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Baroness Hamwee
Lord Paddick

Sent via email

2 November 2018

Dear Sally, Brian

CRIME (OVERSEAS PRODUCTION ORDERS) BILL

Thank you again for your support on the Crime (Overseas Production Orders) Bill and your ongoing contributions.

We all recognise it is vital that we create the right powers for our operational agencies to gain access to the evidence they need to investigate and prosecute serious crime, including terrorism.

In advance of our meeting on Monday, I thought it would be useful to offer some further clarification on the points you raised during and following Report Stage.

Treaties/international agreements

The Noble Lady Hamwee has suggested a couple of potential amendments relating to treaties and international agreements. Below, I have outlined some detail to illustrate how the intent behind both is already provided for.

"Regulations made under section 1(5) shall not come into effect (force?) until (unless?) the relevant treaty has been ratified in accordance with the Constitutional Reform and Governance Act 2010".

In practice we expect that regulations that will designate the agreement will be timed to come into force at the same time as the entry into force of the relevant agreement. In any event, if our regulations designating the agreement for the purposes of incoming requests came into force prior to ratification, the legislation does not permit UK Communications Service Providers to intercept communications in response to requests by foreign law enforcement authorities until the agreement enters into force. The reason for this is that, under section 52 of the Investigatory Powers Act, interception must be in response to a request made in accordance with a relevant international agreement. Until that agreement has come into force (which will be on or after ratification), no request for information could be made "in accordance" with the agreement. What you are seeking to do with the above amendment is therefore already provided for.

"A designated international co-operation agreement may not come into effect (force?) until (unless?) it has been ratified in accordance with the Constitutional reform and Governance Act 2010".

The Government amendment tabled at Report Stage provided that the designated international co-operation arrangement must be in the form of a treaty that must be ratified having been laid before Parliament in the usual way. Ratification will be the process by which the UK expresses its consent to be bound by the treaty. As a matter of international law, a treaty requiring ratification cannot come into force until after ratification. The intent in Baroness Hamwee's second suggested amendment is therefore already provided for.

I hope this provides the reassurance you were seeking and makes clear that requests cannot be made under the auspices of the agreement until the agreement has come into force, and that any agreement cannot come into force until the relevant agreement, which must be in the form of a treaty, has been ratified.

Court Rules

Use of "cannot" rather than "will not"

During Report Stage, we spoke about court rules which we expect will provide that a court must not determine any application for an overseas production order in the absence of the respondent, or person affected, except in a number of specified circumstances. These circumstances include when the court is satisfied that the applicant cannot identify or contact the person. The Noble Lady Hamwee raised concerns on the use of "cannot" rather than "will not".

I would like to clarify why this word is deliberately used. "Cannot" is used to ensure that where an officer is choosing to rely on this circumstance, everything has been done to attempt to contact a potential respondent or person affected. If we were to use the term "will not", it would suggest that an officer could simply decide not to contact that person, and that would be enough for the court to proceed in that person's absence. I do not think this is what the Noble Lady Hamwee intended.

Government court rules amendment – use of "include"

During Report Stage, the Noble Lady Hamwee made a reference to the Government amendment to clause 17. Specifically, where it says that "*references to proceedings relating to an overseas production order include proceedings for the making, variation or revocation of an order*". She asked for clarification as to why the word "include" has been used.

Clause 11(1) of the Bill includes the wording “proceedings relating to an overseas production order”. This clause provides the ability for court rules to make provision in relation to overseas production orders. Prior to the Government’s amendment, that clause could have been interpreted to mean that court rules could only be made in respect of overseas production orders, but not the orders made under clauses 8(4) or 13(3) or (4)(b). Therefore, in clause 17(2) we have provided that references in the Bill to such “proceedings relating to an overseas production order” also include proceedings for the making, variation or revocation of an order under clauses 8(4) or 13 (3) or (4) (b).

Appealing against a judge’s reasonableness

During Report Stage, the Noble Lady Hamwee made a point that in the context of excepted material she would find “it uncomfortable to have to appeal against whether or not a judge was reasonable”. The circumstances we are trying to provide for here are where a judge made an order in respect of information which, when he or she made his/her decision, it was not expected that the information would include excepted data, but when the material has been obtained by the CSP it included excepted data.

In those circumstances, a person would apply to vary or revoke the order, and in doing so bring to the judge’s attention (for the first time) information relating to the existence of excepted information within scope of the order. Based on this new information, it is at that point that the judge would make a new decision (whether to revoke or vary the order). It is not a challenge to the original decision to make the order, which was made on the evidence available to the judge at the time, but a new decision on the basis of all the now available information.

I hope that this letter allays the concerns you have raised. I look forward to discussing in more detail next week.

I will place a copy of this letter in the House Libraries.

Baroness Williams of Trafford