

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Sixth Delegated Legislation Committee

DRAFT INVESTIGATORY POWERS
COMMISSIONER (OVERSIGHT FUNCTIONS)
REGULATIONS 2022

DRAFT INVESTIGATORY POWERS (COVERT
HUMAN INTELLIGENCE SOURCES AND
INTERCEPTION: CODES OF PRACTICE)
REGULATIONS 2022

Wednesday 23 November 2022

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The Committee consisted of the following Members:

Chair: SIR ROBERT SYMS

† Bailey, Shaun (*West Bromwich West*) (Con)
† Baker, Duncan (*North Norfolk*) (Con)
† Bell, Aaron (*Newcastle-under-Lyme*) (Con)
Duffield, Rosie (*Canterbury*) (Lab)
† Elmore, Chris (*Ogmore*) (Lab)
† Gardiner, Barry (*Brent North*) (Lab)
† Green, Damian (*Ashford*) (Con)
Harris, Carolyn (*Swansea East*) (Lab)
† Johnson, Dr Caroline (*Sleaford and North Hykeham*) (Con)
† Lynch, Holly (*Halifax*) (Lab)

† Mann, Scott (*Lord Commissioner of His Majesty's Treasury*)
† Pawsey, Mark (*Rugby*) (Con)
Smith, Henry (*Crawley*) (Con)
† Thomson, Richard (*Gordon*) (SNP)
† Tugendhat, Tom (*Minister for Security*)
Vaz, Valerie (*Walsall South*) (Lab)
† Webb, Suzanne (*Stourbridge*) (Con)

Guy Mathers, Susie Smith, *Committee Clerks*

† **attended the Committee**

Sixth Delegated Legislation Committee

Wednesday 23 November 2022

[SIR ROBERT SYMS *in the Chair*]

Draft Investigatory Powers Commissioner (Oversight Functions) Regulations 2022

9.25 am

The Minister for Security (Tom Tugendhat): I beg to move,

That the Committee has considered the draft Investigatory Powers Commissioner (Oversight Functions) Regulations 2022.

The Chair: With this it will be convenient to consider the draft Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022.

Tom Tugendhat: It is a pleasure, as always, to see you and to serve under your chairmanship, Sir Robert. The draft Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022 were laid before the House on 19 October, while the Investigatory Powers Commissioner (Oversight Functions) Regulations 2022 were laid on 18 October.

Maintaining our national security and keeping the public safe is the top priority of this Government and, I hope, every Government. We seek to make these regulations to ensure the maintenance of transparent oversight and the effective operation of the safeguards that are in place to manage the important powers exercised under both the Investigatory Powers Act 2016 and the Regulation of Investigatory Powers Act 2000.

There are three key points to discuss. First, there are the amendments to the covert human intelligence sources code of practice, which I will refer to as the CHIS code—a lovely phrase. The regulations will update the CHIS code in light of the amendments made to the Regulation of Investigatory Powers Act, henceforth known as RIPA, by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. The amendments to part 2 of RIPA sought to ensure that there is a clear and consistent statutory basis to authorise CHIS to engage in conduct that could otherwise be criminal where it is necessary and proportionate to do so, having regard to the UK’s obligations under the European convention on human rights and the Human Rights Act 1998. The CHIS code sets out the processes and safeguards governing the use of CHIS by public authorities, and provides detail on how CHIS powers should be exercised and duties performed, including examples of best practice. The draft revised CHIS code also sets out enhanced protections for children and vulnerable adults where they are to be authorised as CHIS in exceptional circumstances. There has been extensive, valuable consultation with charities and interest groups to inform these changes.

This instrument will also make necessary changes to the interception of communications code of practice, which I will refer to as the draft revised interception code. The draft revised interception code provides further

guidance on the use of interception by public authorities that exercise such powers, which are also known as intercepting authorities. The changes to the draft revised interception code will reflect the Government’s long-standing position on serving intercept warrants on cloud service providers and the enterprise service that they provide to customers. These limited changes will bring much-needed clarity for relevant UK and US companies that are impacted by enterprise service issues.

A public consultation on the proposed changes was carried out between July and October. After further cross-governmental engagement on the draft revised interception code, there are three additional changes to the proposed revisions, to reflect that an intercepting authority may opt not to serve a warrant on the enterprise if doing so would compromise national security. These changes are intended to provide further examples of the circumstances under which a warrant may be served on a cloud service provider instead of an enterprise customer, and outlines the obligations imposed by the Investigatory Powers Act regarding unauthorised disclosure to help protect national security.

