

Children as covert human intelligence sources: spies first, children second

Abstract

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 empowers the police, and other authorities, throughout the UK to use children as Covert Human Intelligence Sources (CHIS) and to authorise these children to engage in criminality, with no criminal liability, in return for information. In this paper we analyse the risk of severe physical and emotional harm that children face when acting as a CHIS and engaging in criminal behaviour to preserve their cover. This practice of using a child as a CHIS and encouraging children to engage in criminal conduct also runs counter to the Youth Justice Board for England and Wales' 'Child First' vision of a youth justice system that respects children rights and operates in children's best interests. Throughout the article we argue that, despite the existing safeguards, the emphasis should be on helping children to escape a criminal lifestyle, rather than entrenching them further in a life of criminality by encouraging them to act as a CHIS.

Key words: covert human intelligence sources, autonomy, United Nations Convention on the Rights of the Child, Child First , right to an open future.

Introduction

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 empowers the police, and other authorities, throughout the UK to use children as Covert Human Intelligence Sources (CHIS) and to authorise these children to engage in criminality, with no criminal liability, in return for information. Employing a child as a Covert Human Intelligence Source (CHIS) essentially involves requiring the child to remain in a situation where they are being abused, or at risk of harm, to help fight criminality. In *The Queen on the application of Just for Kids Law v Secretary of State for Home Department* (2019) the charity Just for Kids Law (JFKL)

challenged this practice of using children as CHIS in the criminal justice system of England and Wales. JFKL argued that this practice puts children at risk of severe physical and emotional harm and that the safeguards for children used in this way were so inadequate as to contravene domestic and international human rights laws. However, the court rejected these arguments and found in favour of continuing the current practices. Since this judgment the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 has expanded the remit of the CHIS scheme by allowing the police, and other authorities, to authorise children to engage in criminality, with impunity, in return for information. Children used in this way by the police have no right to independent legal advice and only some of these children, those aged 15 years and under, have the right to an appropriate adult to support, advise and assist the child while being interviewed by police (Home Office, 2018). The 2021 Act also permits children aged 16 or 17 years to gather, and report, information about their parents or guardians.

In this article we argue that the emphasis should always be on helping children to escape a criminal lifestyle, rather than entrenching them further in a life of criminality by encouraging them to act as a CHIS. We particularly focus upon section 2 of the 2021 Act which regulates the granting of a ‘juvenile criminal conduct authorisation’. This paper examines the *Just for Kids Law* case to highlight the issues it raised, particularly in relation to the contrived distinctions in protection provided to those aged 15 years and under and children aged 16-17 years. Analysis of this case is particularly timely and pertinent as the issues regarding inadequate safeguards still exist after the passing of the 2021 Act. We argue that using a child as a CHIS will always run counter to the child’s best interests as it increases the likelihood of being involved in crime – as both perpetrator and victim. The current practices of using a child as a CHIS also runs counter to the Youth Justice Board for England and Wales’ ‘Child First’ vision for the English and Welsh youth justice system to be based on respecting children rights and children’s best interests (Youth Justice Board, 2020). We engage with Joel Feinberg’s

(2015) theory that children have a right to an ‘open future’ as a critical tool to explore the links between the child acting as a CHIS and the degradations of the child’s rights and welfare. Feinberg’s theory proposes that the child has an individualised right to an equal chance in life, including the provision of support during childhood, to maximize their developmental capacity to the threshold of adulthood. The United Nations Convention on the Rights of the Child, specifically Articles 3 and 40, and the United Nations Economic and Social Council *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* provide the children’s rights frameworks that we draw on. While the focus of our article is on the law and practice in England and Wales, Californian law is also examined as it provides strict limitations on the use of children as informants requiring a court order to authorise the use of a child as a CHIS. The Californian safeguards provide an example of an enhancement which could be made to the current inadequate practices in England and Wales.

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021

The Regulation of Investigatory Powers Act 2000 (RIPA, section 26(8)) defines a CHIS as someone who covertly establishes or uses an existing personal relationship to obtain information. The National Criminal Intelligence Service (1995: 15) had previously described an intelligence source as an individual normally of criminal history, habits or associates, who freely gives information about crime or persons associated with criminal activity, sometimes in return for a financial reward or other advantage and with the expectation that their identity will be protected. The Regulation of Investigatory Powers (Juveniles) Order 2000 provides the rules in relation to using a child as a CHIS. A specific risk assessment is required for all children under 18 years of age before their use as a CHIS can be authorised by an officer of at least the rank of assistant chief constable. The Regulation of Investigatory Powers (Juveniles) (Amendment) Order 2018 extended the duration of such authorisations from one month to four

