

CRIME (OVERSEAS PRODUCTION ORDERS) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Crime (Overseas Production Orders) Bill as brought from the House of Lords on 20 November 2018 (Bill 293).

- These Explanatory Notes have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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These Explanatory Notes relate to the Crime (Overseas Production Orders) Bill [HL] as introduced in the House of Lords on 20 November 2018 (HL Bill 293)

Overview of the Bill

- 1 The Crime (Overseas Production Orders) Bill enables appropriate officers (e.g. a constable) to apply for the production of existing stored electronic information located or controlled outside the UK, for use in the investigation and prosecution of indictable offences. Such a power can only be applied for where a designated international co-operation arrangement exists and permits.

Policy background

- 2 Electronic information is increasingly important for the investigation and prosecution of criminal offences. The companies providing services which generate and/or store electronic data are often located outside the UK. While the data could be generated by any user, the data can be managed, processed or stored by a company outside the UK. This puts this type of data beyond the current reach of existing domestic court orders. This is because domestic court orders either cannot be made where the data is not located in or accessible from the UK or, where they can be so made, they cannot be served extra-territorially i.e. on entities outside the UK.
- 3 For data that is beyond the reach of domestic orders, Mutual Legal Assistance (MLA) is available which is form of judicial co-operation. Under MLA a requesting country can formally request assistance from an executing authority or country who is then responsible for collating the evidence, often using their own coercive orders or warrants. However, in some cases the MLA process may not be timely enough to produce this evidence to effectively contribute to an investigation or secure a prosecution.
- 4 This Bill addresses the constraints of existing domestic court orders and the limits of MLA in being able to compel the production of this evidence from another jurisdiction and being able to produce this quickly. The Bill does this by creating a new overseas production order which has extra-territorial effect, meaning that these orders granted by UK courts exert jurisdiction over evidence and persons outside the UK. This jurisdiction is only asserted where an international co-operation arrangement to which the UK is a party has been agreed and permits this to happen. An international co-operation arrangement will be in the form of a treaty with another country or countries, which relates to the provision of MLA in connection with the investigation or prosecution of offences. The Bill reflects the anticipated framework required to implement such international agreements in future.
- 5 The practical effect of this power is to allow a UK court (at the request of appropriate officers as defined in the Bill) to require the production of stored electronic information directly from a person or company located overseas, such as an overseas service provider, as it would if the information was located or controlled in the UK.

Legal background

- 6 This Bill creates a new, standalone legal regime for UK law enforcement agencies to obtain data and does not amend existing legislation (except for consequential purposes). However, the Bill draws on existing legislative provisions that relate to the obtaining of material to assist a criminal investigation or prosecution such as the Police and Criminal Evidence Act 1984 (see in particular the powers under section 9 and Schedule 1 to that Act to obtain a production order requiring the disclosure of special procedure material).

Territorial extent and application

- 7 Clause 18 sets out the territorial extent of the Bill, that is the jurisdictions in which the Bill will form part of the law. The Bill extends to the whole of the United Kingdom with the exception of consequential amendments in Clause 10 (which have the extent of the enactment being amended).
- 8 The Bill relates to a mixture of reserved and, in Northern Ireland, excepted and devolved matters. The Bill relates in part to reserved/excepted matters such as international relations, telecommunications, and powers for investigating serious crime including terrorism.
- 9 The Bill also relates to matters within the legislative competence of the Scottish Parliament and Northern Ireland Assembly as it provides a means for devolved law enforcement officials to seek electronic data evidence not covered by specific reservations in relation to a wide range of serious offences, some of which are not reserved/excepted.
- 10 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned.
- 11 The consent of the Scottish Parliament has been sought in relation to this Bill.
- 12 Separate commencement provisions exist within the Bill so that the Northern Ireland Executive may consider the application of these powers once it is restored.
- 13 The Bill does not relate to any matters which are devolved under the Government of Wales Act 2006.
- 14 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Clause 1: Making of overseas production order on application