Finally, I turn to the changes to the investigatory powers commissioner’s oversight functions. I will refer to the investigatory powers commissioner as the IPC. These regulations place two areas on a statutory footing: first, the IPC’s oversight of the GCHQ equities process, and secondly compliance by members and civilian staff of SO15 at the Metropolitan Police Service and members of the National Crime Agency with the guidance referred to as “The Principles relating to the detention and interviewing of detainees overseas”. These areas have previously been overseen by the IPC and his office on a non-statutory basis.

The changes will provide greater public accountability and enable the effective discharge of the IPC’s responsibilities. As a statutory authority, the parameters of the IPC’s remit are set by Parliament and the IPC has made it clear, and the Government agree, that he considers formalising his oversight responsibilities as being in the best interests of transparency and robust oversight. In summary, the regulations provide clarity and transparency around the use of oversight powers that are vital for keeping the public safe. I commend the regulations to the Committee.

9.30 am

Holly Lynch (Halifax) (Lab): It is a pleasure to serve under your chairmanship this morning, Sir Robert. I thank the Minister for his opening contribution.

On the draft Investigatory Powers Commissioner (Oversight Functions) Regulations 2022, as the Minister has said the new regulations stipulate that the oversight functions of the commissioner include keeping under review, by way of audit, inspection and investigation the exercise of GCHQ processes relating to determining whether information about vulnerabilities in technology should be disclosed. Furthermore, the statutory instrument provides the commissioner with oversight of compliance by members and civilian staff of the Metropolitan police force in relation to counter-terrorism legislation and officers of the National Crime Agency with the guidance referred to as “The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees”.

We interrogated those principles for the purposes of the National Security Bill. It is worth being clear and on the record that the principles are explicit that:

“The UK Government does not participate in, solicit, encourage or condone unlawful killing, the use of torture or cruel, inhuman or degrading treatment (“CIDT”), or extraordinary rendition. In no circumstance will UK personnel ever take action amounting to torture, unlawful killing, extraordinary rendition, or CIDT.”

As the Minister knows, we are always very supportive of independent commissioners and reviewers of legislation. I thank Sir Brian Leveson and his team for the valuable work that they do in ensuring that our security services are as accountable and transparent as they are able to be. I am also grateful to the Investigatory Powers Commissioner’s Office for its feedback when I approached the office about these provisions. On that basis, we welcome this further extension of the oversight powers allocated to the commissioner to consider the conduct of these additional agencies.

We sought a legal opinion on some of the provisions. One thing that was not clear in relation to the oversight of GCHQ and the disclosure of technological vulnerabilities is whether the commissioner will only have powers to consider GCHQ’s decision-making processes on whether to disclose such vulnerabilities or not disclose, or if he will have the power to intervene and compel a disclosure should he warrant that necessary.

The second statutory instrument will bring into force the revised code of practice prepared under section 71 of the Regulation of Investigatory Powers Act 2000, providing guidance on the authorisation for the conduct or use of covert human intelligence sources by public authorities. Under section 72 of that Act, a person must, in so far as applicable, have regard to a code of practice when exercising any powers or duties to which the code relates.

Labour recognises the fundamental importance of covert intelligence and the role it plays in keeping our country safe. As an example, in 2018 alone, covert human intelligence sources helped to disrupt more than 30 threats to life, leading to the arrest of numerous serious organised criminals and the seizure of more than 3,000 kg of class A drugs, while taking more than 50 firearms off the street. Given the inherent nature of what covert intelligence entails, it is vital that proper safeguards and the processes for accountability and proportionality are introduced and used exhaustively.

We welcome that this statutory instrument will update the code of practice following the Government consultation that ran for eight weeks, from December 2021 to February of this year. I note however that at least one organisation who made a submission to the consultation felt that eight weeks over the Christmas period and at the height of the prevalence of the omicron variant put a strain on stakeholders to respond.

Colleagues led on the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 during its passage. We agreed it was a marked improvement on the status quo, but Labour raised concerns around the number of public agencies approved. The powers granted by that Bill are incredibly serious and must only be conferred to public agencies where the use of such powers is vital for their work. We pushed for more real-time involvement of the Investigatory Powers Commissioner, and we argued extensively for the most comprehensive protection of children and vulnerable adults in this space.

