

PRISON MEDIA BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Prison Media Bill as introduced in the House of Commons on 11 December 2023 (Bill 55).

- These Explanatory Notes have been prepared by the Ministry of Justice, with the consent of Katherine Fletcher MP, 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.

Table of Contents

Subject	Page of these Notes
Overview of the Bill	2
Policy background	2
Legal background	3
Territorial extent and application	3
Commentary on provisions of Bill	4
Clause 1: Unauthorised photograph or sound-recording of the inside of a prison	4
Clause 2: Unauthorised photographs and sound-recordings of prisons and prison workers	4
Clause 3: Extent, commencement and short title	5
Commencement	6
Financial implications of the Bill	6
Parliamentary approval for financial costs or for charges imposed	6
Compatibility with the European Convention on Human Rights	6
Related documents	6
Annex A – Territorial extent and application in the United Kingdom	7
Subject matter and legislative competence of devolved legislatures	7

Overview of the Bill

- 1 The purpose of the Bill is to strengthen existing legislation (section 40D of the Prison Act 1952 (“the 1952 Act”)) to further address the unauthorised creation and uploading of digital media created of prison workers or of the inside of a prison. These measures will better ensure the removal of such online media from social media and/or video sharing platforms to mitigate its harms.

Policy background

- 2 Under section 40D of the 1952 Act, it is already an offence for a person to create or transmit unauthorised digital media inside a prison. However, this current legislation is insufficient to tackle the issue of people outside a prison either uploading digital media created inside prisons or people outside a prison creating and uploading digital media of the inside of a prison and/or prison workers on prison land.
- 3 The removal of this media, often created on illicit devices in prisons and other devices including drones, is important as it causes harm, for example:
 - facilitating continued criminality (extending beyond prison walls into the community) including drug supply and gang violence;
 - causing distress to victims of crimes in the community;
 - posing security risks e.g., identifying staff or security defences (including aerial footage which captures the fabric of a prison and staff and prisoner movements);
 - threatening the safety of prison workers and their families; and
 - undermining public confidence in the criminal justice system.
- 4 This Bill contains three provisions to modify the 1952 Act:
 - firstly, the Bill will make minor wording modifications to section 40D to put beyond doubt the illegality of creating digital media of the inside of a prison from the outside, including via drone;
 - secondly, the Bill will create a new offence of creating unauthorised digital media of prison workers (including prison custody officers in private prisons) on prison land; and
 - thirdly, the Bill will make the unauthorised uploading of digital prison media created inside a prison, of the inside of a prison or of prison workers on prison land, regardless of whether uploaded from prison or the community, an offence. This will thereby close the current *third-party uploader* loophole.
- 5 We expect these measures to oblige social media platforms to remove uploaded digital prison media under their Terms of Service. All major social media companies state in their Terms of Service that their platforms cannot be used for illegal or unlawful purposes.
- 6 The new offences are solely punishable by a fine for individuals creating and/or uploading unauthorised digital prison media. These would be unspecified (and therefore unlimited) upon summary conviction.

Legal background

- 7 Section 40D(1)(a) of the 1952 Act criminalises taking photographs (including videos, per the definition of ‘including a moving image’ in section 40E(6)) inside a prison without authorisation.
- 8 It is not currently completely clear if section 40D(1)(a), even when read with subsection (2) that ‘it is immaterial for the purposes of subsection (1)(a) where the recording medium is located’, would capture the following situations:
 - Drone footage taken from above prison, capturing the inside of a prison site from above;
 - Footage taken from outside an open prison (i.e. one without a boundary wall), capturing the inside of the prison site.
- 9 This is because section 40D(2) could be argued to be limited to situations such as where a recording is taken of a phone or video call with a prisoner, by the person they are having the call with. Such a situation more squarely falls under ‘taking a photograph, or making a sound-recording, inside a prison’ than the above situations, because the information would be being transmitted from inside the prison, even if the recording took place outside.
- 10 In order to put beyond doubt that this offence would capture the situations set out at para. 8 above, Clause 1 amends section 40D(1)(a) so that it additionally captures when someone “takes a photograph, or makes a sound-recording, of the inside of a prison”.
- 11 While it is an offence to photograph, film or make sound recordings of prison workers (and indeed, at all) in prison without authorisation, it is not currently an offence to do so if the recording takes place outside ‘the prison walls’ (but still on prison land) and does not capture the inside of a prison, thereby avoiding the commission of an offence under section 40D(1)(a). Clause 2 inserts new section 40DA into the 1952 Act, which creates a new offence of taking a photograph, or making a sound-recording, of a prison worker while the prison worker is on prison land, without authorisation and intending the photograph, or sound-recording, to record a prison worker on prison land.
- 12 Under section 40D(1)(b), it is an offence to send or upload any digital media (including unlawfully created media) “from inside a prison”, but if the unlawfully created media is uploaded outside a prison, no offence is committed, even though the media must have initially been sent from inside a prison in breach of s40D(1)(b) (or otherwise brought or conveyed out of a prison in breach of s40D(3)). There is therefore a loophole whereby ‘third party uploading’ of illegally created digital media is still lawful. This means social media companies and/or media-sharing platforms need to establish if such media was uploaded unlawfully from inside a prison or otherwise lawfully uploaded, in order to determine whether it violated their terms of service. Given the current difficulties in establishing this, media depicting the inside of prisons is being left unremoved.

