



BRIEFING PAPER

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Crime (Overseas Production Orders) Bill 2017-2019: Committee Stage Report

By Joanna Dawson

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Summary

The [*Crime \(Overseas Production Orders\) Bill \[HL\]*](#) was introduced in the House of Lords on 27 June 2018. It had its second reading in the House of Commons on 3 December. The Public Bill Committee sat once on 18 December.

The Bill would create a framework to enable law enforcement agencies and prosecutors to apply to a UK court for an 'overseas production order' (OPO) requiring a person (in practice, generally a communications service provider or 'CSP') in a foreign jurisdiction to produce or grant access to electronic data for the purposes of investigating and prosecuting serious crime. An application would only be granted if the judge was satisfied that the data was likely to be of substantial value to the criminal proceedings or investigations for which it was sought, and that it would be in the public interest.

Overseas production orders would only be available where there was a designated international agreement in place between the UK and the country or territory where the CSP was based. No such agreements are currently in force, but the UK has been in the process of negotiating a data sharing agreement with the USA since 2015.

In March 2018 the US passed the Clarifying Lawful Overseas Use of Data Act (the CLOUD Act), which provides authorisation for a form of international agreement to be concluded by the US, allowing foreign governments to seek data directly from US companies without going through political channels.

The Government has stated that the Bill is required due to the increasing use of software applications over public networks to facilitate criminal activities. Evidence generated by such activity is crucial for investigations into serious crimes, including terrorism. However, the companies holding the data are largely situated outside the UK and therefore beyond the reach of existing domestic production orders.

The Bill received broad support in the House of Lords, but was amended to ensure greater parliamentary scrutiny of future international cooperation agreements, and to provide safeguards against UK service providers being required to produce evidence in cases in which the death penalty may be imposed.

In Committee the Lords amendment providing for death penalty safeguards was removed, although the opposition parties continued to support it. The debate otherwise focused on providing additional safeguards for journalistic material. This reflected concerns raised by a number of media organisations in evidence submitted to the Public Bill Committee.¹

This paper covers the main substantive issues that were raised in Committee. For detailed background on the Bill and its provisions, please see Commons Library Briefing Paper [*Crime \(Overseas Production Orders Bill\)*](#).

¹ Including the [BBC](#); [News Media Association](#); [Society of Editors](#); and the [Media Lawyers Association](#)

1. Second reading

The Bill was supported in principle by all parties at second reading.

The Security Minister, Ben Wallace, introduced the Bill, explaining that it is necessary to replace existing mutual legal assistance (MLA) arrangements in order to ensure that law enforcement agencies and prosecutors can access evidential data in a matter of days or weeks rather than months or years. He noted that the orders provided for by the Bill are designed to operate in a similar way to domestic production orders, and that the Bill was thus designed to reflect existing domestic legislation as far as possible.

He also noted a technical deficiency with the Lords amendment to clause 1 providing for death penalty safeguards, suggesting that it would need to be amended to achieve the Opposition's intended effect.²

Nick Thomas-Symonds, the Shadow Security Minister, stated that the Opposition supported the aim of the Bill, agreeing that it was clear that having a smooth, fast, efficient process to obtain evidence was important. He did however raise concerns about bulk data, confidential personal records and non-disclosure requirements.

He also raised the issue of death penalty assurances. Mr Thomas-Symonds noted the strong support for the Lords amendment and pointed out that in the future the Bill might apply with respect to international agreements with countries that do not respect the rule of law. He acknowledged that the Government cannot control whether another Government provides assurances that are asked for, but suggested that where assurances are not forthcoming, they can control whether information will be handed over, including information which could lead to evidence being gathered for use in a court, as well as evidence itself.³

Another area of concern for the Opposition was the protection of journalists' confidential information. Mr Thomas-Symonds indicated that the Opposition would be looking to put safeguards into the Bill to "protect the long-cherished principle of confidentiality of journalists' sources",⁴ as well as on death penalty assurances.

