Crime (Overseas Production Orders) Bill

1. I am writing in relation to the Crime (Overseas Production Orders) Bill, which enables “appropriate officers” to apply for a Court Order for the production of existing stored electronic information located or controlled outside the UK, for use in the investigation and prosecution of indictable offences. Overseas Production Orders are intended to allow speedier access to electronic information for investigations than through using the existing Mutual Legal Assistance process.

2. In the Explanatory Notes, the Home Office has helpfully identified that Article 8 and 10 ECHR are engaged and justifies these interferences for the prevention of disorder and crime and in the interest of national security and public safety (see paragraph 72 of the Explanatory Notes). Further, the Home Office considers that the interferences are proportionate given the requirements that must be met before a judge can issue an Order and the particular safeguards for journalistic material. We are grateful for this analysis; however, we have a few further queries as set out below.

Prior judicial Approval & unopposed Orders

3. We welcome the requirement for prior judicial approval for the making of these Orders as this gives a certain amount of comfort that the legal and human rights standards will be respected in the issuing of these Orders. However, as these are unopposed orders (only the “appropriate” officer” is represented before the judge), great care is needed. Neither the person who will need to give access to the information, nor the person to whom the information belongs (nor indeed the person to whom the information relates, if they are different) are present or represented and therefore they cannot defend their interests. Significant protections are therefore needed to prevent abuse of this process, in particular to ensure that the judge has balanced information before him or her e.g. when deciding on the public interest test (see clause 4(6)).
In that light, the Home Office note that an affected person may apply to have an Order varied or revoked after an Order is made (and presumably after they have been made aware of it) (clause 7(2)(b)).

4. It is important to ensure that balanced information is presented to a judge making such decisions and orders – whether by a special obligation on the appropriate officer; appointing an independent adviser to the Court; or by having no-notice applications as the exception rather than the norm. What consideration has been given to ensuring that balanced information is placed before the judge making the order? What safeguards are in place to ensure that information is balanced and how might these safeguards be improved?

**Overseas Production Orders in respect of Confidential Journalistic data**

5. We also note that applications for an Overseas Production Order in respect of "confidential journalistic data" need to be made "on notice" (see clause 12). However, it is not clear from the Bill on whom notice must be served – is it the person against whom the Order will be made (e.g. an internet company) or the person who owns the confidential journalistic data? Paragraph 54 of the Explanatory Notes seem to suggest this would include notice to journalists, but that ultimately this would be a matter for the Courts to decide in an individual case. Absent any further clarity, we have concerns that this clause lacks sufficient clarity to provide enough protection in such cases. It would seem necessary to clarify, in the Bill, that notice should be served on the journalist as well as the person who holds or stores the electronic information. Do you agree that it would be better to clarify, in the Bill, that notice should be served on the journalist as well as the person who holds or stores the electronic information?

**The International Cooperation Arrangements**

6. Overseas Production Orders can only be made where a designated international cooperation arrangement is in place. Although these Orders seek to assert extra-territorial jurisdiction, in reality, it would seem that much of the “enforcement” of these Orders overseas would need to be done through the operation of the “International Cooperation Arrangements” (see clause 1(5)). These arrangements will be designated by the Home Secretary in Regulations made under the Bill. However, it is not clear how the Home Office envisages these arrangements working, or if there are to be standard clauses in such arrangements. As these arrangements are central to the functioning of Overseas Production Orders, it would be useful to know how the Home Office envisages this system working and to ensure better transparency as to how these mechanisms would work through these international cooperation arrangements. Could you please provide further information on how you envisage this system of international cooperation arrangements working? Does the Government intend for there to be model clauses (including human rights clauses) in these arrangements? How will such arrangements ensure that human rights protections are respected? Might the Government consider making a statement to Parliament explaining how the arrangements protect human rights when presenting the Regulations to designate a given international cooperation
arrangement for these purposes? Will these “International Cooperation Arrangements” be reciprocal? If so, what protections they will contain to ensure that UK companies and nationals are not subject to unfair production orders in respect of their personal data or data they hold?

7. The definition of “International Cooperation Arrangement” (see clause 1(5)) covers both legally binding agreements (treaties) and non-legally-binding arrangements (often referred to as MoUs). In particular in light of the concerns identified in the paragraph above, how can we be satisfied that the necessary human rights and data protection safeguards will be guaranteed if there is only a politically (and not a legally) binding undertaking from the other State?

8. Clause 6(4)(c) notes that the Order has effect “in spite of any restriction on the disclosure of information (however imposed)”. How does this provision comply with any necessary legal and/or human rights protections (e.g. data protection)? What is the result if this provision clashes with local laws and/or terms of the International Cooperation Arrangement?

Retention of Information

9. The electronic data may be “retained for so long as is necessary in all the circumstances” (clause 10(1)). This is very vague and we would normally expect more information, clarifications and protections for retaining such data. How do you envisage this information retention provision operating in practice? Might better protections be included in this provision?

Yours Sincerely

Rt Hon Harriet Harman MP, Chair