Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Ministry of Justice with the agreement of Maria Caulfield MP, the member in charge of the Bill, to assist with the Committee’s scrutiny of the Prisons (Interference with Wireless Telegraphy) Bill (“the Bill”). The Bill was introduced in the House of Commons on 19 July 2017. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. The Bill makes provision for prison security and enables a public communications provider, such as a mobile phone network operator to be authorised to interfere with wireless telegraphy in relevant institutions.

Delegated Powers

3. The Bill contains one delegated power requiring the Secretary of State to give directions to a public communications provider and to a governor/director when the Secretary of State authorises the public communications provider to interfere with wireless telegraphy.

Clause by Clause analysis:

Clause 1(2), Paragraph 2(4) Schedule: Interference with Wireless Telegraphy in Prisons etc

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary procedure: None

Context and Purpose

4. Clause 1(2) of the Bill amends section 1 of the Prisons (Interference with Wireless Telegraphy) Act 2012 (“the 2012 Act”) so that the existing power for the Secretary of State to authorise prison governors or directors in England and Wales to interfere with wireless telegraphy in a prison or Young Offenders’ Institution is extended to include a power to authorise a public communications
provider (PCP), such as a mobile network operator, to effect this interference. The purpose of this amendment is to enable PCPs to operate independently to deploy new technologies to disrupt the use of illegally held mobile phones in custody.

5. Paragraph 2(4) of the Schedule to the Bill then amends section 2 of the 2012 Act so that the current duty for the Secretary of State to give directions to a governor or director who is authorised to interfere with wireless telegraphy is supplemented by a new duty for the Secretary of State to give directions to a PCP that is authorised to effect the interference.

6. The purpose of this new duty to give directions to the PCP is to ensure that there are sufficient safeguards built into the new process of authorisations granted to PCPs. This will ensure that PCPs provide sufficient information to governors or directors and to the Secretary of State, on a sufficiently regular basis, so that the PCP’s actions in effecting the interference with wireless telegraphy can be monitored and scrutinised.

7. Paragraph 2(4) of the Schedule also requires the Secretary of State to give directions to governors or directors specifying descriptions of information which is to be provided to OFCOM and the intervals at which this information is to be provided. The purpose of this measure is to allow OFCOM to scrutinise the way in which the interference by PCPs is being effected, and in particular to guard against the risk of incidental interference with lawful mobile phone communications outside of prison.

8. Pursuant to paragraph 2(2) of the Schedule to the Bill, PCPs will be obliged to act in accordance with the directions which are given to them, and failure to do so will constitute a breach of statutory duty.

Justification for taking the power

9. The power for the Secretary of State to give directions to PCPs is necessary in order to ensure that the process for authorisations granted to PCPs mirrors the existing process for authorisations granted to governors or directors, and contains the same associated procedural safeguards. These safeguards ensure that governors, directors, the Secretary of State, and OFCOM all have sufficient information about the way in which the PCP is effecting the interference. This allows for a sufficient degree of monitoring and oversight. In ECHR terms, it also assists to ensure that any possible interference with Article 8 is “in accordance with the law,” to the extent that there are adequate in-built procedural safeguards.

Justification for the procedure

10. The decision to allow the Secretary of State to issue directions to PCPs administratively without recourse to any parliamentary procedure reflects the existing process for directions issued to governors or directors under section 2(4) of the 2012 Act.
11. As with the existing directions under the 2012 Act, the requirements to be contained within them will be operational and technical in nature, such that parliamentary oversight of their content would be unnecessary. Given the possibility that, in the future, multiple authorisations may be in place across a large number of different prisons, necessitating multiple sets of directions to PCPs, it would not be practicable for all of these directions to undergo parliamentary scrutiny. The absence of any parliamentary process also makes it easier for directions to be amended swiftly where necessary for operational reasons, and this offers the necessary degree of flexibility.

Clause 2(2) Commencement

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary Procedure:* None

Context and Purpose

12. It is standard procedure to make provision for commencement by way of regulations unless commencement provision is made for a clause on the face of the Bill. It is also standard that no parliamentary procedure attaches to the regulation. Parliament has approved the provisions and the power enables the Secretary of State to bring them into force at convenient time if required.

Ministry of Justice

Date 23 November 2017