Territorial extent and application

- 13 Clause 3(1) sets out the extent of the provisions in the Bill. The Bill extends and applies to England and Wales only.
- 14 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Clause 1: Unauthorised photograph or sound-recording of the inside of a prison

- 15 Clause 1(1) sets out that section 40D of the Prison Act 1952 (“**the 1952 Act**”) will be amended.
- 16 Clause 1(2) amends section 40D(1)(a) to insert a new subsection which makes it an offence for someone without authorisation to take a photograph or make a sound-recording ‘*of the inside of a prison*’, as well as inside a prison. This puts beyond doubt the illegality of creating unauthorised digital media of the inside of a prison from the outside, including via drone.
- 17 Clause 1(3) amends section 40D(5)(b) to ensure consistency between the available fine for offences under the existing wording (now at section 40D(1)(a)(i)) and offences under the new wording (at section 40D(1)(a)(ii)). This is in light of section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 operating to remove the limit of the ‘statutory maximum’ where it applies to offences created before the commencement of that provision (such as offences under the existing wording), but not where it applies to offences created after the commencement of that provision (such as offences under the new wording).

Clause 2: Unauthorised photographs and sound-recordings of prisons and prison workers

- 18 Clause 2(1) sets out that the 1952 Act will be amended.
- 19 Clause 2(2) inserts after section 40D new section “40DA Unauthorised photograph or sound-recording of a prison worker on prison land” (“**new section 40DA**”).
- 20 Subsection (1)(a) of new section 40DA creates a new offence of without authorisation creating media of a prison worker on prison land. This is to tackle the creation of digital media of prison workers in the course of their duties, outside the prison boundary but on prison land. Subsection (1)(b) of new section 40DA states that the creation of media of prison workers on prison land must be intentional. This would exclude, for example, instances of filming from property adjacent to the prison, or filming of the exterior of a prison, which unintentionally captured media of prison workers.
- 21 Subsection (2) of new section 40DA states that it is immaterial where the recording medium is located for the new offence of creating media of prison workers on prison land, as per the existing section 40D(1)(a) offence.
- 22 Subsection 3(a) of new section 40DA provides a defence of reasonable belief that the media was created with authorisation. This would include, for example, an honest and reasonable mistake as to whether a Governor of a prison had permitted a news outlet to record interviews of its workers outside the prison. Subsection (3)(b) of new section 40DA sets out a defence where in all the circumstances there was an overriding public interest which justified the recording. This could include, for example, members of the public filming potential misconduct of prison workers on prison land.
- 23 Subsection (4) of new section 40DA establishes that individuals sentenced for the offence of creating media of prison workers on prison land are liable on summary conviction to a fine.
- 24 Clause 2(2) further amends the 1952 Act by inserting new section “40DB Unauthorised uploading of a photograph or sound-recording of a prison or prison worker” (“**new section 40DB**”).

