

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

SERIOUS CRIME BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the amended provisions of the Serious Crime Bill introduced in the House of Lords on 6 June 2014, relating to the prevention or restriction of use of communications devices by prisoners, so far as these matters fall within the competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Michael Matheson, Cabinet Secretary for Justice, under Rule 9.B.3.1(c)(ii) of the Parliament’s standing orders. The Serious Crime Bill was introduced in the House of Lords on 6 June 2014. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2014-15/seriouscrime.html>

3. The Home Office are to seek to amend the Bill at Commons Committee stage to include a power for the Secretary of State, by way of a court order, to compel a Communication Provider (CP) to disconnect unauthorised handsets and SIM cards which are held in prisons. In Scotland this power will be exercised by Scottish Ministers.

4. Scottish Prison Service and Scottish Government officials are involved in the discussion around the drafting of the amendments as they relate to Scotland.

5. The policy was announced by the UK Government during the Bill’s second reading in the Commons on 5 January 2015 and the relevant amendments were tabled at Westminster on 8 January.

6. The presence of electronic communications devices, in particular illicit mobile telephones, presents serious risks to the security of prisons and young offender’s institutions as well as to the safety of the public. Mobile telephones are used for a range of criminal purposes in these institutions, including commissioning serious violence, harassing victims, organised crime and gang activity. Access to mobile telephones is also strongly associated with drug supply, violence and bullying.

7. In Scotland section 41ZA of the Prisons (Scotland) Act 1989 provides that it is an offence to possess, or give to a prisoner in prison, or use, without authorisation or outside of the designated area of the prison, a personal communication device such as a mobile telephone or any other portable electronic device capable of transmitting or receiving a communication. It is also a disciplinary offence for a prisoner to possess a personal communication device such as a mobile telephone in a prison or young offender’s institution.

8. The Scottish Parliament has previously given consent by means of a LCM in this area for the Prisons (Interference with Wireless Telegraphy) Act 2012. This allowed the Scottish Prison Service to procure and install mobile signal denial technology in two pilot sites, HMP Shotts and HMP Glenochil. The technology was installed and operational by the end of the financial year 2013-14. This supplementary LCM for the Serious Crime Bill seeks to enhance the ability of the SPS to address this ongoing criminal issue.

9. The Scottish Parliament previously agreed a LCM for the Bill in relation to provisions amending the Proceeds of Crime Act 2002, the Computer Misuse Act 1990 and the Female Genital Mutilation (Scotland) Act 2005 on 6 January 2015.

Provisions Which Relate to Scotland

10. The amendment will provide a regulation making power for Scottish Ministers, by way of a court order, to compel a Communication Provider (CP) to disconnect unauthorised handsets and SIM cards which are held in prisons.

11. The general principles of the amendment are set out below.

(a) Those persons who may apply for such an order. The amendment will include a power for Scottish Ministers to make regulations which specify who will be able to apply to the Sherriff Court for an Order. At the present time, we consider that will be the Scottish Ministers.

(b) Standard of proof. The standard of proof will be civil, i.e. balance of probabilities;

(c) A power to specify the duration of an order;

(d) Any preliminary requirements, such as a requirement to give notice of an application to a CP and such other persons as may be specified. It is anticipated that in the majority of cases, we will not be in a position to identify the owner, subscriber or person in possession of a particular mobile phone;

(e) Third party rights, for instance, providing that the court must, on an application by a person, give the person an opportunity to make representations in proceedings before it about the making of an order if it considers that the making of the order would be likely to have a significant adverse effect on that person;

(f) A power to vary, extend or discharge an order and power to specify those persons who may apply for such variation, extension or discharge;

(g) Appeals against the making of an order (or refusal to make an order), the variation (or refusal to vary) an order, the extension (or refusal to extend) an order and the discharge (or refusal to discharge) an order, including who might apply for the same.

