

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Briefing on the Crime (Overseas Production Orders) Bill for Report stage in the House of Lords

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Introduction

The Crime (Overseas Production Orders) Bill would allow law enforcement agencies and prosecutors, to apply for an overseas production order to obtain electronic data directly from service providers based outside the UK, for the purposes of criminal investigations and prosecutions of indictable offences, where a designated international co-operation arrangement is already in place,

The current Mutual Legal Assistance (MLA)¹ system provides for judicial co-operation where data is beyond the reach of the UK's domestic courts. However, the Government has argued that the system is "*not timely enough to produce this evidence*"².

The new scheme outlined in the Bill is in actual fact a radical departure from the current system, and the limited safeguards proposed under the new scheme raise a number of human rights concerns.

Liberty's key concerns, addressed in the briefing below, include:

1. The lack of safeguards to ensure that data obtained from the UK – under a reciprocal international agreement – could not be used in a prosecution which results in the death penalty being imposed³.
2. The lack of safeguards to prevent an application for an overseas production order in relation to bulk data sets⁴.
3. The lack of safeguards for confidential personal records, specifically in the context of terrorism investigations⁵.
4. The inadequacy of the "*substantial value*" and "*public interest*" tests, and the need for a wider test of necessity and proportionality⁶.
5. The inadequacy of the provisions relating to the safeguarding of journalistic material⁷.
6. The removal of the requirement for reasonable grounds for belief that an indictable offence has been committed – and for investigation or institution of proceedings in

¹ MLA is a method of cooperation between states for obtaining assistance in the investigation or prosecution of criminal offences. MLA is generally used for obtaining material that cannot be obtained on a police cooperation basis. Requests are made by a formal international Letter of Request. This assistance is usually requested by courts or prosecutors. Government guidance on MLA is available at: <https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests>.

² Explanatory notes, page 2, paragraph 3

³ Clause 1

⁴ Clause 3

⁵ Clause 3

⁶ Clause 4

⁷ Clause 12

respect of the offence – where an order is sought specifically for the purposes of a terrorism investigation.⁸

Death penalty

Amendment

Clause 1, page 1, line 19, at end insert—

“() The Secretary of State may not make regulations designating an international co-operation arrangement with a state which has not abolished the death penalty unless the agreement provides that it will apply only if the other state has given assurances that the death penalty will not be imposed in any case in relation to which electronic data obtained under this Act has been used.”

Effect

This amendment will apply where a state which has not abolished the death penalty enters into an international agreement with the UK to facilitate applications for overseas production orders.

In these circumstances, this amendment requires that formal assurances be provided that the death penalty will not be imposed where electronic data obtained under this Act has been used in the investigation or prosecution of the case.

Briefing

Article 2 of the European Convention on Human Rights – together with Protocol 13⁹, of which the UK is a signatory – provides for the total abolition of the death penalty. It has long been the position that the UK will seek assurances that the death penalty will not be imposed in cases where it provides evidence to assist in its investigation or prosecution.

⁸ Clause 4

⁹ Council of Europe. *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*. 3 May 2002. ETS 187. Available at: https://www.echr.coe.int/Documents/Library_Collection_P13_ET187E_ENG.pdf2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238300/8034.pdf/

Recent events have seen this position placed under threat¹⁰, with the Home Secretary agreeing to co-operate with the United States in sharing evidence concerning two former British citizens and alleged terrorists but declining to seek the appropriate assurances with regard to the death penalty¹¹.

The Home Secretary stated, in a leaked letter obtained by the Telegraph¹², that it is a “*long-held position of the UK to seek death penalty assurances, and our decision in this case does not reflect a change in our policy on assistance in US death penalty cases generally, nor the UK government’s stance on the global abolition of the death penalty*”¹³.

This amendment ensures that the UK’s commitment to avoid complicity in the use of the death penalty is clear on the face of the legislation, safeguarding against future derogations from this fundamental human rights principle.

Bulk data

Amendment

Clause 3, page 3, line 32, at end insert “but does not include bulk data”

Effect

This amendment excludes bulk data from the electronic material which can be made subject to an overseas production order.

Briefing

Rigorous safeguards are required to ensure that overseas production orders are not open to abuse in terms of requesting access to bulk data. The collection of bulk data is not appropriately targeted in accordance with intelligence, and in Liberty’s view breaches the

¹⁰ See e.g. Greison (2018). *Is the UK government’s stance on the death penalty shifting?*. The Guardian. Available at: <https://www.theguardian.com/world/2018/jul/23/is-the-uk-governments-stance-on-the-death-penalty-shifting> [Accessed 26 Sep. 2018].

¹¹ Grierson (2018). *UK government criticised over change in death penalty stance on Isis pair*. The Guardian. Available at: <https://www.theguardian.com/uk-news/2018/jul/23/uk-will-not-oppose-us-death-penalty-for-isis-beatles> [Accessed 26 Sep. 2018].

¹² Riley-Smith (2018). *Sajid Javid tells US: We won’t block death penalty for Isis ‘Beatles’*. The Telegraph. [paywall] Available at: <https://www.telegraph.co.uk/news/2018/07/22/uk-drops-death-penalty-quantamo-opposition-opens-door-execution/> [Accessed 3 Oct. 2018].