months. RIPA 2000 provides that children aged 15 years or under cannot be asked to gather information about their parents, or someone holding parental responsibility for them. An appropriate adult must also be present at all meetings between the police and children aged 15 or under who are acting as a CHIS. The Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which received Royal Assent in March 2021, amends RIPA 2000. Section 2 of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 expands the remit of the use of a child as a CHIS by authorising the granting of a juvenile criminal conduct authorisation which permits a CHIS to engage in criminal conduct in the course of, or otherwise in connection with, intelligence gathering. Any authorised criminal conduct will be ‘lawful for all purposes’ which includes full immunity both civil and criminal, including any crime committed incidental to that of the authorised crime. There is no prescribed limits on what criminal conduct can be authorised. It is not just the police that can authorise a child CHIS to engage in criminal conduct, the following agencies can also do so: National Crime Agency, MI5, MI6, GCHQ, the army, RAF, HMRC, DEFRA, Centre for Environment, Fisheries and Aquaculture Science, Marine Management Organisation, Medicines and Healthcare Products Regulatory Agency, the Home Office, Ministry of Justice, the Insolvency Service, any county council in England and Wales, the Environment Agency, the Competition and Markets Authority, the Financial Conduct Authority, Food Standards Agency, the Gambling Commission and the Health and Safety Executive. Section 2 of the 2021 Act requires that an appropriate risk assessment must be undertaken, that no foreseeable risk to the child is envisaged and that the authorisation is compatible with the need to safeguard and promote the best interests of the ‘juvenile source’. Despite these safeguards, permitting or facilitating children to commit crime arguably runs counter to many of the fundamental principles and laws (both domestic and international) underpinning the English and Welsh youth justice system.

The Youth Justice Board's *Strategic Plan 2021-24* (YJB, 2021) adopts the principle of 'Child First' as a central guiding principle and envisages the English and Welsh youth justice system as one that treats children as children and protects them from all harms that might hinder their growth and their ability to realise their potential. The Child First approach is a child-focused and developmentally informed approach which prioritises the best interests of children. It aims to promote children's individual strengths and capacities to develop their pro-social identity, to empower children to fulfil their potential and make positive contributions to society and to encourage children's active participation, engagement and wider social inclusion in order to 'minimise criminogenic stigma from contact with the [criminal justice] system' (YJB, 2020: 11). Child First explicitly recognises the responsibilities adults have to prevent any long-term damage to children. The Youth Justice Board's Child First approach builds upon Case and Haines 'Child First, Offenders Second' (CFOS) (2014, also Haines and Case, 2015) approach which recognises the vulnerability of children, and emphasises that all youth justice services should be 'child first', trauma-informed, rights-based, and operate in a way which is constructive, future-focussed and in children's best interests. CFOS is underpinned by the principles of promoting positive behaviours and outcomes, diversion, engagement, legitimacy, evidence-based partnership and responsabilising adults to explicitly promote prosocial, positive outcomes for children and minimise the child's exposure to risk (Case and Haines, 2015 and 2018).

Case and Browning (2021: 9-10) identify the theoretical foundations of the CFOS model as including Social Control Theory (Hirschi, 1969) Labelling Theory (Becker, 1963) and the Social Development Model (Catalano and Hawkins, 1996). Social control theory emphasises the importance of social bonds that when weakened can explain engagement in criminal behaviour. Labelling theory identifies the links between labelling a child as a 'deviant' and subsequent offending behaviours. The social development model focusses on the

promotion of positive behaviours and outcomes to prevent child antisocial and offending behaviour. We submit that the CFOS approach's theoretical underpinnings can also be traced to Joel Feinberg's theory that children have a right to an 'open future' (Feinberg, 2007). Feinberg contends that children possess 'anticipatory autonomy rights' that draw their importance from the adult the child will become. Feinberg designated these rights as the child's right to 'an open future' because they exist to facilitate the child's development of autonomy (Jawoniyi, 2015). Feinberg's 'Open Future' principle has been widely invoked in applied ethical discourses such as genetic reproductive technologies (see Davis, 2000), however its relevance for application in the context of the children involved in working as a CHIS cannot be underestimated as it acknowledges that children's inherent vulnerability and immaturity can impact upon their capacity to make decisions in their own long term best interests. The right to an open future is a right to have future options kept open until the child is 'a fully formed self-determining adult' capable of making their own choices (Lotz, 2006: 539). This right protects children against having important life choices determined by others before they have developed the ability to make them for themselves, thus preserving the child's future options. It therefore includes restrictions on what others are allowed to do to children as it is imperative that the child's future options are not prematurely closed (Mills, 2003; Millum, 2014).

According to Feinberg, parents who beat or mutilate their children can expect the state, as *parens patriae*, to intervene and assign the children to the custody of court-appointed trustees (Feinberg, 2015: 151). *Parens patriae* is an English legal doctrine which emerged in the late 14th and early 15th centuries in response to a series of cases heard in English chancery courts (Rendleman 1971; Cogan, 1970; Feld, 1999). In protecting neglected and dependent children, chancery courts used what are called 'equitable powers', the essential ideas of which are flexibility, guardianship, and a balancing of interests in the general welfare, with a view to getting a fairer result than could be obtained by applying more rigid legal rules (Sussman and