12. Scottish Ministers will also have the discretion or power to make provision about the following matters (rather than being required to do so):

- (a) Modification of definitions (for example, it may be necessary or desirable to modify the definition of “relevant institution”);
- (b) Enforcement of an order. This will be by way of proceedings for contempt of court, which is understood to need no express provision. However, it is intended to retain the option of making further or alternative provision;
- (c) Mode of proof and evidence. It is envisaged that in order to provide the court with a sufficient degree of assurance that the correct phones are being disabled, evidence may comprise of, inter alia, the results of communications data applications under Part 1 of the Regulation of Investigatory Powers Act and the use of technology that will analyse the patterns of usage to establish that the phone is in use within a relevant institution;
- (d) The accessibility of court documents by non-parties. Any evidence presented to the court could contain sensitive information and therefore it is preferable that the court would have a discretion to direct that any document in its control is not open for inspection to or otherwise disclosed to the public;
- (e) Hearings to be held in private. The general rule is that hearings are held in public and therefore the Scottish Ministers may wish to make additional provision, depending on the issues that arise in the context of different applications;
- (f) Scope to make provision within the body of an order about the circumstances in which a CP or person specified in the order must take steps to re-establish operation of the device – this is designed to deal with the scenario where it becomes clear an error has been made and the wrong phone has been disconnected. It is anticipated that a customer will in the first instance contact the CP, who in turn will contact SPS, who will seek to establish whether in fact an error has been made. If satisfied that this is the case, there should be scope to provide in the order that the CP must, on direction from the Scottish Ministers or other person specified in the order, take steps to enable re connection without the need to apply to vary the order (which may take some time), although this option should also be available. It will be necessary to consider more fully how this might work when it comes to the detail of the regulations, but it is important to ensure that the provision is there to enable the Scottish Ministers to make suitable provision;
- (g) Time limits for complying with an order; and
- (h) Expenses.

Reasons for seeking a legislative consent motion

13. Whilst telecommunications and wireless telegraphy are reserved matters under paragraph C10 of Schedule 5 to the Scotland Act 1998, the management of prisons is devolved. As the primary purpose of the relevant provisions is to regulate and manage activity in prisons, the Bill is a ‘relevant’ Bill, as defined in Standing Orders Chapter 9B, Rule 9B.1(1) and therefore requires the legislative consent of the Scottish Parliament.

14. Other legislative mechanisms for the Scottish Parliament to achieve the provisions of this UK Bill have been considered namely a Scottish Bill with a

corresponding section 104 Order made under the powers of the Scotland Act 1998. Whilst this route would be possible it would be more complex, take more time and would involve substantially more resource. In this instance therefore, the LCM route offers a more resource efficient and timely legislative vehicle by which to confer the required powers.

Consultation

15. There has been no formal consultation in regard to this provision. However, the UK Government have engaged with the Scottish Prison Service, Northern Ireland Prison Service, mobile phone operators and OFCOM throughout the development of the proposed amendment.

16. There were also similar consultations in this policy area in regard of the 2012 LCM on the Prisons (Interference with Wireless Telegraphy) Act 2012. This amendment will help bolster the policy previously agreed by the Scottish Parliament when passing that LCM.

Financial Implications

17. The Bill will impose modest financial obligations on the public sector. An analysis of the precise costs is not possible at this juncture. It is anticipated that there will be a cost for the disabling of the mobile phone by the CP, however it is not clear how many numbers would be identified and then require to be disconnected from service. It is possible that there may be a small number of cases where the issue of compensation may arise as a result of for example, erroneous disconnections. Although not thought necessary at this moment in time, should a communications data request be necessary this will incur additional cost. As the Bill will make it possible for a court to compel a CP to prevent the use of a mobile phone in a prison, this will also allow the Scottish Prison Service to consider sharing mobile signal denial technologies between sites thus reducing the need for investment in the technologies at each prison.

Conclusion

18. It is a priority for the Scottish Government to tackle serious and organised crime and we are committed to limiting the extent to which prisoners can maintain their criminal lifestyle from within our prisons. The amendment to the Bill will provide an additional tool to do this.

19. The Scottish Government therefore considers it to be in the best interests of the people of Scotland and good governance that this supplementary LCM be passed and recommends the motion to the Parliament.

Scottish Government
January 2015