

## DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

### CRIME (OVERSEAS PRODUCTION ORDERS) BILL

#### MEMORANDUM BY THE HOME OFFICE

1. This memorandum identifies the provisions of the Crime (Overseas Production Orders) Bill (the Bill) which confer powers to make delegated legislation, and explains why these powers have been taken and the nature of, and reason for, the procedure selected for exercising those powers.
2. The purpose of the Bill is to provide a mechanism for law enforcement and prosecuting authorities to obtain court orders for the production of electronic data held by overseas providers of electronic services.

#### **Clause 1(5): power to designate an international co-operation arrangement**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

#### *Purpose*

4. Clause 1(1) provides that a judge may make an overseas production order on the application of a law enforcement or prosecuting authority, provided that certain requirements are met. One such requirement is that the judge must be satisfied that there are reasonable grounds for believing that the person against whom the order is sought operates or is based in a country or territory outside the UK which is a party to or participates in a designated international co-operation arrangement. Clause 9 provides that an order may only be served by the Secretary of State, or the Lord Advocate for orders made in Scotland, who must be satisfied that to do so would be in accordance with a designated international co-operation arrangement.
5. An international co-operation arrangement is defined by clause 1(5) as an international agreement, instrument or other arrangement relating to the provision of mutual assistance in accordance with the investigation or prosecution of offences, to which the UK is a party, or in which it otherwise participates. Clause 1(5) provides for the Secretary of State, by regulations, to designate an international co-operation arrangement for the purposes of the Bill.

*Justification for the power*

6. The delegation ensures that, if the UK enters into an international arrangement providing for mutual assistance in relation to the investigation or prosecution of offences, and that arrangement reflects the provisions of the Bill, the provisions of the Bill may apply in relation to that arrangement without the need for primary legislation. (As set out below, such arrangements will be subject to separate scrutiny through the provisions of the Constitutional Reform and Governance Act 2010).
7. The power will enable the Government to give domestic legal effect to international agreements. As the UK may enter into a number of such arrangements in the future, it is considered necessary that this designation should be delegated to secondary legislation, otherwise additional primary legislation would be needed in each case where the UK enters into such an arrangement.
8. Clause 16(2) provides that regulations made under this power may include transitional, transitory or saving provision, described at paragraphs 36-38 below. This power may be needed where, for example, the UK enters into a new arrangement which replaces an existing arrangement or provides for a new procedure in an area in which overseas production orders are already obtained, to ensure an orderly transition between regimes.

*Justification for the procedure*

9. The Bill specifies in full what the implications of a designation are, and does not permit the implementation into UK law of any international arrangement in relation to the investigation or prosecution of offences, but only one that reflects the terms of the Bill. The provisions of the Bill will ensure that an order is only served where it meets the requirements of the designated international co-operation arrangement.
10. Further, most international arrangements entered into will be subject to the procedure in Part 2 of the Constitutional Reform and Governance Act 2010, so Parliament will have had an opportunity to scrutinise the arrangement before it is ratified by the Government.
11. Accordingly, since any exercise of the power is subject to the safeguards set out in the Bill and Parliament will already have had an opportunity to scrutinise the arrangements, the negative procedure is proposed.

**Clause 2(1)(a)(vii): power to specify a description of persons as “appropriate officer”**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

**Clause 2(1)(b)(v): power to specify a description of persons as “appropriate officer”**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

*Purpose*

12. Clause 1(1) provides that a judge may make an overseas production order on the application of an “appropriate officer”. Subsection (1) of clause 2 defines “appropriate officer” as one of a list of law enforcement or prosecuting authority officers, including a constable or an officer of Revenue and Customs. Subsection (1)(a) contains the definition in relation to England and Wales and Northern Ireland, and subsection (1)(b) in relation to Scotland.
13. Subsection (1)(a)(vii) and (b)(v) provide a power for the Secretary of State, by regulations, to specify a description of persons to be included within the definition of “appropriate officer”.
14. Subsection (7) provides that if such regulations describe a person by reference to that person acting with the authority of another person, the regulations may include a provision with a similar effect to clause 2(6). That section provides that a certificate issued by the person granting the authority (in that case the Commissioners for HM Revenue and Customs) is conclusive evidence of the fact of authority having been granted.