Gavin Newlands stated that the SNP welcomed the aims of the Bill, and believed that investigations and proceedings relating to serious offences in Scotland could benefit from the use of overseas production orders. He also indicated support for the Lords amendment to clause 1, and raised concerns about the lack of safeguards for journalistic material.⁵

² [HC Deb, 3 December 2018, c587-590](#)

³ *Ibid*, c590-593

⁴ *Ibid*, c592-593

⁵ *Ibid*, c593-596

Sir Edward Davey stated that the Liberal Democrats totally supported the thrust of the Bill, but also expressed agreement with the concerns raised by Labour and the SNP.⁶

⁶ Ibid, c596-600

2. Death penalty safeguards

Clause 1: Overseas production orders

Clause 1 would provide for a judge to make an overseas production order on application by an “appropriate officer”, provided certain requirements are fulfilled, namely:

- The application must specify:
 - the designated international co-operation arrangement under which the application is made; and
 - the electronic data that is sought;
- The application must not seek “excepted data”, as defined by clause 3;

Clause 1(5) of the Bill as amended in the Lords would provide that the Secretary of State is precluded from making a designation under section 52 of the *Investigatory Powers Act 2016* with respect to an agreement that provides for requests to be made by the authorities of a country or territory which retains the death penalty.⁷ Subsection (6) would provide that subsection (5) does not apply if the country or territory in question has given assurances that the death penalty will not be applied in the case for which the evidence in question is sought. These provisions are the result of a non-Government amendment at Report stage in the House of Lords. They are intended to reflect the reciprocal nature of the international cooperation agreements envisaged by the Bill, and to preclude the possibility of a UK service provider being required to provide evidence in a case in which the death penalty might be applied.

2.1 Committee debate

In Committee in the Commons, the Government tabled an amendment to remove the additional subsections of clause 1 that were added in the House of Lords.

The Minister noted that the effect of the Lords amendments would be to prevent the Government and all future Governments from designating international agreements under section 52 of the IPA 2016 with a country that retains capital punishment unless assurances have been received. He indicated that the Government were open to compromise, but that the Lords amendments as drafted would put the Bill and any future treaty with the US at risk.

He noted that any future treaty would be subject to parliamentary scrutiny and that this would be the appropriate point at which to object, rather than tying the hands of the Government during live international negotiations.

The Minister informed the Committee that under the last three Governments there have been two occasions when a Government has, in exceptional circumstances, either not sought a death penalty assurance when exchanging evidence, or has provided evidence when no assurance was given. He noted that this had happened under a

⁷ Section 52 of the Investigatory Powers Act 2016 authorises interception on the part of a telecommunications operator in accordance with an overseas request where it is made in accordance with a “relevant international agreement”

Labour Government and under the Coalition Government. He stated that there is an outstanding legal case concerning an occasion on which the current Government had not sought assurances.

He explained that no Government would take such a decision lightly, but that

There may be occasions when something so egregious has happened to a friend and ally that we make a decision that it is not for us to dictate such stringent terms to that ally in our decision to help keep us all secure or to balance the needs of security with the needs of human rights.⁸

The Minister sought to reassure the Committee by suggesting that these agreements would be made with countries such as the US and the EU member states, that have due process, fair trials and an independent judiciary, and thus share the UK's rule of law values.

