



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

13th Report, 2012 (Session 4)

Legislative Consent Memorandum on the Prisons (Interference with Wireless Telegraphy) Bill (LCM (S4) 15.1)

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Pàrlamaid na h-Alba

Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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The Committee reports to the Parliament as follows—

BACKGROUND

The UK Bill

1. The UK Prisons (Interference with Wireless Telegraphy) Bill was introduced to the House of Commons by Sir Paul Beresford MP on 20 June 2012. The Bill provides for the Secretary of State in England and Wales and Scottish Ministers in Scotland to authorise interference with wireless telegraphy¹ for the purpose of preventing, detecting or investigating the use of electronic communications devices (including mobile phones) within prisons or similar institutions.² (In Scotland, similar institutions referred to in the Bill means prisons and young offenders' institutions.) This is to be achieved through deployment of signal denial equipment.
2. The Bill, therefore, requires a Legislative Consent Memorandum (LCM) because it makes provision to alter the competence of the Scottish Ministers.

Legislative Consent Memorandum

3. The Cabinet Secretary for Justice lodged an LCM on the Bill on 3 September 2012.
4. Being in possession of a personal communication device, including a mobile phone and any component part, whilst in prison is an offence under section 41ZA of the Prisons (Scotland) Act 1989, as amended by the Criminal Justice and Licensing (Scotland) Act 2010. Section 41 of the 1989 Act provides that it is unlawful to bring a personal communication device into a prison or young

¹ Wireless telegraphy is a reserved matter under paragraph C10 of Schedule 5 of the Scotland Act 1998, although the running of prisons is devolved to the Scottish Parliament.

² UK Parliament website. *Prisons (Interference with Wireless Telegraphy) Bill*. Available at: <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0047/2013047.pdf> [Accessed 31 October 2012].

offenders' institution. It is also a disciplinary offence for a prisoner to possess a personal communication device such as a mobile phone in a prison or young offenders' institution.³

5. The LCM on the Bill states that 959 mobile phone handsets and more than 800 component parts were found in Scottish prisons in 2011, and it is expected that others have escaped detection. The Scottish Government argues that the measures in the Bill will provide an "additional tool" in limiting the extent to which prisoners can maintain their criminal lifestyle within prisons.⁴

6. The Scottish Government also indicates in the LCM that it did consider introducing Scottish legislation with a corresponding section 104 order⁵ made under the powers of the Scotland Act 1998 to give effect to similar provisions to those in this UK Bill. However, the Scottish Government concluded that this route would be "more complex, take more time and involve substantially more resource" than the LCM.⁶

7. The LCM includes a draft legislative consent motion to be lodged by the Cabinet Secretary for Justice, as follows:

"That the Parliament agrees that the relevant provisions of the Prisons (Interference with Wireless Telegraphy) Bill introduced in the House of Commons on 20 June 2012, relating to the interference with wireless telegraphy in order to prevent the use of electronic communications devices (including mobile telephones) in, or detect or investigate the use of such devices within the executive competence of Scottish Ministers, should be considered by the UK Parliament."⁷

Committee consideration

8. The Parliamentary Bureau referred the LCM to the Justice Committee for consideration on 9 September 2012. The Committee considered its approach to the LCM on 25 September and agreed to invite the Cabinet Secretary for Justice to give evidence on the LCM at its meeting on 30 October. It also agreed to ask him to respond to the Committee's initial observations on the LCM in advance of the evidence session.

³ Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill, paragraph 4. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/54051.aspx>

⁴ Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill, paragraph 14.

⁵ Orders taken forward under section 104 of the Scotland Act allow for consequential modifications to be made to reserved law in consequence of legislation passed by the Scottish Parliament. The Order making power allows for amendments to be made to reserved law to reflect changes in legislation in Scotland. All section 104 orders are laid before the UK Parliament; those which amend primary legislation are debated in both Houses.

⁶ Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill, paragraph 14.

⁷ Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill, paragraph 1.

9. At its meeting on 2 October, the Committee further agreed to invite a number of organisations⁸ to submit written evidence.

ISSUES ARISING FROM EVIDENCE-TAKING

Disproportionate interference

10. Clause 2(4) of the Bill provides that certain directions must be given by Scottish Ministers to the governor or director of a prison or young offenders' institution, who is authorised to interfere with wireless telegraphy. This clause also sets out the circumstances in which the use of the equipment under the authorisation must be modified or discontinued and, in particular, directions aimed at ensuring that the authorised interference will not result in disproportionate interference outside the relevant institution.⁹

11. In its letter to the Cabinet Secretary¹⁰, the Committee sought the meaning of "disproportionate" in this context. In his response¹¹, the Cabinet Secretary stated that trials of signal denial equipment in several prisons in England "have confirmed that it is generally possible to avoid interference outside the prison perimeter", but that there are circumstances in which "leakage" may occur, for example, while the equipment is being configured. He went on to say that whether any particular leakage is disproportionate will depend on a number of factors. For example, for a prison located in a remote area, leakage of a few metres outside the perimeter may be proportionate if mobile phone use by members of the public is unlikely to be affected, while the position may be different for a prison in a built up area where a similar amount of leakage might affect a number of people.

12. The Scottish Human Rights Commission¹², in a written submission to the Committee, stated that it "is concerned that very little attention has been paid to the interference with Article 8 rights¹³ of those living in the surrounding areas of prisons and young people". While written evidence from the Mobile Broadband Group (MBG)¹⁴ suggested that the interference equipment "has the potential to cause harmful interference to the customers of the mobile operators legitimately using their mobile devices in the vicinity of prisons". The MBG further argued that

⁸ The Committee issued a targeted call for written evidence on the LCM to Her Majesty's Chief Inspector of Prisons for Scotland, Scottish Prison Service, Scottish Human Rights Commission, Families Outside, Information Commissioner's Office, Ofcom and the Mobile Broadband Group.