- 15 This clause enables a judge to make, on application by an appropriate officer (defined in Clause 2), an overseas production order. An overseas production order is an order that requires an overseas person (pursuant to Clause 4) to produce stored electronic data (defined in Clause 3) or requires such a person to give access to electronic data.
- 16 The clause sets out the requirements which must be met for an application for an overseas production order to be made, including in relation to an underlying international co-operation arrangement and the scope of data that can be sought by an applicant.
- 17 The application for an overseas production order can only be made by an appropriate officer (defined in Clause 2) who is required to specify or describe the electronic data being sought in the application. When making an application, the appropriate officer must have reasonable grounds to believe that the electronic data that is sought and specified in the application does not include or consist of excepted electronic data. Excepted electronic data is further defined in Clause 3.
- 18 Any international agreement between the UK and another country may be reciprocal, allowing law enforcement agencies in that country to require that data is produced by companies based in the UK. Subsection (5) precludes the Secretary of State from designating an agreement under section 52 of the Investigatory Powers Act 2016 – which makes lawful the interception of communications when a request is made from overseas– where the country or territory with whom the UK has made the agreement retains the death penalty. Subsection (6) provides that subsection (5) does not apply if the country or territory has given assurances in relation to the use of the death penalty, meaning the death penalty cannot be imposed in any case in which or in whose preparation electronic data obtained under this Act has been used. This section was amended at Lords Report stage through a non-Government amendment.
- 19 An application for an overseas production order must identify the international co-operation arrangement pursuant to which the evidential material is being sought by way of an order. Subsection (7) enables the Secretary of State to designate by regulations international co-operation arrangements for the purposes of the Bill. An international cooperation arrangement must be a relevant treaty relating to co-operation or mutual assistance in the investigation or prosecution of criminal matters to which the UK is a party. Subsection 8 defines a relevant treaty as a treaty that has been laid by a Minister of the Crown before Parliament under s20(1)(a) of the Constitutional Reform and Governance Act 2010.
- 20 Subsection (9) defines the judges who can make an overseas production order.

Clause 2: Appropriate officers

- 21 This clause specifies the people who can make an application for an overseas production order. Separate provision is made in relation to England and Wales and Northern Ireland; and in relation to Scotland.
- 22 In the cases of some categories of appropriate officers, they may only exercise functions under the Bill if they are carrying out functions of a particular kind. These limitations are designed to ensure that it is only where the appropriate officer is exercising functions in relation to the investigation or prosecution of criminal conduct that they may apply for an overseas production order.
- 23 The Secretary of State may specify additional descriptions of appropriate officers by way of regulations. Before exercising that power in relation to Scotland, the Secretary of State must consult the Scottish Ministers (see Clause 16).

Clause 3: Meaning of “electronic data” and “excepted electronic data”

- 24 This clause sets out the scope of the applications and orders in relation to material that can and cannot be targeted, by defining “electronic data” and “excepted electronic data”.
- 25 “Excepted electronic data”, which cannot be targeted by applications or orders, includes data that is subject to legal privilege which is further defined in subsection (6).
- 26 “Excepted electronic data” also includes a personal record which is held in confidence. This is further defined in subsection (7) as being a confidential record concerning any individual, living or dead, that could identify the individual and which relates to their physical or mental health (e.g. their medical records), spiritual counselling or assistance given to them, and/or counselling or assistance given to them for the purposes of their welfare. Such records are confidential if created in circumstances giving rise to an obligation of confidentiality to the person to whom they relate, e.g. medical records, and if this obligation has been maintained.
- 27 Subsection (4) narrows the scope of applications and orders in certain circumstances by clarifying that, if the overseas production order is against a person who is a telecommunications operator (as defined under the Investigatory Powers Act 2016), then communications data (e.g. data which relates to the communications rather than content) is to be treated as “excepted electronic data”.
- 28 Subsection (5) broadens the scope of applications and orders in certain limited circumstances by providing that, if the overseas production order is for the purposes of a terrorist investigation (other than a terrorist financing investigation), a confidential personal record is not to be treated as “excepted electronic data” and is therefore within the scope of applications and orders.