He acknowledged that the issue entailed a difficult choice, but suggested that

... we have to balance the security needs of our constituents and our national security with the Government's duty towards human rights and to observe the European convention on human rights.⁹

He referred to internal advice provided under the last Labour Government which stated that in exceptional circumstances death penalty assurances were not required.¹⁰ The Minister also pointed to the guidance that currently governs such decisions – the Overseas Security and Justice Assistance Guidance – which was published for the first time by the Coalition Government.¹¹ He noted that this guidance envisages circumstances in which it will not be necessary to seek or require assurances to be given, and that no political party had raised objections at the time it was published. This was a reference to paragraph 9 of the guidance, which states:

- a) Written assurances should be sought before agreeing to the provision of assistance that anyone found guilty would not face the death penalty.
- b) Where no assurances are forthcoming or where there are strong reasons not to seek assurances, the case should automatically be deemed 'High Risk' and FCO Ministers should be consulted to determine whether, given the specific circumstances of the case, we should nevertheless provide assistance.¹²

Responding for the Opposition, Nick Thomas-Symonds questioned the Minister's assertion that the US would be willing to put the agreement at risk for the sake of a very small number of cases. He explained that the Opposition's position was that it was an important principle that the UK opposes the death penalty not only by not using it here, but by never being complicit in its use elsewhere

It is about us as a country acting up to different moral standards. If we wish to go around the world using our soft

⁸ [PBC, 18 December 2018, c 5](#)

⁹ Ibid, c 6

¹⁰ Ibid

¹¹ [Overseas Security and Justice Assistance Guidance](#), HM Government

¹² Ibid

power and our commitment to human rights to say to other countries that their human rights records should improve—and we should—we as a country need to set the highest standards to have the moral authority to do that.¹³

Responding to this point, the Minister stated that the US had been categorical that it would not proceed with the treaty if the UK adopted “the principle of effectively telling it how to run its justice system”. He also noted that the UK was not in a strong negotiating position, because the US holds 90% of the data.¹⁴

Gavin Newlands noted that the SNP has not been a member of a Government who have passed on information without seeking or receiving assurances about the death penalty. He stated that the SNP’s position was that

... we should not give information to any country seeking the death penalty or seeking information from the United Kingdom in pursuit of the death penalty.¹⁵

In response, the Minister agreed to look at providing in the Bill a primary obligation to seek death penalty assurances.¹⁶

The Committee divided and the Government amendment removing the Lords amendment was agreed.

¹³ Ibid, c9

¹⁴ Ibid

¹⁵ Ibid, c10

¹⁶ Ibid, c11

3. Safeguards for journalistic material

3.1 Conditions for making an order: Relevant evidence

Clause 4: conditions for making an order

Clause 4 sets out the requirements that must be fulfilled in order for a judge to grant an OPO. The judge must be satisfied that there are reasonable grounds for believing the following:

- That that the person against whom the order is sought operates, or is based in, a country or territory which is party to a designated international cooperation arrangement;
- That an indictable offence has been committed and legal proceedings have commenced or an investigation is under way. This requirement does not apply in the case of a terrorist investigation;¹⁷
- That the person against whom the order is sought has some or all of the data in question;
- That the data is likely to be of substantial value to the legal proceedings or investigation;
- That it is in the public interest for the data to be made available

Committee debate

In Committee the Opposition tabled amendments aimed at bringing the requirements for making an order for the production of journalistic material in line with those under the *Police and Criminal Evidence Act 1984* (PACE). Nick Thomas-Symonds explained that under PACE, a warrant for journalistic material can only be granted if the judge is satisfied that a series of conditions have been met. Whilst there is some overlap between the conditions in clause 4 and those provided for by PACE, two conditions do not appear in the Bill, namely:

- That the evidence sought is relevant to the investigation; and
- That all other avenues of procuring the evidence have been exhausted

Mr Thomas-Symonds suggested that adopting a threshold for what data are relevant to an investigation is necessary and proportionate, and is in line with the UK's human rights obligations.¹⁸

The Minister responded to the effect that the omission of the "relevant evidence" condition was deliberate, and sought to ensure that law enforcement agencies could access data that could help an investigation, even if it is not necessarily admissible in court. He explained that this decision was taken on the basis of advice from operational partners. Further, unlike PACE, the Bill would apply to the investigation of terrorist offences, and has been drafted to reflect the *Terrorism Act* and the *Proceeds of Crime Act 2002*, neither of which has a requirement for relevant evidence tests to be met.

