dismissal for cause exist in section 227(5) but these broadly concern bankruptcy, disqualification from serving as a director or where a sentence of imprisonment has been imposed.
[133] *Annual Report of the Chief Surveillance Commissioner for 2016–2017* (HC 299), 2.
[134] Investigatory Powers Act 2016, s. 234.
[135] Ibid., s. 234(6).
[136] Letter from Sir Adrian Fulford to Harriet Harman MP dated 24 August 2018, available at https://ipco.org.uk/docs/IPCO's%20letter%20to%20Harriet%20Harman%20MP%20(24-08-18).PDF) (last accessed 4 October 2019).
[137] California Penal Code, s. 701.5(b).

has suggested the same should happen in England and Wales. His Lordship suggested that rather than having a retrospective inspection of juvenile sources, the judicial commissioners should be asked to approve the source after the authorising officer has made her decision.[138] Lord Judge, while commending the diligence of authorising officers, suggested that a judge or judicial commissioner "will be focused more significantly on the protection and the needs of the young CHIS than perhaps a police officer might be".[139] This is an important point. Internal authorisations will invariably subconsciously consider factors other than the risk to the source. Even though the authorising officer in respect of juvenile CHIS is an executive officer (Assistant Chief Constable), they are still going to be trying to balance competing interests, including local and political policing priorities. A judicial commissioner can provide a truly independent view of the necessity of using this source, and the extent to which the source can be protected.

During the House of Lords Debate, the Government did not reject out of hand the suggestion that there should be judicial authorisation. Baroness Williams, the relevant Home Office minister, stated that it would require primary legislation.[140] Two responses are available. First, governments are rarely shy of putting forward criminal justice legislation. Second, it is not necessarily correct to state that this change would require primary legislation.

The Protection from Freedoms Act 2012 introduced a requirement that some forms of authorisation require either the approval of, or notification to, the judicial commissioners.[141] Section 32A(6)(c) states that, inter alia, the police need to adhere to any condition put forward by statutory instrument. This power was first exercised in The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013.[142] This SI ensured that the authorisation of an undercover police officer requires notification to the judicial commissioners.[143] This requirement was introduced because of scandals that emerged from 2010, where undercover police officers had sexual relations with women in groups that they had been tasked to infiltrate.[144] Requiring greater involvement of the IPCO is designed to minimise the chances of such behaviour being repeated.

The same approach could apply to juvenile sources. An order could be made under section 32A. Two alternatives then exist. The first option is

[138] HL Deb. vol. 793 col. 441 (16 October 2018).
[139] Ibid.
[140] HL Deb. vol. 793 col. 449 (16 October 2018).
[141] Regulation of Investigatory Powers Act 2000, s. 32A, inserted by Protection of Freedoms Act 2012, s. 38(1).
[142] Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013, SI 2013/2788.
[143] Ibid., art. 4(1) when read in conjunction with art. 2.
[144] See e.g. "Undercover Police Had Children with Activists", *The Guardian*, 20 January 2012.

for the SI to require that the use or conduct of a source is not valid until approved by a judicial commissioner. The second option is to require notification (as with undercover officers).[145] Judicial approval is the closest to the Californian system. The authorising officer would still need to approve the use, but that approval would not be valid until a judicial commissioner agrees.

The attraction of approval is that it provides the ultimate safeguard. It recognises the sensitive nature of the operation and ensures that the use of juvenile sources is subject to extra scrutiny. Where a source is to be tasked against members of the source's family or social circle, it ensures that there is greater scrutiny of whether the operation is compatible with Article 8. Where the risk of harm to the source is particularly significant, the judicial commissioner can consider the balance between those risks and combatting the crime under investigation. Perhaps more importantly, it could resolve the question about whether a source is *Gillick* competent, justifying a refusal to seek the permission of a parent.

The disadvantage of approval is that it invariably slows things down. Even with advanced technology, there will be a delay while the paperwork is created and transmitted to a judicial commissioner, who may have questions. A failure of technology is currently causing further delays. Unbelievably, in this era of secure communications, the commissioners still rely on Brent machines, which employ a secure fax system. These machines are failing,[146] and yet the Government has not committed to replacing them. That is something that must be addressed as a matter of urgency.