Baum, 1968). For Feinberg the duty of the state, in its role as *parens patriae*, is to protect the autonomy (or self-determination) and self-fulfilment of the child and to prevent certain crucial and irrevocable decisions determining the course of the child's life being made by anyone before the child has the capacity of self-determination himself (Sussman and Baum, 1968: 153). Accordingly *parens patriae* obligates the state authorities to act beyond the need simply to protect children from the harms of noxious social circumstances or to avail them of developmental and material supports that their families have failed to provide. This doctrine empowers and encourages state actors to protect children from themselves, from their associations with antisocial peers, from poor decision-making with respect to crime, and from harms to their physical and mental health to which they expose themselves. We can see these principles embedded in domestic and international child laws. Section 37 of the Crime and Disorder Act 1998 establishes preventing offending by children as the principal aim of the youth justice system in England and Wales and places all those working in the youth justice system under a duty to have regard to that aim in carrying out their duties. The White Paper *No More Excuses*, which preceded the 1998 Act, stressed that 'preventing offending promotes the welfare of the individual young offender and protects the public' (Home Office, 1997: 2.2). The Youth Justice Board's (YJB) *National Standards Guidance for Youth Justice Practice* also advocates for prevention and diversion approaches that 'promote a childhood removed from the justice system' (Youth Justice Board, 2018: 6). In 2020, the *Prevention and Diversion Project* was jointly commissioned by the National Probation Service (NPS), YJB and the Association of Youth Offending Team (YOT) Managers. *The Prevention and Diversion Project* developed a new definition of prevention as involving the provision of support and interventions to children (and their parents/carers) who may be displaying behaviours which point to their underlying needs or vulnerability. The aim being to address unmet needs, promote positive outcomes and stop children entering the formal youth justice system (YJB, 2021: 2).

Schedule 2 of the Children Act 1989 also requires local authorities to take reasonable steps to encourage children in their area not to commit criminal offences. Section 27 of the Children Act 1989 provides local authorities with a statutory mandate to call upon other departments within local government to assist them in their duties to provide services for children and to prevent youth crime. This important provision of the Children Act 1989 seeks to ensure that the various arms of the public service should cooperate with each other to prevent children becoming involved in criminal behaviour. The Children Act 2004 also imposes a duty on children's services in England to improve the well-being of children in relation to 'the contribution made by them to society' and to cooperate in helping children become responsible citizens. Section 10(2) of the 2004 Act defines wellbeing, by reference to the following five outcomes (a) physical and mental health and emotional well-being; (b) protection from harm and neglect; (c) education, training and recreation; (d) the contribution made by them to society; and (e) social and economic well-being. The 2004 Children Act requires all professionals, including those working with children in the criminal justice system, to work towards achieving these five outcomes in order to safeguard and promote the welfare of children. Section 25 of the 2004 Act, as amended by the Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010 and the Social Services and Well-being (Wales) Act 2014, requires that in Wales authorities must similarly co-operate to improve the well-being and quality of support provided to children and to protect children from abuse, neglect of other kinds of harm. Section 25 of the 2004 Act imposes this duty upon local police bodies in Wales also. Well-being in the Welsh context is defined in the 2004 Act as including the five outcomes listed above, as well as, amongst others, securing rights and entitlements and the child's physical, intellectual, emotional, social and behavioural development. The Welsh Assembly Government expanded upon the Children Act 2004 with the flagship 'Extending Entitlement' policy for supporting young people in Wales. It identifies

ten entitlements as being essential to enable young people to achieve their potential. These include the entitlement to lead a healthy life, both physically and emotionally, and to live in a safe and secure home and community (Welsh Assembly Government, 2002). The *National Strategy for the Policing of Children and Young People* (NPCC, 2015: 8) specifically highlights the prominence which should be given to the ‘safety, welfare and wellbeing’ of children. This strategy confirms the commitment of the police to treat all those aged under 18 years of age as ‘children first’ by having regard to their welfare, safety and well-being in accordance with the Children Act 2004 and the United Nations Convention on the Rights of the Child (NPCC, 2015: 8). This national strategy envisages the police adopting an evidence-based approach in which the voices and opinions of children are heard and respected and which keeps children out of the criminal justice system. Encouraging and/or facilitating a child to engage in offending behaviour undoubtedly runs counter to all of these provisions.

The United Nations Convention on the Rights of the Child (UNCRC) was signed by the UN General Assembly in 1989 and ratified by the UK government in 1991. The UN Convention has not been incorporated by the UK government and as such is not binding in domestic law. Although in Wales youth justice formally remains a non-devolved policy domain, the core services comprising Youth Offending Teams derive from wholly devolved areas of policy. This has allowed Wales to develop an approach to youth justice which is distinctive from the English agenda and is underpinned by the UN Convention requirement for consideration of the rights of the child. The 2009-2011 Delivery Plan (Welsh Assembly, 2009) along with the One Wales agenda (Welsh Assembly, 2007) prioritise the strengthening role of education and training and further integration of youth justice into other social services. Regarding young people as “children first and offenders second” (Welsh Assembly Government, 2004: 3), the Welsh approach stresses that all children, including those who offend, have basic entitlements and emphasises the responsibility of those working with

children to ensure that they receive the services to which they are entitled. The Rights of Children and Young Persons (Wales) Measure 2011 places a duty on Ministers to have due regard to the UNCRC when developing or reviewing legislation and policy. The measure also makes Ministers responsible for ensuring that people in Wales know about, understand and respect the rights of children and young people.