*Justification for the power*

15. The delegation ensures that if new categories of investigating or prosecuting authorities are created in future, or it is considered appropriate for additional categories of investigating or prosecuting authority to be able to make an application to court for an overseas production order, those persons may be added to the definition of “appropriate person” without the need for primary legislation. Given that future international co-operation arrangements may cover

authorities not currently provided for in the Bill, and there may be a need to update this list of authorities to reflect changing circumstances.

16. Clause 16(2) provides that regulations made under this power may include transitional, transitory or saving provision, described at paragraphs 36-38 below. This power is needed in order to ensure an orderly transition where new “appropriate persons” are designated and may apply for an overseas production order, potentially in accordance with an ongoing investigation.

*Justification for the procedure*

17. Updating the list of authorities who can apply for an overseas production order will be a technical matter. The detailed requirements and safeguards for making an overseas production order are set out in the Bill. Any additional description of persons designated as an “appropriate officer” will be subject to those provisions. For those reasons, it is proposed that the power to designate should be subject to the negative procedure.

***Clause 4(1)(b): power to specify additional requirements for the making of an overseas production order***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

*Purpose*

18. Clause 4 sets out the requirements for the making of an overseas production order. Subsections (2) to (7) of that clause set out the matters as to which a judge must be satisfied before making an order, including that there are reasonable grounds for believing that an indictable offence has been committed and is being investigated or prosecuted; that the person against whom the order is sought operates in a country party to a designated international arrangement and has possession or control of the electronic data specified in the order; that the electronic data sought is not excepted electronic data and is likely to be of substantial value to the proceedings or investigation, and that it is in the public interest for it to be produced.
19. Subsection (1) provides a power for the Secretary of State, by regulations, to specify additional requirements for the making of an overseas production order. Those requirements must be satisfied so far as they are applicable.

*Justification for the power*

20. If the UK in future enters into international co-operation arrangements which are designated for the purposes of the Bill, those arrangements may contain terms or requirements which will need to be reflected in the considerations before a judge can make an overseas production order. Different arrangements may contain different requirements, and it is accordingly considered appropriate that the detail of those requirements is contained in secondary legislation.
21. Clause 16(2) provides that regulations made under this power may include transitional, transitory or saving provision, described at paragraphs 36-38 below. This power may be needed where, for example, the UK enters into a new arrangement which replaces an existing arrangement or provides for a new procedure in an area in which overseas production orders are already obtained, to ensure an orderly transition between regimes.

*Justification for the procedure*

22. The exercise of the delegated power effectively imposes additional safeguards on the powers under the Bill, since it will set out further requirements that must be satisfied before a judge can make an overseas production order. However, given that the requirements set out in regulations will form part of the test for the making of an overseas production order, it is proposed that it should be subject to the affirmative procedure.

***Clause 11(1): power to make provision in rules of court as to proceedings relating to an overseas production order***

*Proceedings in Crown Court (England & Wales):*

<i>Power conferred on:</i>	<i>Criminal Procedure Rules Committee</i>
<i>Power exercisable by:</i>	<i>Rules of Court made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative</i>

*Proceedings in High Court of Justiciary or Sheriff's Court (Scotland):*

<i>Power conferred on:</i>	<i>High Court of Justiciary</i>
<i>Power exercisable by:</i>	<i>Act of Adjournal (Scottish Statutory Instrument)</i>
<i>Parliamentary procedure:</i>	<i>No procedure (laid before Scottish Parliament)</i>

*Proceedings in Crown Court (Northern Ireland):*

*Power conferred on:* NI Crown Court Rules Committee

*Power exercisable by:* Northern Ireland Statutory Rules

*Parliamentary procedure:* Negative (UK Parliament: excepted matters)

