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TO: CHRISTINE DARRAH

LCM: EXTENSION TO NORTHERN IRELAND OF THE PROVISIONS IN CHAPTER 3 OF PART 2 OF THE POLICE, CRIME, SENTENCING AND COURTS BILL (EXTRACTION OF INFORMATION FROM ELECTRONIC DEVICES)

Summary A Supplementary Legislative Consent Motion is required to extend the provisions in Chapter 3 of Part 2 of the Police, Crime, Sentencing and Courts Bill to apply to Northern Ireland.

Business Area: Protection and Organised Crime Division.

Issue: Update on the Legislative Consent Motion.

Restrictions: None.

Action Required: The Committee is invited to note the update.

Officials Attending: N/A. This is a written briefing.

Background

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.

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.

In response to ICO concerns, Chapter 3 of Part 2 of the Police Crime Sentencing and Courts Bill (the “Bill”) introduces 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. 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.

The Committee has already considered provisions in the PCSC Bill that have been extended to Northern Ireland by way of an LCM. These provisions included:

- the amendments to the Crime (Overseas Production Orders) Act 2019;
- 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;

- the measure placing the National Driver Offender Retraining Scheme on a statutory footing;
- the 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
- the 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.

The Committee published its report in November and the LCM was approved by the Assembly on 23 November 2021.

Data Extraction Powers and Code of Practice

The provisions in Chapter 3 of Part 2 of the Bill permit the extraction of data 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.

Data extraction powers can be only be used by the named “authorised persons” listed in Schedule 3 of the Bill. This includes all police forces and other authorities with investigatory functions.

The powers in the Bill 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.

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.

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

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.

Code of Practice - Attorney General and Northern Ireland Human Rights Commission

The Code has been drafted by the Home Office in collaboration with key stakeholders and interested parties, including the Department. A draft Code was published at the House of Commons Report Stage in July 2021 and an updated draft was produced ahead of the Bill being presented to the House of Lords in October 2021. The UK Government will launch a public consultation on the Code once the Bill achieves Royal Assent and data extraction powers will not be commenced until the final Code has been prepared and laid before Parliament.

Although the Code remains in draft form, the current text already demonstrates the depth and detail of the guidance that will benefit authorised persons in the exercise of data extraction powers. In Northern Ireland, in particular, the Department has liaised with, and has benefited from the advice and assistance of the Departmental Solicitors Office, the Northern Ireland Human Rights Commission (“NIHRC”) and the Office of the Attorney General (the “AG”). Input from all parties has been shared with Home Office officials on a regular basis and has clearly influenced the drafting of the Code, and clauses, from the Commons Report Stage to date.

For reference, a list of changes/amendments to the Code to date, relative to Northern Ireland, is attached at **Annex A**. A comparison of the original and amended provisions of the draft Bill, which may be read alongside the Code, is also attached at **Annex B**.

While significant progress has been made on the draft Code, there remain some concerns on the part of NIHRC and the AG as follows:

Northern Ireland Human Rights Commission

The most recent letter from the NIHRC is attached at **Annex C**.

NIHRC raised a number of general concerns as follows:

- (a) NIHRC was concerned that the draft Code had missed an opportunity to make express reference to human rights obligations since “those obligations underpin and should therefore inform any decision to extract data from electronic devices.”

In particular:

- where a relevant ECHR Article is engaged the Code should set out how the considerations in that Article are taken into account and what safeguards are required to ensure powers are used lawfully;
 - rather than simply stating that powers must be exercised in accordance with the ECHR, the Code should provide detailed guidance
- (b) NIHRC emphasised that the Code of Practice should be produced in consultation with marginalised and vulnerable people including women, children and LGBTQ+ and their relevant organisations in Northern Ireland
- (c) The Code simply references the ‘four principles’ in the Court of Appeal judgement in *R v Carl Bater-James and Sultan Mohammed*. It should go further by:
- explaining the unique impact that data extraction practice has on sexual assault cases; and
 - ensuring that the legal guidance in *Bater-James* is directly incorporated into the text

Attorney General for Northern Ireland

The AG is of the view that “more could be done” to reduce the risk of a breach of Article 8 ECHR (right to respect for private and family life) and Article 14 ECHR (Prohibition of discrimination) where third party agreement is relied upon to extract information from a device owned by a disabled user who:

- has been deemed not capable of making a decision either to consent or withhold consent to the request; but

- is nevertheless insistent that he or she does not want to give access to the device.