While most operations will be planned days in advance, some will require rapid authorisation. For example, a known source indicates that he has been invited to a county lines meet where a discussion between two gangs will take place on the distribution of drugs or illegal firearms. This may be something that requires a quick response. Other forms of surveillance requiring judicial authorisation, most notably intrusive surveillance, contain an exception for urgent matters,[147] but it is rarely used.

The maximum duration of an authorisation for a juvenile source is four months,[148] but where the source is no longer tasked, the authority should be cancelled.[149] The reality is that this could mean that sources are authorised and de-authorised frequently. Let us take an example:

[145] This is although the long-term authorisation (beyond 12 months) requires the approval of a judicial commissioner, and not just a notification (Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order 2013, SI 2013/2788, art. 3).
[146] Lord Judge, "Annual Report of the Chief Surveillance Commissioner 2016–2017" (HC 299, 2017), 8.
[147] See e.g. Regulation of Investigatory Powers Act 2000, s. 36. The extent to which it was truly urgent will be specifically considered by the judicial commissioner.
[148] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 6.
[149] Home Office, *Revised Code of Practice*, para. 5.32.

> Sarah, aged 16, has agreed to be a source in respect of an investigation into a gang. Her cousin is believed to be on the edges of the gang. Sarah is due to stay with her cousin for three days in March, and then again in May.

In the example above, Sarah should be authorised for the March meeting, with the authorisation cancelled after the March meeting (unless there is a reason to believe the cousin will keep in contact with her), and then re-authorised for the May meeting. This ensures, for example, that the new deployment is considered afresh, including through the production of a new risk assessment.

However, this means that the commissioners could be asked to consider the same case multiple times, potentially wasting resources. Notification would allow the IPCO to monitor the operation. They could identify the pattern(s) of use and ensure that the police follow procedures. For example, they could inspect the authorisation paperwork if there is repeated use over a short period or routine extensions to the authorisation. The judicial commissioners remain involved, but in a more risk-based way, with the IPCO deciding when they need to scrutinise, and when they are satisfied that the operation is proceeding normally.

Notification is simpler. The authorising officer still approves the use or conduct and, once authorised, the use of the source is valid, including allowing for immediate deployment. However, as the IPCO has a responsibility to audit and inspect these powers, the IPCO could choose to look closely at the circumstances of the deployment. Where an inappropriate authorisation occurs, the IPCO could inform the authorising officer of this, in effect requiring the cancellation of the authority.[150]

A difficulty with notification is it does not directly address the point about adjudicating *Gillick* competence. Where there is disagreement about whether a child is *Gillick* competent, the police will be the ones to resolve this, even though they are directly affected by the determination. While the IPCO could retrospectively check whether the child is *Gillick* competent, it would, by then, be too late. The source will have been authorised and possibly deployed.

Approval or notification will increase the workload of the IPCO, but only modestly. Lord Justice Fulford, the former IPC, found that there had only been 14 authorisations between January 2015 and October 2018. While the Government wishes to see an increase in their use, there is no suggestion that they will become routine. In contrast, the latest figures from the IPC note that in eight months there were 577 notifications for undercover officers.[151] That the IPCO has managed those notifications suggests that involving the IPCO in juvenile sources will not be problematic.

[150] A failure to do so would lead to adverse comment in a report and would also be actionable in the Investigatory Powers Tribunal.

[151] Investigatory Powers Commissioner's Office, *Annual Report 2017* (HC 1780, 2018), 15.

Prior approval currently occurs only where the power claimed is a prima facie serious interference with Article 8. Intrusive surveillance involves placing a device in residential premises or a private vehicle. All discussions will, therefore, be recorded, with the potential for collateral intrusion high. Similarly, judicial approval is necessary for a warrant of interception.[152] Again, this has the potential to be a serious interference with Article 8, as the potential for collateral intrusion is again significant. The same is not necessarily true of the deployment of CHIS. There is unlikely to be the systematic recording of all conversations; so the potential for collateral intrusion is reduced. However, the nature of the activity *itself* is a serious interference with Article 8. The ECtHR has been clear that the ability to establish or maintain personal relationships is a fundamental part of Article 8.[153] This right is interfered with because the relationship is undermined by its exploitation by the state. The relationship is not genuine: the state is orchestrating it to conduct surveillance.