¹³ Ibid.

privacy of a large number of people who are not under suspicion of any criminal offence or wrongdoing.

At Committee stage, the Government argued that Amendment 11¹⁴, which excluded bulk data from the scope of this Bill, was unnecessary as:

“the Bill has been drafted to require appropriate officers to consider carefully what data they are targeting which, of course, is not the case with bulk data—and where the information is stored, in order to help with the investigation and prosecution of serious crime, in addition to demonstrating that the data will be of substantial value to the investigation and in the public interest. It feels to me that there are sufficient safeguards in place, because of the processes I have outlined”¹⁵.

Liberty agrees that applications for bulk data lack a careful consideration of which data is to be specifically targeted. However, the Bill does not contain any express provision requiring orders to be targeted in the manner the Government describes. It is perfectly possible for officers to argue to the Government’s satisfaction that bulk data will be of substantial value to criminal investigations and in the public interest, given that the Government already regularly makes arguments as to why bulk powers are required in a wide variety of circumstances¹⁶. As such, this assumption on the part of the Government does not amount to an adequate safeguard against the potential for bulk data to be requested under an overseas production order. Any access to routine, daily, surveillance of communications en masse should be expressly prohibited.

Confidential personal records

Amendment

Clause 3, page 3, line 39, leave out subsection (5)

¹⁴ Clause 3, Amendment 11. Lord Paddick and Baroness Hamwee. Page 3, line 32, at the end insert “but not bulk data”.

¹⁵ HL Deb 5 September 2018 Column 154GC

¹⁶ See eg: Home Office. *Operational Case for Bulk Powers*. March 2016. Accessed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504187/Operational_Case_for_Bulk_Powers.pdf

Effect

This amendment would delete Clause 3(5), which states:

“Where an application for an overseas production order is made for the purposes of a terrorist investigation other than a terrorist financing investigation, this Act applies as if references to excepted electronic data did not include electronic data that is a personal record which is a confidential personal record”.

Briefing

Clause 3 outlines that “*excepted electronic data*” cannot be targeted by applications for orders. This includes data that is subject to legal privilege¹⁷ and any “*personal record which is a confidential personal record*”¹⁸.

However, the Bill broadens the scope of applications for orders by providing that, if the overseas production order is for the purposes of a terrorist investigation (other than a terrorist financing investigation), a confidential personal record is not to be treated as “*excepted electronic data*” and is therefore within the scope of applications and orders¹⁹. The broad definition of a terrorist investigation is taken from Section 32 of the Terrorism Act 2000, which deems any police inquiry into the “*commission, preparation or instigation of acts of terrorism*” to be a “*terrorism investigation*”. This exemption is clearly open to abuse insofar as a wide range of circumstances could be construed as a “*terrorism investigation*”, denying the person whose data is targeted this basic safeguard of their privacy. For example, this could potentially allow for sensitive confidential records from private mental health appointments to be applied for in relation to a case in which environmental activists are alleged to have chained themselves to fracking machinery during a protest.

This significant reduction in protection for individual privacy cannot be adequately justified on the basis that the nature of the offence to which the data pertains is related to terrorism. The same safeguards relating to the deeply sensitive information contained in confidential personal records – which could include medical and mental health records, as well as records relating to spiritual or welfare counselling – should be afforded to those under suspicion of terrorism as those under suspicion of other crimes.

¹⁷ Clause 3(3)(a)

¹⁸ Clause 3(3)(b)

¹⁹ Clause 3(5)

No requirement for reasonable grounds in terrorism cases

Amendment

Clause 4(3), page 5, line 1, leave out paragraph (b)
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Effect

This amendment introduces the same requirement for “*reasonable grounds for believing that an indictable offence has been committed and proceedings in respect of the offence have been instituted or the offence is being investigated*”, as outlined in clause 4(2), where an order is sought for the purposes of a terrorist investigation. Clause 4(3)(b) currently removes this threshold in those circumstances.

Briefing

Clause 4 sets out the conditions and restrictions under which an overseas production order may be made. Under clause 4(3), the judge must be satisfied that there are reasonable grounds for believing that an indictable offence has been committed and that proceedings for that offence have already been commenced, or that the offence is being investigated. In the event that the investigation is a “*terrorism investigation*”, the same threshold simply does not apply and the judge would not need to be so satisfied. Liberty is deeply concerned by this disparity.

This exemption is particularly concerning given the low threshold required for an investigation to be considered a “*terrorism investigation*” under the Terrorism Act 2000. That Act deems any police inquiry into the “*commission, preparation or instigation of acts of terrorism*” to be a “*terrorism investigation*”²⁰. A wide range of circumstances could therefore amount to a “*terrorist investigation*”, allowing for the basic protection of judicial satisfaction under clause 4(3) to be bypassed entirely. For example, the judge would not need to be satisfied of this low benchmark where an animal rights activist is being investigated for indicating an intention to hack the website of a company that tests their product on animals to display a warning message.