Clause 4: Requirements for making of order

- 29 This clause sets out the conditions and restrictions under which an overseas production order may be made.
- 30 Under subsection (2), the judge must be satisfied that there are reasonable grounds for believing that the person who is named in the order (those who possess or control the data overseas) operates or is based in a country which is not the UK. This country must be party to an international co-operation arrangement with the UK which has been designated under Clause 1. A person operating in a country or territory outside the UK is further defined in subsection (7).
- 31 Under subsection (3) the judge must also be satisfied that there are reasonable grounds for believing that an indictable offence has been committed and that proceedings for that offence have already been commenced or the offence is being investigated. Alternatively, the judge must be satisfied that the order is sought for the purposes of a terrorist investigation. This reflects the criteria under which production orders may already be sought against those in the UK (see e.g. paragraph 6(2) of Schedule 5 to the Terrorism Act 2000).
- 32 Under subsection (4), the judge must be satisfied that there are reasonable grounds for believing that the person against whom the order is sought has in their possession, or has in their control, all or part of the data being sought.
- 33 Under subsections (5) and (6) the judge must be satisfied that there are reasonable grounds for believing that some or all of the data that is being applied for will be of substantial value to the investigation or proceedings and that it is in the public interest that this data is made available to the investigation or proceedings. In considering whether something is of public interest, the judge must consider the benefit to the proceedings or investigation that this electronic data is likely to have and also the circumstances under which the person who is required to produce the data under the order has come into possession or control of it.
- 34 The Secretary of State may specify further additional requirements (by way of regulations) that have

to be met in order for an overseas production order to be made (Clause 4(1)(b)). Requirements will still need to be met under clause 4 notwithstanding any additional requirements made by way of regulations.

Clause 5: Contents of order

- 35 The purpose of this clause is to set out what the order needs to specify when a judge is satisfied that, based on the application before them, one can be made. The judge may not specify or describe data in the order which consists of or includes excepted electronic data.
- 36 The order may be for all or part of the data requested in the application. In reviewing the application, the judge may determine that only part of the data has met the necessary requirements and, in this event, only the required data will be identified in the order.
- 37 In particular, subsection (3) explains that, in spite of an order being capable of being made where only part of the data sought in the application satisfies the requirements set out in Clause 4(5) and (6) only such data that satisfies these tests of 'substantial value' and 'public interest' can be identified in the order and required to be produced. Any part of the data that fails to satisfy these tests cannot be included in the order.
- 38 An overseas production order must specify the person to whom the data sought by the order must be produced (or access to the data must be given) and the timeframe or deadline for doing so. This has been set as a default period of seven days starting from when the order is served. However, if the judge sees fit, the judge can specify a longer or shorter period. For example, for urgent terrorist-related investigations, a shorter time period may be appropriate.

Clause 6: Effect of order

- 39 This clause explains what the effect of an overseas production order would be.
- 40 Where the order requires the production of electronic data, it must be in the form set out in subsection (1), which includes the requirement that the data be in a visible and legible form.
- 41 Where the order requires the giving of access to electronic data access must be given to the data in a form set out in subsection (2). That includes the requirement that the data be in a visible and legible form and in a form in which it can be taken away in a visible and legible form.
- 42 Subsection (4) clarifies that the person being served with the order (the person named in it who has possession and control of the data) should supply or give access to this data regardless of where it is stored, but it should exclude any excepted data (as defined in Clause 3). It also clarifies that the order, once granted by a judge, is not rendered ineffective by other restrictions on disclosure.
- 43 It is implicit that any steps to conceal, destroy, alter or dispose of any electronic data specified or described in the order before it has been complied with are likely to prevent compliance with the requirements of the order, which has effect (as regards England and Wales and Northern Ireland) as an order of the Crown Court (see below at Clause 11).