Lord Judge believed that judicial approval was necessary to help ensure that the risks to the source are managed. Currently, the authorising officer decides whether the source understands the risks that the source faces and whether the risks are justified in the context of the operation. Yet the authorising officer is employed by the investigating authority that is trying to use the source. At the very least, this has the appearance of not properly securing the welfare of the child.

Perhaps the solution is a hybrid. It was noted earlier that the "use" authority is arguably more planned than "conduct", which might require swifter action. The initial decision to use an individual as a source must include consideration of the extent to which the individual understands the concept of risk. "Use" authorisation should require approval by a judicial commissioner. The police and IPCO will then be assured that the source understands the concept of risk sufficiently. Accordingly, an authority for "conduct" could merely require notification, rather than fresh judicial approval. The same could be true of renewals. This would mean that where the IPC was concerned about the level of risk, or the duration of the operation, he could swiftly review it. Where the specific risk was not appropriate, the IPC could require that the operation end. However, notification would allow the police to deploy a source quickly, avoiding undue bureaucracy, safe in the knowledge that there has been independent confirmation that the source is aware of the risks of being a source. The authorising officer would still need to be satisfied that the deployment is proportionate, including considering the risks of the particular operation, but this would be within the wider context that there had been external verification of the

[152] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 6 as amended.
[153] See e.g. *Bigaeva v Greece* (Application no. 26713/05) and *Bărbulescu v Romania* (Application no. 61496/08), at [70].

source's maturity. Furthermore, a later decision that a "conduct" authorisation was inappropriate could prevent similar missteps being taken in the future.

E. Duration of Authorisations

The original 2000 statutory instrument states that an authorisation in respect of juvenile CHIS lasts a maximum of one month,[154] but the 2018 amendments changed this to four months.[155] The Government believes that a longer authorisation is necessary because monthly durations were causing administrative problems. The police argue that they needed to prepare a renewed authority almost immediately due to the preparation time.[156] In subsequent correspondence, the Home Office stated:

> A carefully managed, longer term period of activity may result in greater intelligence gains and, may also be in the best interests of the young person involved, reducing any potential risk to them and allowing them a greater period of engagement with experienced policing professionals . . . Operational teams … flagged that, in practice, these restraints mean that they were often reluctant to use juvenile CHIS even where there could be real value, as the one month period made it too difficult to manage, therefore losing out on vital intelligence opportunities.[157]

In the same correspondence, the Home Office argued that the short duration increased pressure on the police to proceed quickly, potentially increasing the risk of harm to the source. However, authorisations were always renewable (although these would take the form of a new application). The essence of the argument of the Home Office appears to be that renewal is more onerous than review. RIPA 2000 itself casts doubt on that. There are several procedural steps required to authorise a source (discussed already), but a review merely requires the relevant officer to consider "the use of the source … and the tasks given to the source".[158] In undertaking the review, however, the officer must consider "whether it remains necessary and proportionate to use a CHIS".[159] An intrinsic part of proportionality is the extent to which the deployment is necessary, balanced against the risk of harm to the child. Thus, the review must consider the risks to the source.

Some in Parliament believe a review weakens the safeguards for children. Lord Paddick, himself a former senior police officer and controller of CHIS, suggested that a review weakened the safeguards because it would be conducted by a lower-ranking officer than the authorising officer.[160]

[154] Regulation of Investigatory Powers (Juveniles) Order 2000, SI 2000/2793, art. 6.
[155] Regulation of Investigatory Powers (Juveniles)(Amendment) Order 2018, SI 2018/715, art. 2(3).
[156] Secondary Legislation Scrutiny Committee, *Draft Investigatory Powers* (HL 168, 2017–19), 2.
[157] Letter from Baroness Williams of Trafford, Minister of State, to Lord Haskel dated 30 July 2018 (obtained by the author through a freedom of information request).
[158] Regulation of Investigatory Powers Act 2000, ss. 43(6), 43(7).
[159] Home Office, *Revised Code of Practice*, para. 8.9.

The Code of Practice indicates that the review should be by the "authorising officer", something confirmed by the Home Office.[161] Thus, it would continue to be an assistant chief constable that conducts the review.