²⁰ Section 32, Terrorism Act 2000

While this may reflect the criteria under which production orders are already sought against people in the UK, Liberty sees no justification for this position. This legitimate and simple threshold for granting an overseas production order should be consistent regardless of the nature of the offence.

Substantial value and public interest

Amendment

Clause 4(5), page 5, line 6, leave out from “satisfied” and insert “that the granting of the order is necessary and proportionate in all the circumstances”.

Page 5, line 11, leave out clause 4(6).

Effect

Currently, under clause 4(5) and 4(6) of the Bill, the judge must be satisfied that there are reasonable grounds for believing (i) that some or all of the data that is being applied for is likely to be of substantial value to the investigation or proceedings, and (ii) that it is in the public interest that this data is made available to the investigation or proceedings.

These two amendments substitute those tests with an overall test of necessity and proportionality, in accordance with established human rights law.

Briefing

When the state seeks to access, examine or retain a person’s data in the manner permitted under an overseas production order, their right to privacy (Article 8 European Convention on Human Rights) is engaged. There must be a legitimate aim for the intrusion, and the intrusion must not occur where the legitimate aim could be achieved in a way which either does not intrude into a person’s privacy, or could do so to a lesser degree.

In order for an interference with a qualified right to be “necessary” it is not enough that it simply be “useful”, “reasonable” or “desirable”²¹. It will be for the Government to establish that the interference with Article 8 rights associated with the use of overseas production orders “necessary” in a democratic society.

²¹ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48.

The test applicable to the assessment of proportionality was set out in *Bank Mellat v Her Majesty's Treasury*²² and includes the following elements, which may overlap:

- (1) whether its objective is sufficiently important to justify the limitation of a fundamental right;
- (2) whether it is rationally connected to the objective;
- (3) whether a less intrusive measure could have been used; and
- (4) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

The use of the necessity and proportionality test in these circumstances retains considerations encouraged by an application of the existing tests, but allows for wider consideration of a full range of factors relating to all the circumstances of the case in question.

Adopting this threshold is not only consistent with human rights principles, but allows for clarity and consistency. Judges considering these applications will be familiar with applying these recognised legal standards, and the nature of the test requires an appropriate balancing exercise to take place.

For example, applying the test of necessity and proportionality in this context may include consideration of the seriousness of the alleged crime in question and whether it has been established that less intrusive methods have been exhausted or would be futile, while retaining a consideration of the degree to which the judge can be satisfied that the data requested contains evidence relevant to that crime.

While the tests currently outlined under the Bill may be designed to reflect the domestic system in relation to use of data in criminal investigations, the Government should take the opportunity to amend this model rather than replicating those inadequate protections in this Bill.

²² (No 2) [2013] UKSC 38 [2014] AC 700, para 20 per Lord Sumption, para 74 per Lord Reid

Journalistic data

Amendment

Clause 4, page 5, line 19, at end insert—

“() The judge must be satisfied that the electronic data specified or described in the application is not confidential journalistic data”.

Effect

This amendment would set out that a judge must be satisfied that the electronic data specified or described in the application is not confidential journalistic data before granting an overseas production order.

Briefing

The provisions contained under clause 12 are inadequate in protecting confidential journalistic material²³ thereby threatening the pursuit of journalist enquiry and undermining the democratic institution of a free press.

While clause 12 provides for a journalist to be given notice and made a party to an application which pertains to their journalistic material, this is not sufficient. The Bill is silent as to whether or how any submissions they make will be taken into account by the judge. No further information is outlined as to what this process would involve and how much information the journalist would be able to access; nor is it clear that sufficient information would be disclosed to enable them to respond appropriately.

Furthermore, there is a dearth of guidance as to what advice or support – if any – will be provided to a journalist in these circumstances. Under clause 13(1)(b), the journalist cannot inform anyone of the application or its contents and no provision is made for this information to be disclosed to a legal adviser or representative. There are also no provisions in place for alerting sources who are not subject to investigation.

²³ Defined at clause 12(2) of the Bill as meaning electronic data that: (a) was created or acquired for the purposes of journalism, and (b) is stored by or on behalf of a person who created or acquired it for the purposes of journalism.

Liberty is deeply concerned about the potential for these provisions to damage the pursuit of journalistic inquiry. The proposed amendment would strengthen the protections for journalistic material by requiring a judge to be satisfied that the electronic data specified or described in the application is not confidential journalistic data before granting an order.

Non-disclosure requirements

Amendment

Clause 8, page 8, line 28, at end insert “A non-disclosure requirement may only be put in place for such a duration as is necessary and proportionate in all the circumstances”.
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Effect

This amendment will set out that a non-disclosure agreement may apply for no longer than is necessary and proportionate.

Briefing

The Bill currently allows for a judge making an overseas production order to put in place a non-disclosure requirement. This requirement is imposed on the person against whom the order is made, and prevents them from disclosing the making of the order or its contents to any person unless they have the leave of a judge or the written permission of an appropriate officer.

While the Bill requires, under clause 8(3), that the order must specify or describe when the requirement is to expire, there are no requirements as to the necessity and proportionality of the requirement itself. It is essential that a non-disclosure requirement is not permitted to run for a longer time than protects the integrity of the criminal investigation.