*Negative (NI Assembly: other matters)*

23. Clause 11(1) confers a power to make rules of court providing for the practice and procedure to be followed in connection with proceedings relating to an overseas production order. The effect of the delegation is that the rules of court applicable to the court considering an application for an overseas production order may include provisions relating to the practice and procedure to be followed in such proceedings.
24. The power to make rules of court is exercisable by different persons in relation to the different courts in which an overseas production order may be made. An application for an overseas production order may be made to a judge of the Crown Court in England and Wales or in Northern Ireland, or in Scotland to a judge of the High Court of Justiciary or the sheriff.
25. Rules for the Crown Court of England and Wales are made by the Criminal Procedure Rules Committee under section 69 of the Courts Act 2003. Section 72(6) of that Act provides that a statutory instrument containing such rules is subject to the negative procedure.
26. Rules of court in relation to the Crown Court in Northern Ireland are made by the Northern Ireland Court of Judicature Rules Committee under section 53A of the Judicature (Northern Ireland) Act 1978. Rules of court are Northern Ireland Statutory Rules, and under section 56 of that Act subject to the negative procedure in the UK Parliament (for excepted matters) or otherwise to the negative procedure in the Northern Ireland Assembly.
27. Acts of Adjournal are made by the High Court of Justiciary in Scotland under section 305 of the Criminal Procedure (Scotland) Act 1995 and are applicable in the criminal courts in Scotland, including the High Court of Justiciary and sheriff court. Section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that Acts of Adjournal are Scottish Statutory Instruments. Acts of Adjournal that prescribe matters which relate to the practice and procedure of the Scottish Courts are not subject to parliamentary scrutiny, but must be laid before the Scottish Parliament as soon as is practicable after it is made.
28. The power in clause 11(1) does not affect the powers to make rules for each court or the applicable Parliamentary procedure. Those procedures have been

decided by the relevant legislature in relation to each court and it is not considered that proceedings relating to an overseas production order necessitate a departure from the existing procedures for making rules for the relevant court.

**Clause 14(3)(d): power to make arrangements for service of an order on a person outside the UK**

*Power conferred on:* *The Secretary of State or Lord Advocate*

*Power exercisable by:* *Arrangements*

*Parliamentary procedure:* *None*

*Purpose*

29. An overseas production order made in England, Wales or Northern Ireland may only be served by the Secretary of State, and an order made in Scotland may only be served by the Lord Advocate. Clause 14 sets out the ways in which the Secretary of State or Lord Advocate may serve an order on a person outside the United Kingdom, including as permitted by rules of court. One of the ways in which an order may be served is in accordance with arrangements made by the Secretary of State or Lord Advocate.
30. International co-operation arrangements may specify particular arrangements for service of process or may preserve scope for agreement that a particular mechanism of service is appropriate in a particular case – for example that consular staff may serve the order by hand or that local service agents are engaged to serve on behalf of the Secretary of State or Lord Advocate. Accordingly the Bill proposes to retain a discretion for the Secretary of State or Lord Advocate to make arrangements for service of an overseas production order in a particular case.
31. As these may be one-off arrangements specific to the circumstances of that case, it is considered appropriate that these are administrative arrangements rather than included in legislation.

**Clause 19(1): power to appoint days for commencement**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *None*

32. Subsection (1) of clause 19 contains a standard power to bring provisions of the Bill into force by commencement regulations. As usual with commencement regulations, they are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

***Clause 19(4): power to make transitional, transitory or saving provision***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *None*

33. Clause 19(4) confers power on the Secretary of State to make transitional, transitory or saving provisions in connection with the commencement of the provisions of the Bill. Clause 16(1) provides that such provision may also be made when exercising the powers in clauses 1(5), 2(1) or 4(1)(b).
34. This is a standard power often linked to commencement to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any Parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them.
35. When the power is exercised with the powers to designate an international arrangement, specify a description of persons as an “appropriate officer”, or specify additional requirements for the making of an overseas production order, the power is subject to the parliamentary procedure which applies to each of these powers.

***26 June 2018***