The UNCRC specifically recognises the inherent vulnerabilities of all children, defined as all those under the age of 18. Article 3, which refers to the best interests of the child, is a guiding principle and cross-cutting standard, which impacts all the other rights contained within the Convention (Varadan, 2019). Article 40 of the UNCRC requires that criminal justice interventions should provide equal opportunities for successful rehabilitation and reintegration to all children, to enable them to assume a constructive role in society in accordance with their individual developmental potential (Van den Brink, 2021). Given the unique challenges of protecting children who have witnessed crimes, the United Nations Economic and Social Council (UNECOSOC) built upon these provisions of the UNCRC and adopted the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* calling for the creation of a national authority to protect child victims and witnesses that would coordinate services on a national level and ensure that each interaction with children was tailored to the particular child (UNECOSOC, 2005). It also requires that those who work with child witnesses receive specific training in upholding the best interests of the child. Child victims and witnesses include children under the age of 18 who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender(s) (UNECOSOC, 2005: Article 9). These *Guidelines* are intended to serve as guidance for policymakers and professionals dealing with child victims and witnesses of crime, including children engaged as a CHIS. Article 8 of the *Guidelines* identifies the following fundamental underpinning principles: (a) that every child is a unique and valuable human being and as such his or her individual dignity,

special needs, interests and privacy should be respected and protected; (b) every child has the right to be treated fairly and equally; (c) every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development. This means that every child has the right to be shielded from any form of hardship, abuse or neglect and the right to a chance for harmonious and healthy development; and (d) every child has the right to contribute to the decisions affecting his or her life and to have those views taken into consideration according to his or her abilities, age and intellectual maturity.

All of these laws, provisions and standards strengthen the obligations upon state actors to embed safeguarding and the best interests of the child in their practices with children, to promote children's development of a pro-social identity, to engage with a diversionary ethos and to ensure all work with children is constructive and future-focussed. The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 envisages empowering state actors to encourage and facilitate children to commit criminal actions, albeit with the promise of no criminal consequences. In those cases where the free exercise of a child's autonomy will be against their own interests, even where the child consents, as for example when agreeing to act as a CHIS, then according to Feinberg, we are justified in interfering with the child's liberty in order to protect the child from harm (Feinberg, 2007: 118). The next section examines the evidence that engaging in offending behaviour, even when there are guarantees that there will be no legal consequences, can have long-term negative impacts upon the child's development.

Impact of engaging in criminal conduct

There is evidence to suggest that the very act of engaging in criminal activity as a child may adversely influence children's expectations for the future, independent of the effects of contact with the criminal justice system (Hinton et al., 2021). Hinton et al. found that the consequences

of engaging in offending behaviour as a child causes children to adjust their expectations to reflect their experiences, lowering their expectations for future success and consequently creating difficulties entering the prosocial world. Engaging in offending behaviour disrupts and weakens their social bonds and sense of control (Piquero, 2014). This pattern can continue throughout adulthood resulting in difficulties such as financial instability, poor social adjustment, and school failure (Makarios, 2017), substance use, aggression, poor mental health, poverty and subsequent criminal convictions into late adulthood (Samuelson et al., 2010). Samuelson et al. (2010) found in their study that children who displayed anti-social behaviour in early adolescence accumulate multiple problems that continued to have a negative impact on their lives up to age 50. Makarios et al. (2017) believed that the reasons for this are because youth criminal activity can work to cement children along a trajectory of poor social development, reducing prosocial bonds, social capital, and social support. Makarios et al. (2017: 701) highlighted that the nature of this reciprocal relationships is troubling because ‘it implies that poor social development can become a downward spiral that reinforces itself, making it difficult to alter this trajectory once an individual has been placed on it for a long period of time’. Poor social development can increase the likelihood of further criminal involvement and that criminal involvement works to encourage further poor social development. What this evidence points to is that allowing children to engage in criminal behaviour, even where there are no criminal or legal sanctions, does not support the prosocial development of the child.

Further examples of the dangers associated with being a CHIS can be found in the USA. In 1998, 17-year-old Chad MacDonald had worked as an informant for the police in California providing information on suspected drug dealers. Chad agreed to be an informant to avoid a custodial sentence after being arrested for possession of drugs (Santiago, 2000: 799). Chad and his 16-year-old girlfriend were subsequently kidnapped and tortured for several days. Chad’s

body was found in an alley in South Los Angeles, his killers had called him a ‘snitch’ and a ‘narc’ who needed to be taught a lesson. His girlfriend had been raped and shot in the face (Dodge, 2006: 237). In another example 17 year-old Robbie Williamson contacted the City of Virginia Beach Police Department and volunteered to provide information regarding illegal drug activities. The Police Department accepted Robbie’s offer and used him as an informant without obtaining parental permission or completing a background check. Robbie committed suicide after he was threatened by the individuals upon whom he had informed (*Williamson v. City of Virginia Beach* (1992)). In England, the *JFKL* case (*The Queen on the application of Just for Kids Law v Secretary of State for the Home Department* (2019)) which challenged the practices of using a child as a CHIS, began after it was revealed in the House of Lords in October 2018 that a 17-year-old girl was recruited by police to spy on a man who was sexually exploiting her (Hamwee, 2018). The girl was left in the situation where she continued to be exploited in order to provide the police with information. Eventually she witnessed a murder and was asked to dispose of evidence in relation to the murder afterwards.

