

FROM THE OFFICE OF THE JUSTICE



MINISTER

Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG

FROM: CLAIRE McCORMICK

DATE: 8 JANUARY 2021

TO: CHRISTINE DARRAH

PROTECTION OF THE POLICE AND PUBLIC, COURTS AND SENTENCING BILL

SUMMARY

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

Issue: Legislative Consent Memorandum to enable inclusion of provisions in the Protection of the Police and Public, Courts and Sentencing Bill.

Action Required: Members are asked to consider the proposal to seek the approval of the Assembly to include the provisions in the Bill by means of a Legislative Consent Memorandum.

Officials attending: Maura Campbell, Brian Grzymek, Sharan Dustagheer and William Dukelow

Introduction

The Department of Justice were advised on 8 December that the forthcoming Protection of the Police and Public, Courts and Sentencing Bill (the Bill) includes provisions relating to certain devolved matters and that engage the LCM process. These include amendments to the Crime (Overseas Production Orders) Act 2019; provision for the enforcement of Scottish Sexual Harm Prevention Orders (SHPO) and Sexual Risk Orders (SROs) in the rest of the UK; and provision for a clear statutory authority for the National Driver Offender Retraining Scheme (NDORS). The Bill is to be introduced to Parliament in January, subject to legislative consent on the part of the devolved institutions. This letter seeks the Committee's view to bringing forward a legislative consent motion to allow the provisions for Northern Ireland to be carried in the Bill.

Provisions to apply to Northern Ireland The Crime (Overseas Production Orders) Act 2019

2. The Crime (Overseas Production Orders) Act 2019 (The 'COPO Act')¹ is a UKwide Act with provisions which relate to both reserved matters (e.g. telecommunications, foreign affairs/cooperation, counter-terrorism powers) and devolved matters (e.g. policing and courts). The Act creates a standalone legal regime for UK law enforcement agencies and prosecuting authorities to obtain electronic data directly from overseas communication service providers for the purposes of criminal investigations and prosecutions, through applying for an overseas production order.

3. The development of the Act was a pre-requisite for the UK to progress a data access agreement with the United States of America, which will enable UK law enforcement and criminal justice agencies access to information held by service providers who process, create, store or communicate electronic data on behalf of UK persons. It will also enable the UK to enter into similar agreements with other international partners.

¹ <https://www.legislation.gov.uk/ukpga/2019/5/contents>



4. The COPO Act received Royal Assent February 2019, with provisions for England being commenced on 9 October 2019. Provisions relating to Northern Ireland were pending the restoration of the devolved institutions.

on 12
and Wales
Devolved
held back

Given that the legislation was already enacted when the devolved institutions resumed, it was not appropriate to approve commencement of the legislation through a retrospective Legislative Consent Motion (LCM).

enacted
was not
the
Legislative

5. Following engagement with Executive Colleagues and a Written Ministerial Statement to the Assembly, the Minister wrote to the Home Secretary on 18 June 2020 to ask for the provisions relevant to Northern Ireland to be commenced. Officials continue to engage with the Northern Ireland Courts and Tribunals Service and the Office of the Lord Chief Justice for Northern Ireland regarding the amendment of the Crown Court Rules in Northern Ireland. Commencement is closely linked to completion of the court rules and it is anticipated that the COPO Act will be commenced for Northern Ireland in February 2021. Commencement will be for the provisions as enacted.

6. The Home Office has advised that during implementation, a national process for Overseas Production Orders (OPOs) has highlighted some practical issues that require resolution through amendments to the Act. Without these amendments, the Act will not be effective in achieving its desired outcome, which is to streamline the gathering of stored electronic data to be used for UK criminal investigations and prosecutions. The amendments to the COPO Act, through primary legislation, are not required for the entry into use of the Act and are currently anticipated to be commenced by the end of 2021. The PSNI have been working with the Home Office regarding the COPO implementation plans. This will ensure that Northern Ireland is on the same footing as the rest of the United Kingdom. A summary of the proposed amendments is included at **Appendix A**.

7. The Minister considers it appropriate that these amendments are enacted within the Westminster Bill as the Act already includes provisions for Northern Ireland and these are technical amendments to the original provisions enacted by Westminster. The

provisions carried in this Bill will cover all jurisdictions of the UK and will rectify a omissions by the Home Office in the original

three
number of
provisions.

Scottish Sexual Harm Prevention Orders (SHPO) and Sexual Risk Orders (SROs)

8. In the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the Scottish Government legislated for new civil preventative Orders for the management of sexual offenders or those whose behaviour indicates a risk of sexual harm. The new Orders - the Sexual Risk Order (SRO) and the Sexual Harm Prevention Order (SHPO) - replace existing preventative Orders but have not yet been commenced. The genesis for the change was influenced by equivalent changes made to preventative Orders in England and Wales in 2014. Members may wish to note that, at that time, the Department reviewed our existing sex offender management Orders and the then Justice Minister concluded that no change was required.

9. The Bill proposes to amend the Sexual Offences Act 2003 (the 2003 Act) to provide for cross jurisdictional enforcement of the Orders in Northern Ireland and England and Wales and the amendments are consequential to the commencement of the provisions of the 2016 Act. Without legislative change these new Orders will not be enforceable in other UK jurisdictions, including Northern Ireland, with the following potential risks:

- individuals subject to Scottish SHPOs and SROs could move to Northern Ireland or England and Wales to evade prohibitions imposed;
- breach of the Scottish SHPOs and SROs in Northern Ireland or England and Wales would not constitute a criminal offence; and
- notification requirements resulting from the Scottish SHPOs and SROs would apply only in Scotland. The individual would only be a 'registered sex offender' in Scotland.

