

CRIME (OVERSEAS PRODUCTION ORDERS) BILL [HL]

EXPLANATORY NOTES ON COMMONS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Commons Amendments to the Crime Overseas Production Orders Bill [HL] as brought from the House of Commons on 31 January 2019.
- 2 These Explanatory Notes have been prepared by the Home Office in order to assist the reader of the Bill and the Commons Amendments, and to help inform debate on the Commons Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Commons Amendments themselves, refer to the Bill as first printed for the Commons (Bill 293).
- 4 These Explanatory Notes need to be read in conjunction with the Commons Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Commons Amendments.
- 5 The majority of the Commons Amendments were tabled in the name of the Secretary of State.
- 6 Commons Amendments 1 and 10 were tabled in the name of the Minister of State for Security and Economic Crime.
- 7 Commons Amendments 7, 8, 9, 11 and 12 were tabled by Huw Merriman MP with the Ministers putting their name to them.

Commentary on Commons Amendments

Commons Amendments to Clause 1: Making of overseas production order on application

Commons Amendment 1

- 8 Commons Amendment 1 would remove a non-Government Lords amendment [included at Lords Report stage] which would preclude 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. This would not apply if the country or territory had given assurances in relation to the use of the death penalty. See Amendment 13 below.

Commons Amendments to Clause 4: Requirements for making of order

Commons Amendments 2 and 3

- 9 Amendment 2 would impose a “relevant evidence” test in Clause 4 which a judge would need to consider when making an overseas production order. The judge would need to be satisfied that there were reasonable grounds for believing that all or part of the electronic data in the application for the order was likely to be relevant evidence in respect of an indictable offence that had been committed and for which proceedings had started or an investigation was in progress. This requirement would not apply to orders for electronic data sought for the purposes of a terrorist investigation.
- 10 Amendment 3 would insert a definition of “relevant evidence” as meaning in relation to an indictable offence anything admissible in proceedings in respect of the offence. The term “proceedings in respect of the offence” rather than “trial for the offence” is used in the amendment. This is to ensure the test does not inadvertently prevent the overseas production orders power being used to obtain data for the purposes of confiscation investigations – where the proceedings in respect of the offence and for which the evidence would be admitted often take place after conviction and therefore separately from the trial.

Commons Amendments to Clause 6: Effect of order

Commons Amendments 4 and 5

- 11 Amendments 4 and 5 (which is consequential on 4) would clarify that the person (for example a communications service provider) against whom an overseas production order is made, taking into account the existence of the order, is under no obligation to comply in any way that would contravene the requirements of the data protection legislation, defined in Amendment 14 below as having the same meaning as set out in the Data Protection Act 2018 (section 3).

Commons Amendment to Clause 10: Retention of electronic data and use as evidence

Commons Amendment 6

- 12 Amendment 6 would clarify that electronic data which is produced in compliance with an overseas production order and which may be retained for so long as is necessary in all the circumstances (Clause 10(1)), is subject to the applicable obligations on the processing of personal data found in the data protection legislation (defined in Amendment 14 below).

Commons Amendments to Clause 12: Notice of application for order: confidential journalistic data

Commons Amendments 7, 8, 9 and 11

- 13 Amendment 7 would remove Clause 12 (1) and replace it with a provision which extends the requirement to give notice of an application for an overseas production order to all cases where there are reasonable grounds for believing that the electronic data sought consists of or includes journalistic data, subject to the exceptions set out in Amendment 8 below. Amendment 9 would be consequential on Amendment 7 and would remove the definition of confidential journalistic data which would become redundant (it being a sub-set of journalistic data).

- 14 Amendment 8 would set out that notice of an application relating to electronic data consisting of or including journalistic data would be served on the person (ordinarily the communications service provider) against whom the overseas production order is sought and, if different, the person by whom or on whose behalf the journalistic data is stored (i.e. the journalist). This amendment would also set out when a judge may direct that notice of an application is not required: where notice would prejudice the investigation of an indictable offence or a terrorist investigation, or where practically it would not be possible to identify or contact the relevant person. Amendment 11 would be consequential on this amendment and defines the meaning of an indictable offence (in Scotland and Northern Ireland) and “terrorist investigation”. See also Amendment 15.

Commons Amendment 10

- 15 Amendment 10 would insert a new subsection into Clause 12 which is intended to aid the determination of whether, for the purposes of Clause 12(5), a purpose is a criminal purpose or not.

Commons Amendment to Clause 15: Application of Act to service police

Commons Amendment 12

- 16 Amendment 12, which is consequential on Amendment 8, ensures that where Clause 12 applies in the context of an application for an overseas production order by a member of the service police, “indictable offence” in new Clause 12(2B) is read as a reference to an offence under the Armed Forces Act 2006 (see Clause 15(3)(e)).

New Clause after Clause 15: Designation of international agreements for purposes of section 52 of Investigatory Powers Act 2016

Commons Amendments 13 and 15

- 17 Amendment 13 would insert a new Clause which would, in certain circumstances, oblige the Secretary of State to seek a written assurance “relating to the non-use of information obtained by virtue of the [relevant designated] agreement in connection with proceedings for a death penalty offence” before the agreement could be designated for the purposes of section 52 of the Investigatory Powers Act 2016. Such an assurance would need to be sought by the Secretary of State where the country or territory concerned retains the death penalty.
- 18 Amendment 15 would amend the long title of the Bill to add at the end “and about the designation of international agreements for the purposes of section 52 of the Investigatory Powers Act 2016”, reflecting the provision in Amendment 13.

Commons Amendment to Clause 17: Interpretation

Commons Amendment 14

- 19 Amendment 14 would insert a definition of “the data protection legislation”, referred to in Amendments 4 to 6, namely that this term has the same meaning as in the Data Protection Act 2018 (section 3).

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Ordered by the House of Lords to be printed, 31 January 2019

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