In particular, the risk would be mitigated if both the authorised person and the third party providing agreement:

- were clear on how to assess the best interests of the device user; and
- actually did assess those interests before carrying out their respective functions.

The Code does not currently state how the best interests of the device user should be assessed and nor does it make such an assessment mandatory. The absence of such guidance does not alter the pre-existing duty on decision makers to act in a way which does not unjustifiably interfere with protected rights. Assistance for those who may not be used to assessing best interests in practice would, nevertheless, be preferable.

The latest comments from the NIHRC and a separate analysis of the view provided by the AG have been shared with the Home Office, and the Department has indicated that it will require all relevant concerns to be addressed, as far as possible, prior to the provisions in the Bill coming into force in Northern Ireland. Since the Bill is now at an advanced stage, it is unlikely that the Code will be amended further before Royal Assent is given. However, 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.

LCM

Whilst Home Office assurances on the Code have been gratefully 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 Minister of Justice proposed, and the Northern Ireland Executive has subsequently agreed to support, a conditional form of legislative consent as follows:

- *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.*

In practice, this conditional form of consent envisages that the Minister of Justice will consult with the Assembly following completion of the public consultation on the Code. Following consultation, the NI Assembly will have the opportunity to decide whether or not to agree to the commencement of the provisions for Northern Ireland. The Justice Minister has committed to consult the Assembly and will not agree to commencement of the provisions without the consent of the Assembly.

The Minister wrote to the Rt Hon Kit Malthouse MP Minister for Crime, Policing and Probation and Tom Pursglove MP Minister for Justice and Tackling Illegal Migration on 14 January 2022 outlining Executive support for the proposed arrangement and advised that she will keep them informed of the progress of an LCM. The Minister also advised of the position regarding the other proposed amendments. The Bill will progress quickly, the Home Office has advised that the LCM would need to be secured as quickly as possible and we are aiming to schedule the debate towards the end of February if possible.

Further Amendment to Extraction Clauses

From the date of first introduction of the Bill to the House of Commons, clause 42 of the Bill has required the Secretary of state to make regulations about the exercise of data extraction powers in relation to confidential information. At the request of the House of Lords, the Government has proposed a late amendment to replace this with direct provision on the face of the Bill. This amendment does not authorise the extraction of

confidential information, or extend or otherwise alter the scope of extraction powers as originally drafted. Rather, it outlines a number of new steps that must be taken, in addition to all other existing steps in the Bill and Code, if an authorised person thinks that in exercising those powers, there a risk of obtaining such information.

For the purposes of the Bill to date "confidential information" means "journalistic material" and "protected material". In that context:

- Journalist material means “journalistic material within the meaning of the Investigatory Powers Act 2016”. That is, essentially, material obtained for the purposes of journalism which is either held or intended to be held in confidence.
- Protected material means, variously:
 - ‘items subject to legal privilege’ within the meaning of Article 12 of PACE 1989;
 - material referred to in Article 13(1)(a) of PACE 1989 viz. ‘certain personal records held in confidence’; and
 - material referred to in Article 16(2) of PACE 1989 viz. ‘other material acquired in the course of a trade etc. that is held in confidence’.

The amendment does not materially alter the scope of extraction powers envisaged by the Bill, it provides greater clarity on the exercise of those powers in the context of confidential information. The amendment seeks to ensure that extraction is proportionate to the risk of obtaining that information.

The amendment does not introduce new material to be extracted, it has always been in the draft Bill. The amendment is to require (in the Bill) an authorised person to take additional steps when extracting information if there is a risk of extracting confidential information.

Other Proposed Amendments

In November, the Minister of Justice was asked to consider other proposed Government amendments, both the response and request are attached for information. Home Office

officials have subsequently advised that the public order provisions that could be applicable to Northern Ireland were rejected by the Lords and the child cruelty offences could not apply to NI as this is not practically possible in the time available, it should also be noted that in the original request the opportunity to consider any amendment through LCM for child cruelty offences was not offered. There was insufficient time to consider the pardons and disregards for historical convictions for consensual same sex sexual activity, and the Minister will ensure that the necessary template is completed and laid in the Assembly in relation to this decision. As you will note from the response, as there was insufficient time to fully consider these proposals, the Justice Minister has asked for preparatory work to be undertaken to consider the changes in a NI context.

Next Steps

The Executive agreed that this subsequent LCM could proceed on 22 December 2021. The Minister would be grateful for the Committee's consideration of the proposed Conditional Legislative Consent Motion to be laid before the Assembly. Officials will of course assist with any further queries the Committee may have.

CLAIRE MCCORMICK DALO