

## Serious Crime Bill

### Delegated Powers – Supplementary Memorandum by the Home Office

The Government has tabled further amendments to the Serious Crime Bill for Commons Committee stage; these include two new delegated power. This supplementary memorandum explains why the powers have been taken and the reason for the procedure selected.

#### **New clause “*Guidance*”: Power to issue guidance in relation to new offence of controlling or coercive behaviour in intimate or family relationships**

*Power conferred on:* Secretary of State

*Power exercisable by:* Statutory Guidance

*Parliamentary procedure* None

1. New clause “*Controlling or coercive behaviour in an intimate or family relationship*”, which extends to England and Wales, provides for a new domestic abuse offence. That new clause sets out the elements of the new offence. In appropriate cases certain terms used in the construction of the offence are defined in the legislation, for example the term “members of the same family”, while others, such as “controlling or coercive” are left undefined and will take their ordinary meaning. In the normal way, it will be a matter for a jury or magistrates to determine whether, on the facts of a particular case, the offence has been made out. That said, the Government sees the merit in providing guidance to the police to accompany the new offence to assist police forces in understanding and investigating the new offence, and in giving statutory underpinning to such guidance. Statutory guidance is also expected to be of value to third sector organisations and others working in the field of domestic abuse. Accordingly, new clause “*Guidance*” confers a power on the Secretary of State to issue guidance to whatever persons she considers appropriate concerning the investigation of the new offence. This is accompanied by a power to revise any guidance which is issued, and a duty to arrange for any guidance that is issued or revised to be published. Amongst other things, such guidance would provide examples of the kind of behaviours that might be considered to be controlling or coercive when the offence is being investigated.

2. Any guidance issued under the new clause will not be subject to any parliamentary scrutiny, on the grounds that it will be worked up in consultation with all interested stakeholders and practitioners. The guidance will not conflict with, or alter the scope of, the new criminal offence, which will itself be the subject of parliamentary scrutiny during the parliamentary passage of this Bill. And finally, new clause “*Guidance*” does not impose any obligation on any named public authorities or individuals to follow the new statutory guidance. The approach taken in the new clause is consistent with other

legislative provisions providing for statutory guidance, for example, section 63Q of the Family Law Act 1996 in relation to forced marriage and sections 19, 32, 41, 56, 73 and 91 of the Anti-social Behaviour, Crime and Policing Act 2014 in respect of powers for tackling anti-social behaviour.

**New clause “*Prevention or restriction of use of communication devices by prisoners etc*”: Power to make regulations conferring power on a court to order a communications provider to disconnect a mobile phone in use in prison without authorisation**

*Power conferred on:* *The Secretary of State and the Scottish Ministers*

*Power exercisable by:* *Regulations made by statutory instrument*

*Parliamentary procedure:* *Affirmative*

3. New clause “*Prevention or restriction of use of communication devices by prisoners etc*” confers on the Secretary of State (in relation to England and Wales) and the Scottish Ministers (in relation to Scotland) a power to make provision by regulations conferring power on a court to make a “telecommunications restriction order”. This is an order which will require a communications provider to take whatever action the order specifies for the purpose of preventing or restricting the use of a mobile phone (or other communications device) in a prison where the use of the phone is unauthorised. The new clause sets out what regulations must make provision about (subsection (3)) and what they may make provision about (subsection (4)). It also defines certain terms, such as “communications provider” (subsection (8)).

4. Mobile phones in prisons are associated with numerous crimes, including the illicit supply of drugs and other organised crime. There are a number of offences relating to the use of mobile phones in prisons without authorisation. These can be found in the Prison Act 1952 (for England and Wales). Similar offences exist for Scotland. Section 40D(1) of the Prison Act 1952 creates the offence of taking a photograph or making sound recordings in a prison or transmitting any image or sound by electronic communications. Section 40D(3) creates offences designed to prohibit the conveyance or transmission of restricted documents out of a prison. Section 40D(3A) creates an offence in relation to the possession of, inter alia, a mobile phone, without authorisation.

5. ‘Authorisation’ for the purposes of section 40D of the Prison Act 1952 is defined in section 40E of that Act and means authorisation given for the purposes of that section in relation to all prisons or prisons of a specified description, by prison rules or by the Secretary of State; and in relation to a particular prison—

- by the Secretary of State;
- by the governor or director of the prison;

- by a person working at the prison who is authorised by the governor or director to grant authorisation on his behalf.

6. The Prisons Rules 1999 provide for powers of confiscation of unauthorised articles:

‘43(5) The governor may confiscate any unauthorised article found in the possession of a prisoner after his reception into prison, or concealed or deposited anywhere within a prison.’

7. Detection technology and cell and prisoner searches are currently used to identify and seize phones in prison. However, many of the phones in question are not found resulting in few prosecutions and relatively few confiscations.

8. Although communications providers may be able to disconnect the phones in question in accordance with the terms and conditions attached to usage, this is not certain. Consequently, the Government considers it necessary to make bespoke provision via regulations where a court can order the communications provider to disconnect the phone.

9. The Government considers that it is appropriate to put the detail pertaining to this measure into regulations, since some of it will necessarily be technical in nature. As technology evolves, and new equipment becomes available, it may for instance be necessary to update the detection to disconnection process. Technology has a limited lifespan and therefore, by including technical details about the process in regulations as opposed to on the face of the Bill, we are better placed to amend if required. Further, given that technology changes rapidly and that therefore it may be necessary to modify the provisions accordingly, it is more practicable to do this via secondary legislation. That said, whilst the scheme is to be set out in secondary legislation, the purpose of the scheme, namely to confer a power on the civil courts to require communication providers to take specified action to prevent or restrict the use of mobile phones by prisoners, is clearly set out on the face of the new clause (subsections (1) and (2)). Moreover, the new clause requires that any regulations must include certain core elements of the scheme (subsection (3)), including key safeguards in respect of rights to make representations and provision about appeals. Subsection (4) sets out matters about which the regulations may make provision.

10. Given that the scheme itself is to be set out in secondary legislation, and in order to ensure that the rights of those affected are fully considered, the Government considers that it is appropriate for the regulations to be subject to the affirmative procedure thereby ensuring that the details of the scheme must be debated and approved by both Houses (or, in Scotland, by the Scottish Parliament).