Lord Paddick suggested that, if it was the authorising officer who was to undertake the review, it was not clear how a four-month authorisation, reviewed monthly, differed from a renewable monthly authorisation.[162] However, more effort is required for an authorisation than for a review. That does not mean a reduced focus on safeguarding, as the risks to a child are monitored continuously.[163] Introducing notification to the IPCO would simplify matters because an independent examination of risk would occur. Cancellation would be a notifiable event,[164] and accordingly, the IPCO would be in a position to monitor the frequency of extensions and cancellations. The IPCO would be able to investigate repeated renewals to assure themselves that the criteria for renewal were satisfied. This would mark a significant improvement to the current position.

V. Should Juveniles Be Used as CHIS?

The use of informers has been described as a "necessary evil",[165] and this must be especially true of juvenile sources. As noted above, there is sometimes a choice between not targeting a particular crime effectively or deploying juvenile CHIS.

As has been seen throughout this piece, the risks to a source are real. This means that a source should only be used where it is necessary, and this will undoubtedly be restricted to the most serious crimes. The paradox that is created, of course, is that the more serious the crime, the more serious the risks to the source become. That being the case, juvenile sources should only be used exceptionally and their use should be subject to strict regulation. This article has shown that, while they are used rarely, there are gaps in the regulatory framework and this arguably leaves juvenile sources open to harm.

The Government intends that there should be an increase in the number of juvenile sources used. With the increase in gang activity and the radicalisation of some youths, this is understandable. There is a case for increased use, but it should continue to be rare for juveniles to be used as CHIS.

[160] HL Deb. vol. 793 col. 436 (16 October 2018).
[161] Letter from Baroness Williams, Minister of State, to Lord Paddick dated 25 October 2018 (obtained by the author through a freedom-of-information request).
[162] HL Deb. vol. 793 col. 436 (16 October 2018).
[163] Regulation of Investigatory Powers Act 2000, s. 29(4).
[164] As it is with intrusive surveillance: Regulation of Investigatory Powers Act 2000, s. 35(1).
[165] D. Lowe, "Handling Informers" in J.A. Eterno and C. Roberson (eds.), *The Detective's Handbook* (Abingdon 2015), 200.

The secrecy that is inherent in covert policing means that we cannot be sure how juveniles are recruited as sources. The police will inevitably approach them following arrest, but there is less certainty regarding whether potential sources are routinely offered a "deal" to encourage them to become CHIS. While it may be thought that this should not happen, we must also be realistic. There are numerous reasons why people choose to be a source,[166] but it is rarely because the source wants to "do the right thing". In many instances, it will be because people believe that they will be treated more leniently by the police and/or courts if they cooperate.

It is important that any negotiation around the treatment of a source, and particularly a juvenile source, does not lead to the impression that a person has no option but to become a source. There should not be unrealistic promises, and there should never be threats or coercion. It was noted that, in the US, there had been instances of police officers threatening to arrest siblings or other members of the family. That should not happen here.

An appropriate adult should be present when the source is recruited. Such an adult's presence has the potential to ensure that the police are open about what help they can provide to an offender facing arrest or prosecution, do not make false promises and do not try to coerce a juvenile into becoming a source, particularly where the risks to that source are significant. Judicial approval of juvenile sources will also help ensure recruitment is fair and transparent, as a judicial commissioner will be able to investigate how a source was recruited, including by talking to the appropriate adult.

Our initial instinct is that a parent ought to be involved in the decision as to whether the parent's child should be a source. This also means the parent acting as an appropriate adult where the parent is available. However, sources are likely to be involved in, or on the periphery of, crime. The same is likely to be true of their parents. Therefore, there is an increased risk by involving a parent. The emphasis on *Gillick* competence is, it is submitted, slightly disingenuous. The inherent jurisdiction of the courts acts as a failsafe where there are doubts as to the child's decision. The same is not true of sources, where there is no obvious judicial adjudication. A child of 16 or 17 does not assume all the rights of adulthood; the state often treats those under 18 differently. Saying that they can make their mind up in the same way as an adult source is unconvincing.