In order for children to make an informed choice when deciding whether to become a CHIS, they will need to be supported to ensure that they understand the potential long-term consequences of their choice. In England the use of a child as a CHIS must be approved by an Assistant Chief Constable. Although such an officer may be able to make the decision whether the deployment of a child as a CHIS is suitable, it is questionable whether a police officer would have sufficient expertise to consider the long-term impact of a child performing a potentially dangerous role. In the USA there are no national guidelines on the use of child informants by prosecutors. Nevertheless some jurisdictions have adopted state-wide guidelines regulating the use of child informants which typically restrict the use of children to extraordinary or critical circumstances (Dodge, 2006: 237). For example, following the killing of Chad MacDonald California banned the use of children under the age of twelve years as

informants (California Penal Code § 701.5(e) (commonly called ‘Chad’s Law’)). Children older than twelve years may be used only with prior court approval, unless in very exceptional circumstances such as they are involved in a tobacco sting program designed to detect shops selling tobacco to children. Under the Californian Penal Code, before providing authorisation for a child to act as a ‘minor informant’ the court must interrogate, amongst other considerations, whether the child has voluntarily, knowingly and intelligently agreed to act as an informant (California Penal Code § 701.5(c)). The court must consider the child’s age and maturity, the gravity of the offence filed against him, the public’s safety, and the interests of justice. The court must also inform and advise the child about the benefits of cooperating with the police. Osther (1999) has recommended that all states should, similar to California, ban the use of young children (e.g., 12 years or younger), establish clear and comprehensive guidelines to determine levels of maturity, protect children from overly dangerous situations, and require officials to consider all alternatives. We would recommend similar safeguards in England and Wales. Additionally we would add that police who work with a child CHIS should have specific training in working with children including education about the social and psychological stages of child development so that they will be better placed to prevent physical, psychological and/or emotional harm to the child.

Children making big choices: Just for Kids Law

Just for Kids Law (JFKL) is a London-based charity which provides advocacy and legal services to children, as well as campaigning for wider reform to benefit children living in the United Kingdom. JFKL sought a judicial review to challenge the use of a child as a CHIS on the basis that it constituted a breach of their Article 8 rights under the European Convention on

Human Rights (ECHR) due to insufficient safeguards for these children. There were two elements to the challenge:

- (i) that there was a breach of Article 8 of the ECHR as there were insufficient protections within the scheme to ensure it was only utilised when necessary and proportionate, that it was inconsistent with the obligation to treat the interests of the child as a primary consideration, and there were insufficient procedural safeguards; and
- (ii) the distinction between children aged 15 years or under, and those aged 16 and 17 was challenged on the basis that the older group did not have the same protections in place that their younger counterparts had, specifically the failure to recognise a universal requirement for those aged 16 and 17 to an appropriate adult.

(i) Protecting children's Article 8 rights

The Code of Practice for the Regulation of Investigatory Powers Act 2000 outlines the safeguards which should be in place to protect a child CHIS (Home Office, 2018). A vulnerable individual will not usually be permitted to be a CHIS unless there are 'exceptional' circumstances (Home Office, 2018). It is stated in section 4.1 of the Code of Practice that an individual who may be unable to take care of themselves or to protect themselves from significant harm or exploitation falls within the category of 'vulnerable individuals'. It does not matter whether the vulnerability arises as a result of mental disorder, disability, age or illness. In response to JFKL's argument that it should be explicitly clear in the legislation, or the accompanying Code of Practice, that all those under the age of 18 are 'vulnerable', the court stated in *JFKL* that the mention of the word 'age' in section 4.1 of the 2000 Act

acknowledged youth as a potential vulnerability and that it was not necessary that the CHIS scheme should recognise all children as vulnerable. The protections which exist in relation to regularly reviewing the order authorising the juvenile CHIS, with an independent person making the authorisation, were considered by the court as sufficient protection for all under 18 year olds. Just for Kids Law also argued that the failure to have anyone who specialised in the welfare of children involved in carrying out individual risk assessments meant that it was difficult to justify the legitimacy of the process. The very nature of the CHIS role means that many people who may come into contact with the individual child may have information which is important but it may not be made available to the police for them to consider it. The Secretary of State successfully argued that involving those in mental health or social care in the assessment of a child would risk compromising the child's involvement with the police as a CHIS. This attitude is consistent with the aim of the scheme lying in the prevention and prosecution of crime, as distinct from a focus upon concerns for the welfare of the individual child and a blindness to the dangers these children face.

(ii) Distinctions between children aged 15 years or under and those aged 16 & 17 years.

The Code of Practice for the Regulation of Investigatory Powers Act 2000 states that all those under 18 years of age should be recognised as juvenile sources, however there are distinctions regarding the protections offered to different groups within the juvenile category depending upon their age and whom they are seeking to provide information on (Home Office, 2018: 4.2-4.3). The Code of Practice explicitly states that those aged 15 years or under should 'on no occasion' be authorised to give information against their parents (Home Office, 2018: 4.2). The Code's focus upon the need to prevent harm to the parental-child relationship relies upon the judgment in *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) where it was held that part of assessing the *Gillick* competence of under-16s involved the child

understanding the impact of their decision upon the relationship with their parent. This implies that 16 and 17 year olds will have a different type of relationship with their parents and that this relationship is less deserving of protection.

