

LEGISLATIVE CONSENT MEMORANDUM

THE POLICE, CRIME, SENTENCING AND COURTS BILL

Draft Supplementary Legislative Consent Motion

1. The draft motion, which will be tabled by the Justice Minister , is:

“That this Assembly agrees in principle to the extension to Northern Ireland of the provisions in Chapter 3 of Part 2 of the Police Crime, Sentencing and Courts Bill, in so far as they relate to Northern Ireland, and agrees that commencement of those provisions would be conditional on Assembly agreement to consider whether the Code of Practice, following the public consultation, complies with protected rights and requirements.”

Background

2. This memorandum has been laid before the Assembly by the Minister of Justice under Standing Order 42A(2). The Police, Crime, Sentencing and Courts Bill was introduced in the House of Commons on 9 March 2021. The latest version of the Bill can be found at:

<https://bills.parliament.uk/bills/2839>

3. On 23 November 2021 the Assembly approved an LCM extending various provisions of the Bill to Northern Ireland. These provisions included:
 - amendments to the Crime (Overseas Production Orders) Act 2019;
 - the application of section 29 of the Petty Sessions (Ireland) Act 1851 (which includes provision for the execution of process of English courts in Northern Ireland) to the provisions in the Bill enabling a judge in England and Wales to make an order authorising the police to obtain information about the location of human remains outside of a criminal investigation;
 - a measure placing the National Driver Offender Retraining Scheme on a statutory footing;
 - a measure enabling the variation etc. of orders made under Part 2 of the Sexual Offences Act 2003 in England and Wales or Scotland by a court

- in Northern Ireland and the enforcement, in Northern Ireland, of Scottish orders made under that Part; and
- an amendment to the Proceeds of Crime Act 2002 to bring electronic money and payment institutions within the scope of account freezing and asset forfeiture powers in Northern Ireland.
4. The supplementary LCM relates to the provisions in Chapter 3 of Part 2 of the Bill (the “provisions”) which were not included in the motion of 23 November 2021 above.

Summary of the Bill and its policy objectives

5. Chapter 3 of Part 2 establishes a statutory framework for the extraction of information from digital devices for the purposes of the prevention, detection, investigation or prosecution of crime, safeguarding purposes and the purposes of investigating deaths.
6. The provisions in Chapter 3 of Part 2 of the Bill permit the extraction of information from relevant electronic devices in two scenarios as follows:
- Clause 37 of the Bill creates a clear statutory basis to extract information from digital devices with the agreement of the user of the device. This power can be used for the purposes of preventing, detecting, investigating and prosecuting crime, helping to locate a missing person or protecting a child or at-risk adult from harm
 - Clause 41 of the Bill creates a clear statutory basis to extract information from digital devices in the investigation of a death if the device is believed to have been used by the deceased prior to their death and where there may be an investigation by a coroner.
7. Data extraction powers can be only be used by the named “authorised persons” listed in Schedule 3 of the Bill. This will be a non-coercive power based on the agreement of the routine user of the device
8. The powers in the Bill do not replace the existing requirements of data protection legislation and authorised persons must continue to comply with all existing legal frameworks relevant to their particular area of practice. In every case where authorised persons are extracting personal material from a device under these powers, they must continue to meet the strict necessity

threshold under the Data Protection Act 2018 when processing information for law enforcement purposes. Where authorised persons are extracting information from a device for non-law enforcement purposes e.g. an inquest, they must also continue to meet the requirements of the General Data Protection Regulation, including that information is processed lawfully, fairly and in a transparent manner, and only where it is necessary.

9. When extracting information from any electronic device, all authorised persons must have due regard to a separate, statutory Code of Practice (the “Code”), the publication of which is made mandatory by clause 42 of the Bill. The Code seeks to ensure that authorised persons:
 - exercise data extraction powers only where necessary, and thereafter only in a manner that is proportionate, in accordance with the law and pursuant to a reasonable belief that there is relevant information on the device;
 - have access to practical guidance on the exercise of data extraction powers in practice, including to determine if such powers are the most appropriate for use in any particular case; and
 - have access to specific guidance on the considerations they should make, and the greater level of sensitivity they should apply when interacting with victims and witnesses of a crime, especially vulnerable victims of serious offences, such as rape and other sexual offences
10. The Code is admissible in evidence in criminal or civil proceedings and a court may take into account a failure to act in accordance with it in determining a question in those proceedings.
11. The provisions do not replace existing statutory powers for the seizure of devices from suspects or any other specific powers available to authorised persons listed in Schedule 3 of the Bill.