I note that most of the consultation responses had a focus on protecting children and vulnerable adults, and I can see that the Government have reflected on those submissions. While we remain and will always be very uncomfortable about those with vulnerabilities, be they age-related or otherwise, being involved in this line of work, the updated guidance is an improvement on the guidance that predates it, and it benefits from the consultation submissions. The standardisation of the use of the word “child” or “children” rather than “juvenile” is welcome, and we hold the Government to their statement in the response to the consultation that

“Children are only authorised as CHIS in exceptional circumstances and the duty of care that is owed to children in this context is taken extremely seriously.”

I look to the Minister for assurances that, in these circumstances, every other possible means of gathering intelligence is explored and exhausted first.

The Minister will be aware of the distressing case earlier this year of a person acting as a CHIS for our intelligence services who had used that status to abuse his former partner. I cannot see that the code reflects the potential for abuse of the status by a CHIS, and I hope the Minister can provide assurances to the Committee that that situation is being investigated and that processes are being revised accordingly, so that we close down opportunities for anyone acting as a CHIS to use the status to abuse others.

I note that the explanatory memorandum states:

“A person must have regard to the Code when exercising powers and any function to which this Code relates.”

However, it goes on to say:

“Failure to comply with the Code does not render that person liable in any criminal or civil proceedings.”

It says that

“the Code is admissible in evidence in criminal and civil proceedings”,

but given the seriousness of these powers and the fact that we all want and need to see the guidance adhered to in the strictest sense, what assurances can the Minister provide that there will be consequences of a failure to comply with the code?

We will continue to follow closely the work of the Investigatory Powers Commissioner in his ongoing assessment under these statutory instruments, and we renew our commitment to always engage with Government constructively, to find the right balance between keeping people safe and upholding the personal freedoms we hold dear.

9.37 am

Richard Thomson (Gordon) (SNP): It is a pleasure to serve under your chairmanship, Sir Robert. I was pleased to be nominated by my party to contribute to the scrutiny of these measures, not least because I had the unexpected duty of speaking on Second Reading of the Covert Human Intelligence Sources (Criminal Conduct) Bill on 5 October 2020. I think it is fair to say that at that stage, we were not terribly impressed with the measures in the Bill and were looking for a number of assurances from Ministers, which, sadly, were not forthcoming. That is one of the major reasons why we voted against the Bill’s Third Reading and the Scottish Government withheld their legislative consent.

[Richard Thomson]

Notwithstanding that, the measure is a positive development, given the benefits it brings in placing informal arrangements for oversight of GCHQ and others on to a statutory footing. We welcome the revised CHIS code and the revised interception code, albeit cautiously. However, we remain concerned that they do not appear to deal with the dangers caused by agents provocateurs, and the CHIS code still does not require authorising officers to be completely independent of the investigation. That separation of powers is extremely important, because there is an obvious conflict of interest, and as far as we can see, no measures in the SI or the code deals with that. Like the hon. Member for Halifax, we also remain concerned about the lack of oversight in real time of the use of covert human intelligence sources.

We will keep these matters under review, and we urge the Minister to reflect on the fact that those concerns still exist. Nevertheless, in the narrow terms of the measures before us, we think that they are a positive development, and on that basis, we are content to see them progress.

9.39 am

Tom Tugendhat: I thank both Opposition parties for their co-operation. Both codes are very important, and the commissioner is an important addition, so I am extremely grateful that they have given their consent.

Sadly, tracking not only individuals but state-based threats around our country requires powers that many of us wish we did not have to exercise or use, but it

would be irresponsible of the state not to have them. Governments in the past have always supported this, so I am glad that we have done so.

It is worth noting that the IPC only has the powers to oversee the process and report, not to intervene or act in any other way, so that has not changed; it has just been extended. Chapter 2 of the CHIS code makes clear that criminal conduct authorisation must be set out clearly for each CHIS. The hon. Member for Halifax is right to ask about the use of children. Of course, children would always be extremely cautiously used in any Government activity and only in the most appropriate circumstances, when no other way could be found to achieve the same result. I assure her that no authorisation would be given unless it was absolutely necessary and the interests of the child were fully taken into account. It is such commitments that have allowed us to get through the consultation process with many groups that are rightly entirely focused on the interests of the child.

I thank the Committee for considering these regulations. Thank you, Sir Robert, for your chairmanship; it is always a pleasure to see you. I thank the Opposition parties for supporting these important SIs.

Question put and agreed to.

**DRAFT INVESTIGATORY POWERS
(COVERT HUMAN INTELLIGENCE
SOURCES AND INTERCEPTION: CODE OF
PRACTICE) REGULATIONS 2022**

Resolved,

That the Committee has considered the draft Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022.—(Tom Tugendhat.)

9.42 am

Committee rose.