- 25 Subsection (1) of new section 40DB states that a person is guilty of an offence if without authorisation, they upload digital media to an internet service, which was taken or made inside a prison, is of the inside of a prison, or records a prison worker on prison land. This closes the previous loophole whereby ‘third party uploading’ of illegally created digital media would otherwise be lawful.
- 26 Subsection (2)(a) of new section 40DB provides a defence where the accused did not know and had no reasonable cause to believe that the media was taken or made inside a prison, is of the inside of a prison, or records a prison worker on prison land. This could include uploading media, reasonably believing it is a fictitious depiction of prisons or prison workers, historical footage, from a foreign country or from a decommissioned prison, for example. Subsection (2)(b) of new section 40DB provides a defence of reasonable belief that the media was uploaded with authorisation. This could include, for example, uploading footage of interviews of prison workers outside the prison, where there had been an honest and reasonable mistake as to whether a Governor had permitted the uploading. Subsection 2(c) of new section 40DB provides a defence where in all the circumstances there was an overriding public interest which justified the uploading. This could include, for example, members of the public uploading a recording of potential misconduct of prison workers on prison land.
- 27 Subsection (3) of new section 40DB provides that the offence is solely punishable by a fine.
- 28 Subsection (4) of new section 40DB establishes the meaning of “internet service”.
- 29 Clause 2(3) modifies references in Section 40E of the 1952 Act to accommodate the new sections. It also defines the terms “prison land” and “prison worker”. “Prison land” is defined as land vested in the Secretary of State, and other land in which the Secretary of State has an interest or which is occupied by the Secretary of State, for any purpose connected with the provision, running or management of the prison. This could include land immediately surrounding the prison walls, as well as land used for car parking, storage or housing staff, for that prison. A “prison worker” is defined as a prison officer, prison custody officer, and other persons who (whether as a servant or agent of the Crown or otherwise) work in a prison, or visit or attend at a prison for the purpose of their work (including voluntary work). This could include legal visitors, inspectors, delivery drivers, and building contractors, and providers of healthcare and education.

Clause 3: Extent, commencement and short title

- 30 Clause 3(1) provides that the Bill will extend to England and Wales only.
- 31 Clause 3(2) gives the Secretary of State the power to appoint the day that clauses 1 and 2 of the Bill will come into force, by regulations made by statutory instrument.
- 32 Clause 3(3) provides that different days for coming into force may be appointed for different purposes or areas.
- 33 Clause 3(4) provides that clause 3 comes into force on the day the act is passed via Royal Assent.
- 34 Clause 3(5) provides the Secretary of State with the power to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Act, by regulations made by statutory instrument.
- 35 Clause 3(6) sets out that the power under Clause 3(5) includes the power to make different provision for different purposes.
- 36 Clause 3(7) establishes that this Bill may be referred to as the Prison Media Act 2024 once in force.

Commencement

- 37 Clause 3(2) sets out that the provisions in the Bill will be brought into force by means of regulations made by statutory instrument.

Financial implications of the Bill

- 38 The Bill is unlikely to have a significant economic impact on business, charities, voluntary bodies or the public sector. The new offences will be punishable by a fine and will not incur prison place-related costs. Imposing the fines will be covered by existing Ministry of Justice and HM Courts and Tribunals Service resources as part of business-as-usual costs. It is possible that a very low number of individuals could be recalled to prison if they commit the new offences while on licence, but the number of cases and associated costs are expected to be negligible.

Parliamentary approval for financial costs or for charges imposed

- 39 As any additional expenditure arising from this Bill will be minimal, this Bill is not subject to a money resolution.

Compatibility with the European Convention on Human Rights

- 40 This is a Private Member's Bill and there is no requirement for a statement of compatibility with the European Convention on Human Rights ("ECHR") in accordance with section 19(1)(a) of the Human Rights Act 1998.
- 41 The Ministry of Justice has, nevertheless, considered the question of compatibility and has concluded that the Bill is compatible with the ECHR.

Related documents

- 42 The following documents are relevant to the Bill and can be read at the stated locations:

- The Prison Act 1952:
<https://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/52/contents>

Annex A – Territorial extent and application in the United Kingdom

43 The Bill extends and applies to England and Wales only.

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	No	No	No	No	No
Clause 2	Yes	Yes	No	No	No	No	No
Clause 3	Yes	Yes	No	No	No	No	No
Clause 4	Yes	Yes	No	No	No	No	No

Subject matter and legislative competence of devolved legislatures

- 44 The management of persons charged with, or convicted of, offences is a reserved matter in Wales. The criminal justice system and legal jurisdiction of England and Wales are reserved. On that basis, a legislative consent motion is not required for this Bill to apply to Wales.
- 45 The management of offenders is not a reserved matter in Scotland, nor a reserved or excepted matter in Northern Ireland. The criminal justice systems of Scotland and Northern Ireland are devolved to the Scottish Parliament and Northern Ireland Assembly, respectively. This Bill does not extend to Scotland or Northern Ireland.

PRISON MEDIA BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Prison Media Bill as introduced in the House of Commons on 11 December 2023 (Bill 55).

Ordered by the House of Commons to be printed, 11 December 2023

© Parliamentary copyright 2024

This publication may be reproduced under the terms of the Open Parliament Licence which is published at www.parliament.uk/site-information/copyright

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS