Dear Harriet,

Crime (Overseas Production Orders) Bill

Thank you for your letter regarding the Crime (Overseas Production Orders) Bill. The aim of this Bill is to provide the framework to address the problem of obtaining electronic evidence when it is stored outside the UK. Too often, criminals, including terrorists, are using global communications services to facilitate their criminal activities. And in many cases the companies providing the services being used are located outside the UK. This information can be a vital source of evidence in the investigation and prosecution of serious crime and we need to make sure UK law enforcement officers and prosecutors have timely access to it. It is already the case that a production order can be issued by a UK court to obtain electronic material held by a company based in the UK. This Bill sets out the framework for obtaining data when it is held by a company based outside the UK, in certain circumstances.

You raised a number of important points in your letter and I have attempted to answer them below.

Judicial Approval

You raised the issue of prior judicial approval before an overseas production order can be issued, and asked about the information that must be placed before the judge in making an application for an order, and the safeguards in place for ensuring the information provided is balanced. As you may know, there is an express legal requirement in the Human Rights Act 1998 which requires a Court, when exercising
its order-making powers under the Bill, to do so in a way which is compatible with Convention rights. This obligation is not removed or modified by anything in the Crime (Overseas Production Order) Bill. We expect that the judge will start from the position that the interests of those who hold the data, and those who the data relates to, should be protected. It is only when the court is satisfied that the requirements set out in clause 4 are met that an order can be made. These requirements ensure that an application must be scrutinised robustly and maintain existing high levels of protection for Convention rights.

I should also stress that this approach reflects the domestic framework already in place for applying for, and granting, production orders under the Police and Criminal Evidence Act 1984 (see paragraph 2 of Schedule 1), the Terrorism Act 2000 (see paragraph 5 of Schedule 5) and the Proceeds of Crime Act 2002 (see section 346).

With regards to the safeguards in place to ensure that the information provided to the courts is balanced, it is an established principle that an applicant seeking an order without giving prior notice to the person on whom the order is to be served, or to whom it relates, is under obligation to provide full and frank disclosure to the court. This includes disclosure of relevant legal principles and facts, even if they are not in the applicant’s favour. This principle ensures that the information placed before the court in respect of an overseas production order will be balanced. Again, I should stress that the process set out in the Bill and the safeguards referred to here already exist in relation to production orders that can be issued by the court in relation to material held by companies based in the UK. In addition, as explained in more detail below, the court will have discretion in any particular case to decide whether a person who would be affected by a notice should be notified of an application.

**Confidential Journalistic data**

You asked about clause 12 of the Bill which makes provision for notice to be given of applications concerning confidential journalistic material.

This clause requires the application to be made ‘on notice’ which means that notice should be given to the respondent to the application. This will be the ‘person’ from whom electronic data is sought – in most cases the CSP. However, the judge also has the discretion to require that any other person who may be affected by the order be notified.

We do not think it would be appropriate to include on the face of the Bill a requirement for the journalist to be notified, which would have to be complied with in all cases. This is because there might be circumstances where notifying the journalist could prejudice the investigation. For example, a strict reading of the term ‘journalist’ might require notice of a terrorist investigation to be given to an ISIS blogger. We believe therefore, that providing the judge with discretion to notify the journalist in those cases where he or she feels it is appropriate to do so, strikes the right balance.

This approach is consistent with existing domestic legislation for example, paragraph 7 of Schedule 1 to the Police and Criminal Evidence Act 1984, as well as Rule 47.5(3) and (4) of the Criminal Procedure Rules (as amended).
International Cooperation Arrangements

You asked about international arrangements and how we envisage these working in the future.

International cooperation arrangements will be reciprocal, and will allow one country to comply with lawful orders for electronic communications from the other, without any conflict of law in tightly defined circumstances. They will be permissive, and any requirement to comply with such an arrangement would derive solely from the requesting country’s law.

Any arrangement that the UK enters into will be based on trust and a mutual respect for each countries’ adherence to principles including the rule of law, due process and judicial oversight for obtaining and dealing with information and evidence with regards to serious crime. This would also include a respect for human rights.

We would require the other country to set out the powers it intended to use in pursuance of requests made under the arrangement. The UK would also ask the other country to commit that they wouldn’t rely on another power unless agreed by both parties. Similarly, we could also attach conditions on the use of data obtained under any international cooperation arrangement.