With respect to the proposed requirement to exhaust all other avenues before an OPO is granted, the Minister suggested that this could have

¹⁷ According to the explanatory notes, this reflect the position with respect to domestic production orders, para 31

¹⁸ [PBC, 18 December 2018, c 24](#)

the effect of compelling a judge to ensure that law enforcement agencies had tried the MLA route, thus defeating the point of the Bill.¹⁹

Similar amendments were tabled by the SNP, which sought to ensure that safeguards equivalent to those provided for in PACE would apply with respect to journalistic material, including a relevant evidence condition.

The Minister reiterated that the Bill was intended to apply to a wider range of investigations than those covered by PACE, including terrorism cases, and that it would not be appropriate therefore to apply the same requirements:

More crucially, the Bill was designed not to imitate PACE but to take relevant parts of PACE, the Terrorism Act and POCA and merge them into something appropriate for an entirely new tool: a streamlined version of mutual legal assistance called overseas production orders—a new tool that confers a new or revised set of conditions. I accept that the greatest number of production orders are issued under PACE, but the power under PACE is limited to just one type of production order, for special procedure material and excluded material. If material that is not special procedure or excluded material is not voluntarily given to the police, an ordinary search warrant would be used.

The purpose of the overseas production orders will be to request evidence held overseas where we could not use search warrants. In addition to PACE, production orders can be issued under the Terrorism Act and POCA for different types of evidence. Indeed, overseas production orders will seek electronic content data for a range of offences related to serious crime, which may include terrorism.²⁰

The amendments were ultimately withdrawn, but the opposition parties indicated an intention to return to the issue.

3.2 Notification

Clause 12: notice of application for order relating to confidential journalistic data

Clause 12 provides that if there are reasonable grounds for believing that the electronic data sought included 'confidential journalistic data' then the application for the order must be made 'on notice'. This would enable those on notice, such as a journalist whose confidential data was sought by an order, to be a party to the application.

Confidential journalistic data is defined as data which:

- Was created or acquired for the purposes of journalism;
 - Is stored by or on behalf of a person who created or acquired it for the purposes of journalism; and
 - Was not created or acquired or intended to be used for furthering a criminal purpose and
 - Was created or acquired in circumstances which gave rise to an obligation of confidentiality, and that obligation continues; or
 - Is subject to a restriction on disclosure, or an obligation of secrecy, contained in any enactment
- It would be for the judge to decide who should be put on notice.

¹⁹ Ibid, c25-27

²⁰ Ibid, c30

Committee debate

The Opposition tabled amendments in Committee that would have required notice to be given of an application for an overseas production order for electronic data which is believed to contain any journalistic data, not just confidential journalistic data.

Nick Thomas-Symonds explained that the purpose of the amendment was to broaden the notice requirement to include sensitive material that might not be counted as strictly confidential.

The Shadow Minister noted the importance of the notice procedure in enabling a negotiation between the journalist or media organisation and the law enforcement agency as to what data it is appropriate to provide. It would also enable the journalist to oppose the application if necessary. He suggested that the amendment would introduce an appropriate balance and protect press freedom and investigative journalism.²¹

The amendments were supported by the SNP.

The Minister informed the Committee that it was the Government's intention that where an application for an OPO was made, there would be a presumption that any person affected by the order, which would include a journalist, would also be put on notice. He stated that this would be included in the relevant court ruled, as is the case with domestic production orders.

He noted that the procedure under the Bill would be different to that provided for by PACE, because under PACE the production order would normally be served directly on the journalist, as the person holding the data. Under the Bill, the OPO would be served on a CSP, and the journalist would be a third party. He suggested that in these circumstances the judge would be well placed to determine whether the journalist should be notified.

The Minister concluded by committing to give the matter further consideration.²²

²¹ Ibid, c33-34

²² Ibid, c33-34

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