RESPONSE FROM HER MAJESTY’S CHIEF INSPECTOR OF PRISONS FOR SCOTLAND

1. Thank you for the Committee’s invitation to provide a written submission prior to the evidence session to scrutinise the above Bill. This letter constitutes my written submission.

2. As the Committee will be aware, I have no technical responsibility for security, but I clearly have views about prisoner telephonic access to their families and legal agents. I also have views about safety and security in prisons which I have expressed before.

3. Firstly, I am clear that good prisoner communication to their families and legal agents is a Human Right. Importantly, good telephone access is an official HMIP Standard1. I inspect and measure against the Standards. I refer to page 32 of the Standards:

“Standard: Telephone contact is made as easy as possible.

- There are enough telephones for each prisoner to have daily access at times appropriate to their needs.

- Prisoners are told clearly that telephone calls are monitored.

- Telephones are not in a noisy place where prisoners cannot hear properly.

- Prisoners can talk on the telephone without being heard by other prisoners.”

4. Although I am not an expert on Human Rights, in my opinion the Standard attends to Article 8 of the European Convention of Human Rights: Right to respect for private and family life. Specifically: ‘There shall be no interference by a public authority with the exercise of this right...’: By providing sufficient, affordable, and easy access to fixed telephones in prisons, it is my view that the SPS are not interfering with the provisions in Article 8. I have looked at the oversight arrangements for the operation of authorised interference in prisons. Provided that each prison keeps to the provisions of Article 8 I cannot see that the Human Rights of prisoners would be affected in any way. I have seen no evidence of concerns about health or security and the Committee would need to listen to experts on these specific issues and take advice on current usage in other jurisdictions such as France and New Zealand.

5. I have, in the past, worried about the cost of making such telephone calls, but I am now content that the tariff charged has been reduced by 37% since I first took over as Chief Inspector. It is imperative that telephonic communications continue to

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1 Standards Used in the Inspection of Prisons in Scotland (August 2006).
be affordable and easy. That is applicable to foreign nationals as well. Calls to
countries such as Poland, China, Hong Kong and the Baltic Republics where the
majority of foreign national prisoners in Scotland come from, are, by and large,
similar to UK calls\(^2\). There are countries further afield, such as Colombia, where calls
are much more expensive (£2.72 per minute), but the cost is the same for mobiles as
well. It is up to individual prisons to ensure such prisoners have sufficient access to
telephones and that these calls can be afforded. I shall continue to monitor this
situation.

6. I have consistently urged that the smuggling of illegal items such as drugs and
all communication devices be attended to by the SPS\(^3\). Such items have the
potential to cause prisons to be less safe and to allow serious organised crime to
continue within HM Prisons. “My concerns centre on the volume and nature of the
[illicit and unauthorised smuggling] trade and the fact that it enables criminal activity
to continue from within prisons. It causes bullying and intimidation to be
perpetrated;….and for potential operational instability to result.”

7. Consequently, I am supportive of any measures that deal with the illicit
smuggling of illegal items. Searching measures are not yet sufficiently well advanced
to stop illegal smuggling altogether. Although I am not in a position to judge
affordability, I therefore support the use of ‘phone blocking’ technology in prisons in
Scotland.

Brigadier Hugh Monro CBE
HM Chief Inspector of Prisons for Scotland
11 October 2012

RESPONSE FROM THE SCOTTISH PRISON SERVICE

1. Thank you very much for the opportunity to provide the Committee with the
views of the Scottish Prison Service (SPS) in relation to Legislative Consent
Memorandum (LCM) and the provisions of the UK Prisons (Interference with
Wireless Telegraphy) Bill currently being considered by the Committee. You also
wrote to the Governor of HMP Edinburgh, Sue Brookes seeking comments on the
LCM because of Edinburgh’s involvement with the Prison Watch scheme. Sue has
now moved from Edinburgh to HMYOI Polmont however I am pleased to include in
this reply information about the Prison Watch scheme and how this initiative fits with
this legislation.