We will also agree procedures, including in respect of how any data is handled, for overseeing compliance with the terms of the international cooperation arrangement and would maintain the right to dissolve the arrangement if we had concerns with the other country’s compliance with its terms.

The government is yet to conclude such an arrangement. However, the Bill makes it that any future cooperation arrangement could only be designated under regulations as set out in clause 1(5). Such a designation would be subject to the negative procedure. This mirrors the level of Parliamentary scrutiny required for ratifying treaties which are also subject to annulment in pursuance of a resolution of either House of Parliament. Parliament will therefore have an opportunity to scrutinise any international arrangement that is to be designated under this Bill – including whether its terms comply with human rights obligations. For the avoidance of doubt, Parliamentary scrutiny of the designation process does not replace scrutiny of the international agreement itself, in accordance with the provisions of the Constitutional Reform and Governance Act 2010.

You also asked how the Government could 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 one state in an international agreement.

The wording in clause 1(5) of the Bill was used to reflect a wide range of legally binding arrangements. The UK Government is unlikely to conclude an arrangement of this kind via an informal non-legally binding arrangement or MOU. An MOU arrangement is unlikely to provide the legal certainty required that will satisfy the UK that the other country will remove any barriers in their law to compliance.

Third countries are also unlikely to want to conclude such arrangements by anything other than a legally binding international agreement. This is because these
arrangements will be viewed by many international partners as creating exceptions to the principle that one State should not subject entities in the territory of another State to the jurisdiction of its criminal courts without that other’s states consent. Some States attach particular significance to the importance of this principle.

All international cooperation arrangements will be subject to parliamentary scrutiny when they are designated under the Bill.

You also asked about clause 6(4)(c) of the Bill which provides that the Order has effect “in spite of any restriction on the disclosure of information (however imposed)”. Any international arrangement that is concluded is premised on the requirement that the two contracting countries would be required to make compliance possible – making this a permissive regime. The purpose of this clause is to ensure that the recipients of a disclosure order can comply with it even where there is a conflict in the law of the UK. For example, where the recipient owes a duty of confidence in respect of a third party, clause 6(4)(c) will allow the recipient to produce the data without breaching that duty. This approach reflects the domestic framework used for making and granting production orders under the Terrorism Act 2000 (see paragraph 8(1)(b) of Schedule 5) and the Proceeds of Crime Act (see section 348(4)).

But a judge will not issue an overseas production order unless it meets the criteria set out in the Bill and it otherwise lawful to do so. The provision in clause 6(4)(c) of the Bill is only about ensuring that a 'lawful' order has absolute effect. The provision does not provide that the courts can side step other statutory provisions (like the Data Protection Act 2018) when making an overseas production order.

I should also stress that this Bill does not provide access to any data which is not already available via Mutual Legal Assistance. It simply ensures that data can be accessed more quickly. The Bill will put on an equal footing the means by which a UK law enforcement officer or prosecutor can apply to the court for access to electronic evidence irrespective of whether the data is held by an entity that is based in the UK or elsewhere in the world where a relevant agreement is in place.

Information obtained via an overseas production order will be handled in the same way as data obtained in the UK under a production order as currently issued by the courts, including restrictions on retention, use and dissemination. Data obtained by law enforcement officers and prosecutors will be subject to all relevant domestic and international obligations and restrictions, including the Data Protection Act 2018 requirements that came into force on 25 May 2018. Part 3 of that Act provides for law enforcement data processing.

**Retention of Information**

You asked about the retention of electronic data, as provided for in Clause 10(1) of the Bill.

This clause has been drafted to recognise that any evidence obtained may be required for investigative purposes and/or prosecutorial purposes. It would be inappropriate to stipulate a prescribed time for retaining data when there is no fixed
limit on when an investigation or prosecution could conclude. As mentioned above, appropriate officers are required to adhere to obligations under the Data Protection Act 2018 and in particular – in accordance with part 3 of that act which covers law enforcement data processing.

Again, this approach reflects the domestic framework used for making and granting production orders under the Police and Criminal Evidence Act 1984 (see section 22(1)) and Terrorism Act 2000 (see section 114(3).

I hope I have addressed all the issues raised in your letter and provided the further reassurance you were seeking.

Rt Hon Ben Wallace MP
Minister of State for Security and Economic Crime