If *Gillick* competence becomes the benchmark for avoiding parental consent, then it is imperative that the judiciary are involved, so that it is not the police who decide whether the juvenile is competent when it is in their interests for the answer to be "yes". Even if they are entitled to make their own decisions, it does not follow that juveniles understand everything about life as a source or the actions of the police. A source under the age of

[166] Dunnighan and Norris, "A Risky Business".

18 should be entitled to have an appropriate adult present. At present, this is mandatory for those under 16, and the Code and legislation are silent as to the position of those aged 16 and 17. This should change, and a child aged 16 or 17 should be offered the opportunity to have an appropriate adult. That should be asked of the child freely, and the decision recorded in the paperwork.

Who then should the appropriate adult be? For the reasons set out already, it should not be a parent. Either the parents will be conflicted, or they are unlikely to know much about life as a source. Unlike when interviewing suspects under caution, there is no clear understanding of what the role of the appropriate adult is. It should be ensuring that the child is not placed under undue pressure to undertake risky actions, the risks are properly explained to the child, and that the police are actively assessing the appropriateness of the deployment. Accordingly, a small number of social workers or other professionals should receive training on the use of CHIS, and they should become appropriate adults. Such professionals would have a professional obligation to safeguard the child and would therefore be able to hold the police to account.

The biggest change should be to involve the judicial commissioners in the authorisation of juvenile CHIS. It has been noted that the difference between an undercover officer and an informer is training.[167] Yet we are now in a position where recruitment of the person with the specialist training – the police officer – involves greater initial scrutiny than recruitment of the amateur. That cannot be right. Deploying an undercover police officer is now either notified to or approved by the IPCO due to the sensitivities raised in their use. This followed scandals where undercover officers acted inappropriately, but it is important to note that this was only a very small percentage of undercover officers. However, the risk (including political risk) was considered sufficiently high to justify the use of the judicial commissioners. The same must be true of juvenile sources. Indeed, there is a greater need for involving the judiciary given that the issue of *Gillick* competency – which is ultimately a legal test – now appears central to the use of juvenile sources.

At present, a police force that wishes to use a source in an operation that it runs, in the hope of arresting someone who is committing a crime in its area, is the one who decides whether to deploy a juvenile source. While the authorising officer is of executive rank, and may not be involved in the operation itself, this has the appearance of a clear conflict of interest. There is no external verification of the risk(s) involved, the proportionality of the operation or an assessment of whether the juvenile fully understands the consequences of the juvenile's actions, including ways in which to

[167] C.J. Ransom, "Does the End Justify the Means – Use of Juveniles as Government Informants, Helpful to Society While Harmful to the Child" (1999) 20 J.Juv.L. 108.

minimise risk to self. Judicial commissioners can impartially provide that scrutiny, reassuring the public that juvenile sources are only being used in exceptional circumstances where there is no realistic alternative.

It is the "use" authority that requires the examination of *Gillick* competence, and whether the child is capable of understanding risk. That being the case, that authority for use should only become effective when a judicial commissioner approves it. The use of juvenile CHIS is planned, and such judicial authorisation would not unduly delay matters. The actual deployment of the source involves the authorisation of "conduct". This should be a notifiable event. The authority can be granted internally by the assistant chief constable, but it must be notified to the IPCO. A judicial commissioner could then review the authority if they so wished. Cancellations and renewals would also be notifiable events, meaning that the IPCO could monitor the deployment, and intervene where they think it is no longer proportionate or where the risk is too great. This strikes the correct balance between providing careful oversight and allowing the police to respond quickly to developments in active operations.

If the changes set forward in this article are implemented, the public could have confidence that juvenile sources are being used appropriately. Will the public ever be comfortable with their use? Probably not. Most members of the public probably share the disquiet of Lord Haskel and others. However, the police sometimes need to do things that make wider society uncomfortable. The fight against serious crime occasionally requires unorthodox steps. Informers have been used for as long as law enforcement has existed. If we accept that serious crime orchestrated by juveniles and young people exists, then the use of juvenile CHIS cannot be ruled out, as it may be the only way of tackling this crime. The moral uncertainty, however, means that the public has the right to expect that there are sufficient safeguards to protect the integrity of the criminal justice system and the source. At present, those safeguards do not exist. The changes proposed here would safeguard the source, justifying the exceptional use of this tactic.