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POLICE, CRIME, SENTENCING AND COURTS BILL – PROPOSED LEGISLATIVE CONSENT MOTION

Thank you for your letter of 22 April 2021 regarding the proposed Legislative Consent Motion.

I have provided comments (from the Department or Home Office as appropriate) below on the issues raised in the reports from the Attorney General and NI Human Rights Commission on the relevant provisions that are proposed to apply to NI.

Extraction of information from mobile devices

DoJ Response to Comments from Attorney General

The Department has previously consulted with the Attorney General's Office in relation to the data extraction provisions at Chapter 3 of the Bill and subsequently sought assurance and clarification from the Home Office on the issues raised.

Where the concerns of the Department could not be addressed by direct amendment of relevant clauses in the Bill itself, the Department sought assurances from the Home Office that provision would instead be made in the accompanying 'statutory Code of Practice' ("the Code"). The issues raised in the Attorney General's letter of 8 April were all considered capable of being addressed in the Code.

Response to recommendations from NIHRC

Following a response from the Northern Ireland Human Rights Commission (NIHRC) the Department asked the Home Office for comment.

The Home Office response to the five recommendations made by the NIHRC has been summarised below:

Recommendation 1 - The NIHRC advises that the proposed Code of Practice should be published and consulted on in advance of the LCM to ensure its compliance with human rights standards. Subject to review of the code of practice, the NIHRC advises that an LCM would be appropriate to bring this chapter of the Police, Crime, Sentencing and Crime to the NI Assembly.

Home Office response: We are already working with Department of Justice NI and the PSNI to ensure their views are taken into account in the drafting of the code of practice. We cannot begin a formal consultation until after the Bill has received Royal Assent, but we will continue this informal consultation and share a draft of the code as soon as we are able.

Recommendation 2 - The NIHRC recommends that any individual or organisation listed as an "authorised person" in Schedule 3 of the Bill with jurisdiction in NI should be subject to specific oversight and required to publish the extent of the use of the powers and their circumstances.

Home Office response: Authorised persons with jurisdiction in Northern Ireland named on the Bill such as PSNI are already subject to specific oversight from HMIC and the

Police Ombudsman Northern Ireland, and from the Information Commissioner's Office which has the UK wide remit for managing compliance with the Data Protection Act.

Recommendation 3 - The NIHRC recommends that any statutory code of practice in relation to data extraction from electronic devices which is applicable to NI should be produced in consultation with individuals and relevant organisations in NI

Home Office response: We have already begun engagement with stakeholders in Northern Ireland on the code of practice and will be sharing the draft for review and comment with a wider set of stakeholders as part of the informal consultation of the first draft of the code.

Recommendation 4 - The NIHRC recommends the proposed statutory code of practice should provide sufficient detailed guidance to enable those making decisions on the extraction of data from electronic devices to do so in an ECHR compliant manner. Home Office response: Agreed and as noted above, Home Office are already engaging with stakeholders to ensure that the guidance is clear in the issues it covers.

Recommendation 5 - The NIHRC advises that the Code of Practice should expressly address the unique impact data extraction has had on sexual assault cases and the legal guidance from R v Bater-James should be incorporated into the code to ensure legal certainty.

Home Office response: Agreed. The code will refer to the legal guidance from R v BaterJames and ensure that all those reading it are made aware of the ruling and act accordingly. We have further analysis to undertake with colleagues in the Devolved Administrations to ensure that any guidance is compatible with their legal systems. The code will also address the impact of information extraction on victims of rape and sexual offences and ensure best practice for dealing with these offences is incorporated.

Amendments to Crime (Overseas Production Orders) Act 2019

Response to recommendations from NIHRC

The Department asked the Home Office for comment on the NIHRC recommendations.

The NIHRC advises that amendments to section 3 of the COPO Act concerning communications data (or metadata) impact on the rights to privacy and freedom of expression. Further safeguards are required to ensure that the acquisition of metadata does not violate Articles 8 and 10 of the ECHR.