Clause 7: Variation or revocation of order

- 44 This clause permits a judge to vary or revoke an overseas production order where a person defined in subsection (2) makes an application for variation or revocation. The person affected by the order may apply for a variation or revocation as may the appropriate officer who applied for it. Likewise, the Secretary of State or Lord Advocate, who is responsible for serving the order (see Clause 9) may also apply for variation or revocation.
- 45 The application for a variation must specify the relevant designated international co-operation arrangement as well as the data to be covered under the varied order. As with the requirements to apply for an order, excepted electronic data is not in scope for a varied order.

Clause 8 Inclusion of non-disclosure requirement in order

- 46 This clause enables the judge who is making an overseas production order to include in the order a requirement on the person being served the order not to disclose the existence or contents of the order unless permission is given by a UK judge or by the appropriate officer who requested the order or an equivalent officer.
- 47 Subsection (3) requires a judge to consider when the non-disclosure requirement should expire and, if so, to specify in the order when the requirement expires. For example, the continuation of a non-disclosure requirement is unlikely to be appropriate once the investigation has concluded or proceedings instituted have been concluded.
- 48 Where an order is being revoked, the judge may order that the unexpired non-disclosure requirement in that order continues to have effect. This may be appropriate, for example, where it is clear to the judge that a further overseas production order may be sought.

Clause 9: Restrictions on service of order

- 49 Only the Secretary of State can serve an order made in England, Wales and Northern Ireland. Only the Lord Advocate can serve an order made in Scotland. An order may only be served if service would be in accordance with a designated international co-operation arrangement.
- 50 This clause provides that an overseas production order must be served within three months of it being made. If it is not served within this time period, then it ceases to have effect.

Clause 10: Retention of electronic data and use as evidence

- 51 This clause relates to the retention of electronically stored data obtained or to which access is provided under an overseas production order. It permits the retention of electronically stored data for as long as is necessary, including for use as evidence at a trial for the offence which the judge made the order against.
- 52 Subsections (2), (3) and (4) ensure that the data produced under an overseas production order can be used as evidence in UK criminal proceedings.

Clause 11: Procedural matters

- 53 This clause provides that rules of court may be used to specify the process that should be followed by the court in relation to proceedings that relate to overseas production orders.
- 54 For orders made in England, Wales and Northern Ireland, these would have the effect of Crown Court orders. Non-compliance with overseas production orders made by a judge (UK wide) may therefore give rise to Contempt of Court proceedings for non-compliance.

Clause 12: Notice of application for order: confidential journalistic data

- 55 This clause stipulates that an application for an order must be made on notice if there are reasonable grounds for believing the electronic data consists of or includes confidential journalistic data. This provision will enable those on notice (such as journalists whose confidential journalistic material is sought by an order) to be party to any such application heard by a court. The same requirements as in Clause 4 will still need to be met when a judge decides whether to make an application. It will be for the judge to determine who should be put on notice of such applications and rules of court will further provide for mechanisms for doing so.

Clause 13 Effect of giving notice of application

- 56 Clause 13 provides that a person who has been given notice that an application for an overseas production order has been made must not hide, destroy or alter the electronic data specified in the

application or disclose the making of the application. The aim of this provision is to protect evidence (and prevent prejudice to an investigation) whilst providing for the opportunity for affected parties to participate in proceedings considering access to such material.

57 Subsections (3), (4) and (5) set out when the duty ceases to apply.

Clause 14: Means of service

58 This clause sets out how an order, notice of an application, and any other document made by a court relating to an overseas production order can be served on a person. Such order, notice or document can be served, including electronically (e.g. service via email), by any means set out and permitted by rules of court. Additionally, service can be effected on a person outside the UK by serving it on their principal UK office or nominated UK address or, in certain circumstances, by making it available for inspection. Where a person has no principal office in the UK, documents can also be served at any place in the UK where that person carries on business or conducts business activities. Service can also be made in accordance with such administrative arrangements as might be made by the Secretary of State or, in relation to Scotland, the Lord Advocate.