Provisions which deal with a Devolution Matter

12. The Department is satisfied, and the Home Office has agreed, that legislative consent is required for the following reasons:

- Activities involving the extraction and use of information from digital devices for the purposes of preventing, detecting, investigating or prosecuting criminal offences and for safeguarding and preventing serious harm fall within the realm of police powers and the criminal law more generally and, accordingly, constitute devolved matters.
 - Although activities involving the interception of communications within the scope of paragraph 9 of Schedule 3 to the Northern Ireland Act 1998 are reserved, activities involving the extraction of information more generally, including of a type and by means prescribed in Chapter 3 of Part 2 of the Bill, are not. Such activities, accordingly, constitute devolved matters.
13. The Scottish Parliament approved a supplementary LCM for the data extraction clauses on 21 December 2021, assurances were sought that changes it requested in relation to the Code will be taken into account.

Reasons for making the Provisions

14. In June 2020, the Information Commissioner’s Office (the “ICO”) published a report on police practice in England and Wales around the extraction and analysis of data from mobile phones and other electronic communication devices of victims, witnesses and suspects during a criminal investigation. The report identified inconsistencies in the approach taken by police forces to extract digital data and the complex legal framework that governs this practice. It also recommended clarifying the lawful basis for data extraction and introducing a code of practice to guide this activity in order to increase consistency and ensure that any data taken is strictly necessary for the purpose of the linked investigation.
15. After a pause in its own investigative work due to the impact of the COVID-19 pandemic, the ICO broadened its area of interest to consider the issue of mobile phone extraction in criminal justice systems across the UK. In June 2021, a separate report on mobile phone data extraction by police in Northern Ireland further recommended that the legislative framework on data extraction should be strengthened to ensure clarity for

victims, witnesses and offenders, and to clarify the lawful basis for such extraction.

16. In response to ICO concerns, the provisions in Chapter 3 of Part 2 of the Bill introduce a specific legal basis for the extraction of information from complainants', witnesses' and others' digital devices. The power to extract information will be non-coercive and based on the agreement of the routine user of the device. It will be applicable to specified law enforcement and regulatory agencies, such as the police (referred to as "authorised persons") who extract information to support investigations or to protect vulnerable people from harm.
17. Taken as a whole, the provisions are intended to provide a nationally consistent legal basis for the purpose of preventing, detecting, investigating or prosecuting criminal offences and for safeguarding and preventing serious harm.

Reasons for utilizing the Bill rather than an Act of the Assembly

18. Ordinarily, the provisions in Chapter 3 of Part 2 would be legislated for through the Northern Ireland Assembly. The Bill has, however, already been introduced in the UK Parliament, and the provisions will apply across the UK. In light of these factors, and in light of the time constraints in the current mandate, it would prove more practical to bring these provisions into operation via the Westminster Bill to ensure parity with the rest of the UK.

Consultation

19. Consultation was carried out with relevant NI Departments, the PSNI, the Attorney General of Northern Ireland and the Northern Ireland Human Rights Commission.
20. The Department of Justice and Home Office UK have been working together to refine the Code of Practice for the data extraction provisions to account for Northern Ireland's interests. Since lodging the previous LCM the UK Government has advised that the draft Code of Practice will not be

finalised, and that the data extraction provisions will not be commenced, until completion of a public consultation after the Bill receives royal assent.

21. Potentially extensive amendments are expected as a result of the public consultation, and the Department will continue to work with Home Office officials from Royal Assent through to the proposed time of commencement. In that context, Home Office officials have assured the Department that a copy of the consultation documentation, including an updated draft Code, will be provided in advance of the public consultation. They have also given assurances that relevant feedback, whether received from the Department or via the public consultation, will be captured in the final text.
22. Whilst Home Office assurances on the Code have been received, the Department has sought to ensure that commencement of the data extraction provisions in Northern Ireland requires satisfactory completion of the Code of Practice. To that end the Justice Minister proposed, and the Northern Ireland Executive has subsequently agreed to support a conditional form of consent permitting the Minister to return to the Assembly for further consultation following completion of the public consultation on the Code. The Justice Minister has committed to consult the Assembly and will not agree to commencement of the provisions without the consent of the Assembly.

Human Rights and Equality

23. The UK Government considers that the Bill is compatible with the European Convention on Human Rights. The provisions in Chapter 3 of Part 2 of the Bill will be underpinned by a Statutory code of Practice to ensure that the exercise of the powers, in practice, are also compliant. This Code will be subject to full public consultation following Royal Assent, and the NI Assembly will not be asked to commence the provisions unless the Justice Minister is assured that any compliance and/or equality issues identified have been addressed.

Financial Implications

24. No expenditure implications have been identified.

Summary of Regulatory Impact

25. There would not be a significant impact on the business or voluntary sectors.

Engagement to date with the Committee for Justice

26. A written briefing was provided to the Justice Committee on 3 February 2022.

Conclusion

27. The view of the Minister of Justice is that the Assembly should support the provisions in Chapter 3 of Part 2 of the Bill that deal with a devolution matter.

Department of Justice

4 February 2022