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DATE: 17 FEBRUARY 2021

TO: CHRISTINE DARRAH
CLERK TO THE COMMITTEE OF JUSTICE

SUMMARY

Business Areas: Policing Policy & Strategy Division and Criminal Justice Policy and Legislation Division

Issue: Legislative Consent Motion to enable inclusion of provisions in the forthcoming Westminster policing and crime Bill.

Action Required: Members are asked to consider the proposal to include an additional provision in the Legislative Consent Motion.

Introduction

The Committee was briefed on 14 January on the proposal to bring forward a Legislative Consent Motion (LCM) to give effect to certain provisions included in the forthcoming Westminster policing and crime Bill (the Bill). A further written briefing, including details of a further provision to be included in the LCM, was provided to the Committee for consideration at its meeting on 4 February. It now transpires after further discussions with the Home Office that a further provision in the Bill engages the LCM process. This is in respect of new powers relating to the extraction of information from mobile devices. This paper seeks the Committee's view on including this provision in the Legislative Consent Motion and seeks the Committee's agreement to the LCM.

Powers to extract information from mobile devices

2. As noted above, it has emerged that a new power relating to the extraction of information from mobile devices also engages the LCM process.
3. The power responds to a recommendation made by the Information Commissioner's Office (ICO). The ICO published a report in June 2020 on the extraction and analysis of data from mobile phones and other electronic communication devices belonging to complainants, witnesses and suspects by police forces in England and Wales as part of a criminal investigation. The report recommended that the legislative framework should be strengthened to ensure clarity for victims, witnesses and offenders, to address inconsistencies between forces and to clarify the lawful basis for data extraction. In particular, the ICO questioned whether the use of common law powers and consent from the holder of the device would, in themselves, constitute lawful authority for interception of communications to take place under the Investigatory Powers Act 2016 (IPA).
4. The power creates a clear statutory basis for police and other authorities to extract information from digital devices where the device user (most likely to be a victim or witness) agrees to give it to police and agrees that data can be extracted from it.
5. The purposes the power can be used for are:
 - The prevention, investigation, detection and prosecution of criminal offences;
 - To help locate a missing person or safeguard a person at risk of serious harm;
 - and
 - To investigate death where information might be required to support an investigation by a coroner.
6. If the user of device is unable to give agreement, either because they are a child or because they are an adult lacking capacity, then agreement can be sought on their behalf from another person such as parent, guardian, social worker etc. Details of who can provide consent will be specified in the Bill.

7. The power is for use overtly with the device user's agreement and cannot be used where the user does not have access to the device. This power does not allow for any covert purpose that must be authorised by an IPA warrant. However, the provision makes clear that police do not commit the offence of unlawful interception when they extract data from digital devices.
8. The power will be supported by a code of practice which will give guidance to authorised persons on the use of the power including how to obtain agreement, the information they must give to the device user, and how to ensure they meet the required standards of necessity and proportionality before using the power.

Need for an LCM

9. As officials advised during the oral briefing, it would not be possible to achieve equivalent legislation via an Assembly Bill within the same timescale as could be achieved in the Westminster Bill. In addition, the Bill is UK wide and will enable us to ensure consistency of approach across jurisdictions on matters that will be of benefit here.

Next Steps

10. Home Office officials have advised that the Bill will be introduced to Parliament during w/c 1 March 2021 and the LCM will be tabled within 10 working days of that date.

A final version of the Bill will be sent to the Committee as soon as it is available.

11. The Minister would be grateful for the Committee's approval for the Legislative Consent Memorandum, with the addition of this provision, to be laid before the Assembly. Officials will, of course, assist with any further queries the Committee may have.

CLAIRE MCCORMICK DALO