Clause 15: Application of Act to service police

59 This clause explains how the provisions in this Bill also apply to a member of a service police force.

Clause 16: Regulations

60 This clause makes provision for the regulations that may be made by the Secretary of State under the Bill.

61 Subsection (3) provides that the Secretary of State must consult the Scottish Ministers before making regulations that specify additional “appropriate officers” who may apply for an overseas production order in Scotland.

62 Any regulations made under Clause 4(1) (power to specify additional requirements for making an overseas production order) must be laid in draft and approved by each House of Parliament before being made (in other words, such regulations are subject to the affirmative procedure).

63 Other regulations made under this Bill are subject to the negative procedure.

Clause 17: Interpretation

64 This clause defines various terms used in the Bill, including appropriate officer, designated international co-operation arrangement, electronic data, excepted electronic data, judge and overseas production order.

65 This clause also clarifies what references in the Bill to proceedings relating to an overseas production order will include.

Clause 18: Extent

66 This clause sets out the extent of the Bill. The Bill extends to the whole of the United Kingdom (except for the amendments made by Clause 10(2) and (3) which have the extent of the enactment being amended).

Clause 19: Commencement

67 Provisions relating to the making of regulations, interpretation, extent and the short title come into force the day the Bill is passed. Otherwise the clauses of the Bill come into force in accordance with regulations made by the Secretary of State.

Clause 20: Short Title

68 This Clause is self-explanatory.

Commencement

- 69 Provisions relating to regulations, interpretation, extent and the short title of this Bill come into force the day the Bill is passed. Otherwise, the substantive provisions of this Bill will be brought into force by regulations made by the Secretary of State. The Secretary of State may specify different days for difference purposes or areas.

Financial implications of the Bill

- 70 There are already costs incurred in making Mutual Legal Assistance requests. It is expected that these unit costs will continue as the onus will be for law enforcement and prosecuting agencies to prepare applications for orders rather than write out Letters of Request for this type of evidence.
- 71 There will be a new downstream impact cost on the court services. However, based on the current number of outgoing requests for electronic evidence under Mutual Legal Assistance, it is thought this will be a minor additional cost to Her Majesty's Courts and Tribunals Service.

Parliamentary approval for financial costs or for charges imposed

- 72 No money resolution or ways and means resolution is needed for the Bill.

Compatibility with the European Convention on Human Rights

- 73 The Home Secretary, the Rt. Hon. Sajid Javid MP, has made a statement that, in his view, the provisions of this Bill are compatible with the Convention Rights (within the meaning of section 19 of the Human Rights Act 1998).
- 74 The provisions of the Bill confer a power to require electronic data, which may include the content of private communications, to be made available to the State, and accordingly Articles 8 and 10 of the Convention are engaged. These intrusions into ECHR rights can be justified as necessary in a democratic society for the prevention of disorder and crime and in the interests of national security and public safety and are proportionate in light of the requirements that must be met before a judge can make an overseas production order, and the other safeguards set out in the Bill. To the extent that the electronic data made available may include journalistic material, the requirement that an order is made by a judge provides prior judicial oversight for the exercise of the power, and accordingly an Article 10 compliant safeguard.

Related documents

- 75 The following documents are relevant to the Bill and can be read at the stated locations:
- Impact assessment
 - Delegated Powers Memorandum

Annex A - Territorial extent and application in the United Kingdom

The Bill extends to the whole of the United Kingdom with the exception of two consequential amendments which have the same (limited) extent as the enactment being amended.¹

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1 to 20 (except Clause 10)	Yes	Yes	Yes	Yes	n/a	n/a	n/a	Yes – Scotland
Clause 10	In part	In part	In part	In part	n/a	n/a	n/a	Yes - Scotland

¹ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

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