The link between differences in the parent and child relationship for those under 16 years and those aged 16 and 17 years old is also evident in terms of the provision of an appropriate adult. The Code states that those aged under 16 should normally have their parent as their appropriate adult unless they are unavailable or there are specific reasons for excluding them (Home Office, 2018: 4.3). The specific reasons mentioned include the parents being the subject of the intelligence procedure in the first place (Home Office, 2018). There is a presumption that 16 and 17 year olds will be able to provide the necessary consent to their involvement as a CHIS but that, where deemed necessary, an appropriate adult could be appointed by the Police. Just for Kids Law claimed that the lack of requirement for an appropriate adult for 16 and 17 year olds, a decision which would be made by police themselves, failed to recognise the need to protect all those aged under 18 years (Home Office, 2018). Justice Supperstone utilised *Gillick* competence to rule that as a child grows up they have increased maturity and independence and that this needs to be factored into considerations when assessing the need for safeguards such as whether an appropriate adult is required. ‘*Gillick* competence’ was created in the 1985 case *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) in which the House of Lords ruled that a child under 16 could request contraception against their parent’s wishes. Lord Scarman ruled that if a child had the intelligence and maturity to understand the treatment proposed they should be deemed competent to consent:

‘the parental right to determine whether or not their ... child below the age of 16 will have medical treatment *terminates* if and when the child achieves a *sufficient*

understanding and intelligence *to* enable him or her to *understand fully* what is proposed.’ (at 119, Emphasis added)

Gillick acknowledges that parental involvement in decision making ‘yields to that of the young person’ as they grow up and approach adulthood, however the focus of the *Gillick* case was on the need to balance the protection of children aged under 16 years from harm with their ability to make decisions which impact upon, and potentially bring benefits to, their own lives. In the *Just for Kids Law* case the benefit of the use of a child as a CHIS is the prevention and prosecution of crime, that is the benefit of a child CHIS is for the Secretary of State and the police authorities who authorise the use of a child in the scheme rather than benefits which directly accrue to the child. In *Gillick*, for a child to be seen as capable of providing the necessary consent, it was necessary for them to understand not only the effect of the medication, but also the impact of using the contraception on her relationship with her parents, as well as the risks associated with having sexual intercourse, especially in relation to underage sex. Lord Justice Parker in *Gillick* acknowledged that the idea of sufficient understanding will depend upon the nature of the decision; the more serious the decision, the higher level of understanding which will be required (at 555). As seen in the previous section, the decision to become a CHIS can have long-term negative consequences for children and the parent-child relationship. Autonomous decision-making is not simply a matter of comprehension, it also involves the ability to make evaluative judgments based on personal choices, and motivations, and, more importantly, freedom from external manipulations, distortions, and coercions. The two basic requirements of autonomy are often described as agency (the capacity for intentional action) and liberty (independence from controlling influences) (Herring and Wall, 2015: 711). In the differing context of how children decide to make guilty pleas, Helm describes autonomy as ‘the opposite of oppression or coercion, where individuals are guided by external factors and not their authentic beliefs or desires’ (Helm et al., 2022: 137). Helm recommends that given

the importance of autonomy in the process of making a guilty plea, that courts should actively interrogate the incentives to plead faced by each defendant and also the conditions they were in when making their decision to plead and consider whether the decision to plead guilty is in line with the defendant's own core values (Helm et al., 2022: 161). Similar safeguards should also be in place when a child has decided to become a CHIS.

The importance of supporting children when making important decisions is underpinned by the evidence which shows that when making decisions, such as the decision to become a CHIS, children tend to lack the ability to make critical decisions in a mature manner, are prone to risk-taking, are more gullible and are more susceptible to being pressured for invalid reasons (Osther, 1999: 110; Dodge, 2006: 234). Developments in neuroscientific research indicates that their neurodevelopmental immaturity renders them 'prone to impulsive, sensation-seeking behaviour, with an under-developed capacity to gauge the consequence of actions' (Modecki, 2008, Centre for Social Justice, 2012). These processes of neurodevelopment mean that children may lack the ability to perceive risks, understand consequences and make decisions in their own best interests and are more likely to prioritise immediate gratification over long-term consequences. Young people are at greater risk of suggestibility and being overly compliant in police interviews (Singh and Gudjonsson, 1992; Redlick and Goodman, 2002). The relationship between the police and the potential child CHIS involves the relatively powerless child being encouraged to dive more deeply into the criminal world by an adult in a position of power who may be motivated by a desire to make arrests and solve crime. This power discrepancy can create conditions in which the child is manipulated and exploited, as Cooper and Murphy (1997: 5) note 'there appears to be considerable scope for coercive and manipulative handling of individuals who are often on anything but equal terms with the police.'

In other contexts, English law recognises that children need protection in a paternalistic form from the long-term consequences of their decision-making in various areas of their lives. A child cannot join the armed forces until they are 16 years old. A child must be 16 years old before they can consent to sexual relations. They must be 18 years old to buy cigarettes or alcohol, get a tattoo or vote. When making a decision about whether or not to act as a CHIS, children appear to be granted almost unconstrained agency and autonomy.