⁹ Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill, paragraph 9.

¹⁰ Correspondence from the Convener of the Justice Committee to the Cabinet Secretary for Justice. 25 September 2012. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53550.aspx>

¹¹ Correspondence from the Cabinet Secretary for Justice to the Convener of the Justice Committee. 18 October 2012. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/53550.aspx>

¹² Written submission from Scottish Human Rights Commission. Available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/WT_submissions.pdf.

¹³ Article 8 of the European Convention of Human Rights provides that "everyone has the right to respect for his private and family life, his home and his correspondence" and details exceptions whereby interference with the exercise of this right by a public authority is acceptable.

¹⁴ The Mobile Broadband Group's members are Telefonica O2, Three, Vodafone and EE) which operates the Orange and T-mobile brands in the UK.

the equipment must be designed, tested and deployed in such a way that interference with emergency services could not happen.¹⁵

13. During evidence at the Committee's meeting on 30 October, the Minister for Community Safety and Legal Affairs confirmed that safeguards would be put in place, such as rigorous testing, to ensure that no interference occurred outside prisons. She explained that colleagues involved in the pilot projects in England and Wales currently test the interference on an annual basis with a view to identifying and containing any leakage, and that Ofcom has been monitoring the situation but has not received any complaints from members of the public.¹⁶

14. The Committee recommends that the Scottish Government ensures that similar testing and monitoring is undertaken if the Scottish Ministers authorise any interference with wireless telegraphy in prisons and young offenders' institutions in Scotland.

Obtaining, retaining and disclosing information

15. In its letter of 26 September, the Committee noted that information obtained through an authorisation can be retained and disclosed beyond the three-month limit stated in the Bill on specified grounds, including the protection of health and morals. It therefore asked for details of the rationale behind including the 'protection of health and morals' as a ground for retaining or disclosing information.

16. In his response, the Cabinet Secretary clarified that the provision is designed to be consistent with Article 8(2)¹⁷ of the European Convention of Human Rights. Clause 3 of the Bill therefore mirrors the specific grounds set out in Article 8(2), which outlines when that right may be limited. He added that "in order for the information to be retained or disclosed, the disclosure would, of course, also have to be necessary and proportionate".

17. In response to a question on how data obtained would be held, the Minister said that it would be "dangerous" to specify the arrangements for retaining data at this stage, as technology was still evolving. Jim O'Neill, a Senior Legal Policy Manager at the Scottish Prison Service, explained that two types of device could be used: a simple blocking device that would not obtain any data, and a 'grabber' device that is able to identify data attached to the phone, for example, the SIM number and data and time of call.¹⁸

¹⁵ Written submission from Mobile Broadband Group. Available at:

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/WT_submissions.pdf

¹⁶ Scottish Parliament Justice Committee. *Official Report*, 30 October 2012. Col 1881. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7480&mode=pdf>

¹⁷ Article 8(2) states that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

¹⁸ Scottish Parliament Justice Committee. *Official Report*, 30 October 2012. Cols 1878-1880.

Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7480&mode=pdf>

Register of authorisations

18. During evidence the Minister, in response to a question on who is responsible for keeping a register of authorisations confirmed that a single register would be maintained by the Scottish Prison Service.

Oversight

19. In its letter to the Cabinet Secretary, the Committee asked for details of the oversight arrangements for the operation of authorised interference in prisons and young offenders' institutions in Scotland and suggested that Her Majesty's Chief Inspector of Prisons for Scotland could have such an oversight role.

20. In his response, the Cabinet Secretary explained that the Office of Communications (Ofcom), as the regulator for communications for the UK, has responsibility for oversight of the interference of wireless telegraphy in prisons and young offenders' institutions.

21. During evidence on 30 October, the Minister said that Her Majesty's Chief Inspector of Prisons for Scotland could provide independent review and monitoring of how any authorised interference is working in practice.

Financial obligations

22. The Committee, in its letter to the Cabinet Secretary, sought clarification as to whether there would be any financial implications arising from the Bill. The Cabinet Secretary explained that "the Bill itself does not impose financial obligations, as Ministers could choose not to exercise the powers provided in the legislation". However, he went on to clarify that costs would be incurred when the power was exercised and that the main costs would be in the purchase and installation of the equipment.

23. This issue was explored further during the evidence session with the Minister on 30 October. When asked whether Scottish prisons could afford to use the technology, the Minister responded that it would be for individual institutions to decide whether to seek an authorisation to interfere with wireless telegraphy and in doing so would need to consider whether their own budgets could sustain the technology.

Public consultation

24. The Committee noted in its letter of 26 September that a public consultation was not conducted at UK level and asked for any information that the Cabinet Secretary has on why this was not undertaken.

25. The Cabinet Secretary responded that the National Offender Management Service had explained that, "as existing legislation already makes it an offence to possess and use a mobile phone (or similar device) in prison, and the Bill is designed to enable prison governors and directors to enforce these existing prohibitions by preventing and detecting the use of illicit mobile phones in prison, it was not considered necessary to carry out a public consultation". The Minister,

during evidence to the Committee, also confirmed that the Bill has attracted broad cross-party support and there has been no public opposition to the proposals.

RECOMMENDATION

26. The Committee recommends that the Parliament approves the forthcoming legislative consent motion on the UK Prisons (Interference with Wireless Telegraphy) Bill to be lodged by the Scottish Government.

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