Home Office Response:

This Act does not provide for access to any electronic data which is not already available, for example via Mutual Legal Assistance (MLA). It simply ensures that electronic data can be accessed and obtained by law enforcement officers and prosecutors through a more streamlined, quicker and effective process. The Act contains robust tests and safeguards governing the application, making and serving of a UK court approved overseas production order (OPO) to ensure these orders are used appropriately and as necessary to obtain vital information for the purposes of evidence to support UK investigations and prosecutions.

The COPO Act 2019 currently forbids the collection of communications data sought from telecommunication operators. The policy intention was to ensure that the Act did not undermine the existing UK legislation which provides for communications data to be sought under the Investigatory Powers Act 2016 (“the IPA”). This has had the unintended consequence of excluding from scope the ability of law enforcement officers and prosecutors to obtain relevant associated or connected communications data, which provides the necessary information to understand who sent a message, to whom and when, without which the content data sought will have no context and is, therefore, of limited use as evidence. The ability to seek communications data for any other purpose is still excluded from the scope of the COPO Act.

The proposed amendment is limited, therefore, to allow a UK court approved overseas production order to be sought by specified appropriate officers (Section 2 COPO Act) to obtain the content of the communication and only communications data (as mentioned

currently available under MLA) that is “comprised in, included as part of, attached to or logically associated with electronic data“ from a service provider located outside the UK, where a relevant international cooperation agreement is in place. Each Agreement is required to be laid before Parliament under section 20(1)(a) of the Constitutional Reform and Governance Act.

The powers within Act are consistent with our existing high levels of privacy protection, respect for freedom of speech and international human rights law, including Articles 8 (privacy) and 10 (expression) of the ECHR. There are stringent tests and safeguards which will need to be satisfied, similar to our own domestic evidence gathering powers, before an overseas production order can be granted by a Crown Court judge (or equivalent). These include the following:

- An overseas production order is made by a UK judge who can only make such an order if the requirements set out in section 4 of the COPO Act 2019 are met. These include a judge being satisfied that an indictable offence has been committed and proceedings in respect of the offence have been instituted or the offence is being investigated or that the order is sought for the purposes of a terrorist investigation. A judge must also be satisfied that there are reasonable grounds for believing that all or part of the data sought is likely to be of substantial value to the investigation or proceedings, that the data is likely to be relevant evidence to the offence mentioned and that it would be in the public interest for this data to be produced. A judge is also required to exercise his/her powers to consider and grant orders compatible with human rights obligations including privacy.
- Special protection is given in the COPO Act to journalistic material and to personal and confidential records as well as to items subject to legal privilege. The processing of requests made and the product of any such request will be governed by the Human Rights Act 1998 and the Data Protection Act 2018.
- Each request will be subject to scrutiny in UK courts, mirroring the existing safeguards and tests already in place for domestic powers to obtain investigatory and evidential material.

The NIHRC recommends that further information is sought on who will be a “prescribed person” in advance of an LCM and to ensure that effective oversight mechanisms are in place to cover such individuals

Home Office Response:

The Crime (Overseas Production Orders) Act 2019 currently empowers the Secretary of State for England, Wales and Northern Ireland and the Lord Advocate for Scotland to serve overseas production orders against the service provider from whom electronic data is sought for the purposes of evidence to support domestic investigations and prosecutions. The operational use of overseas production orders only applies where a relevant international cooperation agreement is in place between the UK and the country in which the service provider, from whom data is sought, is located.

Each Agreement is required to be laid before Parliament under section 20(1)(a) of the Constitutional Reform and Governance Act.

The proposed amendment will allow for tasks related to the service of an Overseas Production Order under Section 9 of the COPO Act to be delegated by the Secretary of State or Lord Advocate, by regulation exercisable by Statutory Instrument, to an appropriate body (“prescribed person”) for example for the secure transmission of an order. This will allow necessary operational agility and effectiveness in the implementation of the overseas production orders process between the UK and another country. This will meet the demands of any arrangements relating to the serving of an order which we have and will have in place in any future agreed international cooperation agreements designated under the COPO Act.