Conclusion

Using covert human intelligence sources is recognised as an efficient and cost effective means of gathering evidence on criminal activities (HMIC, 1997: 2.13; also Audit Commission, 1993: 96; Harfield, 2009). The practice of using a child as a CHIS is quite rare, figures released by the Investigatory Powers Commissioner's Office reveal that between 2015 and 2019 17 children, in 11 local authorities in England, had been recruited as spies, one aged 15 years (IPCO, 2017). However the use of a child as a CHIS is a dangerous undertaking which may diminish treatment and rehabilitation efforts and further entrench the child in a life of offending. The current safeguards in England and Wales fail to acknowledge or give due weight to the particular interests and concerns of any child who acts as a CHIS, particularly the physical, ethical, intra-family, and psychological harms that may result. If the Child First agenda is to be truly embraced then there needs to be a closer alignment between how the use of a child as a CHIS is regulated and domestic and international children's rights instruments that require that the best interests of children are unarguably 'appropriately integrated and consistently applied' in every action taken by public institutions that affect them (UNCRC, 2013: 13). One of the central principles of the Child First approach is that that all work with children should be developmentally appropriate and acknowledge their inherent 'child' status focusing prospectively (into the future) on facilitating positive behaviours (Case and Browning,

2021: 11) Children are not always equipped and enabled to defend their own ‘open future’ interests against present infringement by the state. Therefore it is important that the child’s actual or presumptive, explicit or tacit consent is carefully and independently interrogated in order to ensure that ‘the child’s future is left open as much as possible for his own finished self to determine’ (Feinberg, 2015:158).

References

Audit Commission (1993) *Helping with Enquiries: Tackling Crime Effectively : Management Handbook* London: Audit Commission.

Becker, H (1963) *Outsiders: studies in the sociology of deviance*. New York: Free Press.

Case, S and Browning, A (2021) *The Child First Strategy Implementation Project: Realising the Guiding Principle for Youth Justice*. Loughborough: Loughborough University.

Case S and Haines K (2014) Children first, offenders second: the centrality of engagement in positive youth justice *Howard Journal of Crime and Justice* 54(2): 157-175.

Case S and Haines K (2015) Children first, offenders second positive promotion: Reframing the prevention debate. *Youth Justice Journal* 15(3): 226–239.

Case S and Haines K (2018) Transatlantic ‘positive youth justice’: Coherent movement or disparate critique? *Crime Prevention and Community Safety* 20(3): 208–222.

Catalano, R and Hawkins, J (1996) The Social Developmental Model: A Theory of Antisocial Behaviour. In Hawkins, J (ed) *Delinquency and Crime: Current Theories*. New York: Cambridge University Press.

Centre for Social Justice (2012) *Rule of Engagement: Changing the Heart of Youth Justice* London: CSJ.

Cogan N (1970) Juvenile Law, Before and After the Entrance of ‘Parens Patriae.’ *South Carolina Law Review* 22: 147–181.

Cooper P, and Murphy J (1997) Ethical approaches for police officers when working with informants in the development of criminal intelligence in the United Kingdom. *Journal of Social Policy*, 26(1): 1-20.

Davis, S (2000) *Genetic Dilemmas: Reproductive Technologies, Parental Choices and Children’s Futures* New York: Routledge.

Dodge M (2006) Juvenile Police Informants: Friendship, Persuasion, and Pretense *Youth Violence and Juvenile Justice* 4(3): 234-246.

Feinberg J (2007) The child's right to an Open Future. In Curren R (ed) *Philosophy of Education: An Anthology*. Malden MA: Blackwell, pp. 112-123.

Feinberg J (2015) The child's right to an Open Future. In Engster D and Metz T (eds) *Justice, Politics, and the Family*. London: Routledge, pp.145–158.

Feld B (1999) *Bad Kids: Race and the Transformation of the Juvenile Court*. New York: Oxford University Press.

Haines K and Case S (2015) *Positive youth justice: Children first, offenders second*. Bristol: Policy Press.

Hamwee, HL Deb, 16 October 2018, c438.

Harfield C (2009) The Regulation of CHIS. In Billingsley R and Mackenzie J (eds.) *Covert Human Intelligence Sources : The 'Unlovely' Face of Police Work*, Winchester: Waterside Press.

Hirschi, T (1969) *Causes of delinquency* Berkeley: University of California Press.

IPCO Letter to Rt Hon Harriett Harman MP https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/correspondence/2017-19/190308_IPCO_to_Chair_re_Child_Spies.pdf

Helm R, Dehaghani, R and Newman, D (2022) Guilty Plea Decisions: Moving Beyond the Autonomy Myth. *Modern Law Review* 85(1) 133-163.

Herring J and Wall J (2015) Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act. *Legal Studies* 35(4): 698-719.

Hinton M, Tillyer M and Tillyer R (2021) Victimization, Offending, and Expectations for Future Success among High-Risk Youth. *Deviant Behavior* 42(6): 777-791.

HM Inspector of Constabulary (1997) *Policing with Intelligence* London: HMSO.