10. Under the 2003 Act, an order made in England and Wales can be varied in Northern Ireland. However, there is no reciprocal provision to allow for variation by a court in England and Wales or Scotland of a Northern Ireland Order (i.e. SOPO, FTO or RoSHO).



It is considered advisable that all UK should be able to vary each other's Orders effective management of sex offenders who one jurisdiction to another. The Bill will provisions to address this legislative gap.

jurisdictions to allow for move from contain

National Driver Offender Retraining Scheme (NDORS)

11. The National Driver Offender Retraining Scheme (NDORS) courses were introduced in Northern Ireland in June 2010 and provide for courses to be offered as an alternative to prosecution for certain fixed penalty offences. A driver who successfully completes a course avoids any liability to conviction or having endorsable points on their driving licence. There is no clear statutory legal basis for charging for educational courses and it is, therefore, proposed to provide a clear statutory authority that would avoid potential challenges to the power to charge for these courses.
12. Provision was included in clause 23 of the Vehicle Technologies and Aviation Bill, which fell when the UK Parliament was dissolved ahead of the 2017 general election. That Bill also contained separate provision for Northern Ireland, and it is proposed that the forthcoming Westminster Bill should again include provision for Northern Ireland. The Bill would amend the Road Traffic Offenders (Northern Ireland) Order 1996, legislating for the power to charge fees for courses, and the power to make regulations.
13. The legislation would provide a statutory basis for what currently happens in practice and the Department has been engaging with the members of the NI Road Safety Partnership (NIRSP), who manage the scheme. The Policing Board and PSNI have confirmed they support the proposed legislation.
14. A motorist who decides to accept a course is required to pay a fee that covers the cost of administering and providing the course. In 2019/20 surplus fees of £315k were collected by the PSNI and returned to HM Treasury. Colleagues on the NIRSP are keen to have access to these funds to invest in road safety initiatives. This legislation will enable that money to be retained.



15. The main provisions include:

- A power for the Chief Constable, approval of the Policing Board, to charge a fee for courses as an alternative to prosecution, set at a level that exceeds the cost of the course and related administrative costs;
- That any excess fees must be used for the purpose of promoting road safety; and
- a power for the Department of Justice to make regulations about fees.

Need for an LCM

16. The constraints on the legislative programme in this mandate mean that 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, which is scheduled to be introduced to Parliament later this month. The Bill is UK wide and will enable us to address gaps in quicker time in a way that would be beneficial for Northern Ireland.

Next Steps

17. The Minister would be grateful for the Committee's co-operation to enable a Legislative Consent Memorandum to be laid before the Assembly, subject to Executive approval, for debate later in January. Officials will, of course, assist with any further queries the Committee may have.

CLAIRE McCORMICK DALO

Appendix A

SUMMARY OF PROPOSED AMENDMENTS TO THE COPO ACT

Ancillary or connected Communications Data

An overseas production order can be made for stored electronic data (e.g. stored content of emails and pictures). However, an appropriate officer cannot specify or describe



electronic data where they have reasonable believing it consists of, or includes communications data (e.g. information on email, date, time and IP address). The policy behind this provision was to ensure that the Act did not provide an alternative and competing regime to that contained in the Investigatory Powers

grounds for
who sent an
intention

Act 2016 (IPA) which sets out the process for requesting 'pure' communications data. This remains the policy intention. The unintended consequence of this, however, is that it precludes any communications data associated with the content from being sought or used.

Stored content of an email is of little value without it being attributed to a person connected to the date and time it was sent.

evidential
or
It also

became clear that, in practice, service providers are unable, in the main, to separate communications data from other data (such as content data) due to the way that it is stored. An amendment to the Act is therefore required to allow appropriate officers to access and obtain communications data that is associated with the content data this is the subject of the request.

Serving Overseas Production Orders

An overseas production order is currently required to be served by the Secretary of State (for England, Wales and Northern Ireland), or by the Lord Advocate (for Scotland). This mirrors the process in mutual legal assistance, in which the Home Secretary and Lord Advocate perform a role in both outgoing and incoming requests. Since enactment, and in developing the implementation process, it has become clear that service of orders is best placed with a secure outlet. The National Technical Assistance Centre (NTAC) were identified as best placed to securely transmit and receive data of this kind. NTAC are not part of the Home Office or Lord Advocate, nor can the Secretary of State or Lord Advocate entirely delegate this function to them. An amendment to the Act is therefore required to provide the flexibility for an appropriate body to be able to serve the overseas production orders on behalf of the UK. For the sake of future proofing (e.g. under future international co-operation agreements) the instruction is that the appropriate body remain unnamed on the face of the Act.



Department of
Justice

An Roinn Dlí agus Cirt

Máinnystrie O tha Laa

www.justice-ni.gov.uk

Rectifying a consequential amendment

During the Parliamentary process of the COPO Act, an amendment was inserted that requires a judge to be satisfied before approving the overseas production order that the electronic data requested is likely to be relevant evidence. However, a consequential amendment was not made to make reference to this test as part of the provision in the Act for a judge not to specify or describe any electronic data that wholly or in part, does not fulfil all required data related tests. An amendment is needed to include reference to the relevant evidence test in this subsection.