The UK US Data Access Agreement (“the Agreement”) is the first and currently the only international cooperation arrangement to be designated as a relevant international agreement for the purposes of the COPO Act.

The Functions of the Investigatory Powers Commissioner (Oversight of the Data Access Agreement between the United Kingdom and the United States of America and of functions exercisable under the Crime (Overseas Production Orders) Act 2019) Regulations 2020 specify that the Investigatory Powers Commissioner (IPC) has the specific function of keeping under review the compliance by public bodies with the terms of the UK-US Agreement. It also added the COPO Act to the list of legislation specified in s229(4)(d) of the Investigatory Powers Act, under which certain activities fall to be reviewed by the IPC.

The Agreement requires that there is a single designated authority for each party that is responsible for the secure transmission of orders made under the Agreement and data produced in response to orders made under the Agreement.

In accordance with the Agreement, the Investigatory Powers Unit within the Home Office has been designated by the Home Secretary as the UK designated authority.

Secure systems are required to support the UK designated authority to avoid prejudicing the investigation and prosecution of serious crime. Where necessary, the UK designated authority will make use of the existing technological infrastructure of NTAC, an operational unit that provides support to serious crime and counter terrorism operations in the UK.

The Home Office determined that due to the nature of the information that would be included on the order, where necessary, the UK designated authority will make use of the existing technological infrastructure of the National Technical Assistance Centre (NTAC), an operational unit that provides support to serious crime and counter terrorism operations in the UK.

NTAC is an operational unit that provides support to serious crime and counter terrorism operations in the UK. It was identified as best placed to securely transmit and receive data of this kind when necessary.

Under any future data access agreements with other countries, implementation including any arrangements for the transmission of overseas production orders will be specific to the terms and contexts.

The NIHRC recommends that the additional judicial oversight provision outlined in Schedule 5, paragraph 3 of the PCSC Bill should be monitored to ensure it is being implemented effectively.

Home Office Response:

During the passage of the Crime (Overseas Production Orders) (“COPO”) Bill, an amendment was made at section 4(6) which provides for the need for a judge to be satisfied that the electronic data sought is likely to be relevant evidence, before making an overseas production order. Court Rules relating to the COPO Act 2019 already provide for consideration of this test by the Court judge (or equivalent) in England, Wales and Northern Ireland. A reference to this relevant evidence test (in section 4(6)) was not made, however, to section 5(3) of the COPO Act which currently refers to the tests in section 4(5) (evidence of substantial value) and section 4(7) (benefit likely to accrue) but not in section 4(6) (relevant evidence). This amendment seeks to include reference to section 4(6) and so to rectify this.

Speeding courses as alternative to prosecution

The NIHRC recommendations have been accepted by the Department and shared with the Policing Board and PSNI.

Management of sex offenders

The NIHRC recommended that the Committee for Justice may wish to request additional information from the Home Office regarding how individuals subject to SHPOs or SROs who move between jurisdictions will be identified within the new jurisdiction to ensure that effective monitoring is achieved.

DoJ Response:

The proposals in the Bill seek to amend the Sexual Offences Act 2003 (the 2003 Act) to enable the UK- wide enforcement and manageability of all civil prevention orders for sex offenders, across the UK jurisdictions as a consequence of proposed SHPO and SRO introduction planned by Scotland.

The SHPO and SRO were originally introduced in England and Wales in 2015 and replace existing UK-wide civil preventative orders previously made under the 2003 Act – the Sexual Offences Prevention Order (SOPO), the Foreign Travel Order (FTO) and the Risk of Sexual Harm Order (RoSHO). The SHPO replaces the SOPO and the FTO and is largely a consolidation of these Orders, combining measures to address risk within and outside the UK. The SRO replaces the RoSHO and addresses risk from non-convicted sources. Sex offenders in Northern Ireland will continue to be managed under the SOPO, the FTO and the RoSHO.

I hope the Committee finds this information helpful.

Yours sincerely

CLAIRE McCORMICK DALO