Home Office (1997) *No more excuses: A new approach to tackling youth crime in England and Wales*. London: The Stationery Office.

Home Office (2018) *Covert Human Intelligence Sources Revised Code of Practice*. London: Home Office.

Jawoniyi O (2015) Religious Education, Critical Thinking, Rational Autonomy, and the Child's Right to an Open Future. *Religion & Education* 42(1): 34-53.

Lotz M (2006) Feinberg, Mills, and the Child's Right to an Open Future. *Journal of Social Philosophy* 37(4): 537-551.

Makarios, M, Cullen, F and Piquero A (2017) Adolescent Criminal Behavior, Population Heterogeneity, and Cumulative Disadvantage: Untangling the Relationship between

- Adolescent Delinquency and Negative Outcomes in Emerging Adulthood. *Crime & Delinquency* 63: 683–707.
- Mills C (2003) The Child's right to an Open Future. *Journal of Social Philosophy* 34(4): 499-509.
- Millum J (2014) The foundation of the child's right to an Open Future *Journal of Social Philosophy* 45(4): 522-538.
- Modecki K. (2008) Addressing gaps in the maturity and judgment literature: age differences and delinquency. *Law and Human Behaviour* 32: 78-91.
- National Criminal Intelligence Service (1995) *Service Level Agreement*. London: Association of Chief Police Officers for England and Wales Crime Committee.
- National Police Chief's Council (NPCC) (2015) *National Strategy for the Policing of Children and Young People*. London: NPCC.
- Osther D (1999) Juvenile Informants - A Necessary Evil. *Washburn Law Journal* 39(1): 106-127.
- Piquero A (2014) 'Take My License N' All that Jive, I Can't See ... 35: Little Hope for the Future Encourages Offending over Time. *Justice Quarterly* 33: 1–27.
- Redlich A and Goodman G (2003) Taking responsibility for an act not committed: The influence of age and suggestibility. *Law and Human Behavior* 27: 141-156.
- Rendleman D (1971) *Parrens Patriae: From Chancery to the Juvenile Court*. *South Carolina Law Review* 23: 205–259.
- Samuelson Y, Hodgins S, Larsson A, Larm P, Tengström A (2010) Adolescent Antisocial Behavior as Predictor of Adverse Outcomes to Age 50: A Follow-Up Study of 1,947 Individuals. *Criminal Justice and Behaviour* 37(2): 158-174.
- Santiago M (2000) Best Interests of the Child – Scrutinizing California's Use of Minors As Police Informants in Drug Cases. *McGeorfe Law Review* 31: 777-800.
- Singh K and Gudjonsson G (1992) Interrogative suggestibility among adolescent boys and its relationship with intelligence, memory, and cognitive set. *Journal of Adolescence*, 15, 155-161.
- Sussman F and Baum F (1968) *The Law of Juvenile Delinquency* New York: Ocean.
- United Nations Committee on the Rights of the Child (2013) *General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)*. CRC/C/GC/14, Geneva: United Nations.
- United Nations Economic and Social Council (2005) *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 22 July 2005, E/RES/2005/20.

Varadan S (2019) The Principle of Evolving Capacities under the UN Convention on the Rights of the Child. *International Journal of Children's Rights* 27(2): 306-338.

Van den Brink Y (2021) Equality in the Youth Court: Meaning, Perceptions and Implications of the Principle of Equality. *Youth Justice* Epub ahead of print 3rd May 2021
doi.org/10.1177/14732254211013420

Welsh Assembly Government (2002) *Extending Entitlements: support for 11-25 year olds in Wales*. Cardiff: Department for Training and Education.

Welsh Assembly Government (2004) *All Wales Youth Offending Strategy*. Cardiff: Welsh Assembly Government.

Welsh Assembly (2007) *One Wales: A progressive agenda for the government of Wales*. Cardiff: Welsh Assembly

Welsh Assembly Government (2009) *Priorities for Wales: Taking Forward the United Nations Convention on the Rights of the Child*. Cardiff: Welsh Assembly Government.

Youth Justice Board (2018) *Standards for Children in the Youth Justice System 2019*. London: YJB

Youth Justice Board (2020) *Strategic Plan 2021-2024*. London: YJB.

Youth Justice Board (2021) *Prevention and Diversion Scoping Survey*. London: YJB.

Cases

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

The Queen on the application of Just for Kids Law v Secretary of State for the Home Department [2019] EWHC 1772 (Admin).

Johnston v Wellesley Hospital (1970) 17 DLR (3d) 139.

Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1242 (E.D. Va. 1992)

Legislation

California Penal Code

Children Act 1989

Children Act 2004

Covert Human Intelligence Sources (Criminal Conduct) Act 2021

Crime and Disorder Act 1998

Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010

Regulation of Investigatory Powers Act 2000

Regulation of Investigatory Powers (Juveniles) Order 2000 SI 2000/2793
Regulation of Investigatory Powers (Juveniles) (Amendment) Order 2018
Rights of Children and Young Persons (Wales) Measure 2011
Social Services and Well-being (Wales) Act 2014
United Nations Convention on the Rights of the Child
United Nations Economic and Social Council Guidelines on Justice in Matters involving Child
Victims and Witnesses of Crime