Agency status of the SPS

2. The Committee will be aware that the SPS is an Agency of the Scottish
Government and that under the Agency Framework Agreement I am accountable to
the Scottish Ministers for the operation of SPS; for advising them on policy on
prisons; for the management of SPS; and for planning its future development. SPS is
therefore part of the Justice department within Scottish Government and I am
pleased to offer the Committee my views on the operational benefits and impact of

\(^2\) SPS Telephone tariff per minute UK: 10.1p (previously 16p)
\(^3\) See: Annual Report 2009-10. Page 5, item entitled “Smuggling of illegal items in to prison”.

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the provisions of the UK Bill and LCM. In particular I provide below information about
the technology and trials of the equipment in England; the expected impact of the
authorisations and directions envisaged by the legislation and the operational impact
of the necessary safeguards provided by the Bill.

Prison watch

3. I attach as an Annex some background information about Prison Watch which
is fully supported by SPS; indeed it was one of my staff at Edinburgh prison who took
the initiative to develop this scheme in partnership with Lothian and Borders Police
and the City of Edinburgh Council. In its first year the scheme has proved very
successful at reducing the volume of contraband entering the prison and the Scheme
will be rolled out through-out the prison estate by Spring 2013.

4. However despite this Scheme and other security measures that we deploy,
illicit mobile phones enter our prisons. I believe that this legislation complements our
existing security arrangements and schemes such as Prison Watch. This legislation
will give us the ability to block mobile phone signals and effectively stop prisoners
from using them and will mean that mobile phones will no longer be effective
currency in prison.

The technology and trials in England

5. Colleagues in the National Offender Management Service (NOMS) have
trialled a range of signal denial equipment in a small number of prisons and these
trials were successful in blocking mobile phone signals. Blocking mobile phones in
prison is not a simple or quick solution; the effective use of signal denial technology
is technically challenging and expensive due to the different fabric and layouts of
prisons. Tackling serious and organised crime and the illegal use of mobile phones
in prisons are common goals for both jurisdictions and I am grateful to colleagues in
NOMS for sharing their experience of the trials with us and I have asked the SPS
Director of Operations to continue to work with NOMS and to consider how SPS can
best benefit from the deployment of signal denial equipment in our Scottish prisons.

Safeguards: authorisations and directions Issued by Scottish Ministers

6. The Committee has asked specifically about SPS’ views about putting into
practice the authorisations from the Scottish Ministers in relation to the deployment
of signal denial equipment. The Bill makes provision for a number of safeguards; the
most fundamental being that the signal denial equipment is fit for purpose. Scottish
Ministers will require assurance of this and it will be for SPS to ensure that we have
robustly tested the technology so that this assurance can be given. This will be a
crucial phase before signal denial equipment can be deployed in Scottish prisons
and will require SPS to engage with industry experts to achieve that assurance.
Thereafter SPS will be required to comply with directions given by Scottish Ministers
about circumstances in which the use of the equipment must be discontinued and
there must be directions aimed at ensuring that there will be no disproportionate
interference with wireless telegraphy outside the prison.
Operational impact of safeguards

7. SPS must comply with the essential safeguards in the legislation namely directions that will be given by Scottish Ministers therefore staff in prisons where the equipment is to be deployed will be provided with the necessary technical and operational support that will have been identified at an early stage in our considerations of the deployment of the signal denial equipment. We have already advised the SPS Trade Union Side about our general direction of travel with regard to the impact of this legislation and they will be fully involved in any future considerations of the deployment of signal denial equipment in Scottish prisons.

8. There are other safeguards in the legislation, in particular the key role of the communications regulator, the Office of Communications (OFCOM) however I note that the Committee has written to the Cabinet Secretary for Justice for clarification on oversight arrangements therefore it is appropriate that I leave the explanation of these wider safeguards to Mr MacAskill.

9. I fully support this legislation and the LCM that will give SPS the powers through Scottish Ministers to block mobile phone signals and give us another tool to limit the extent to which prisoners can maintain their criminal lifestyle from prison.

Colin McConnell
Chief Executive
22 October 2012

RESPONSE FROM OFCOM

Thank you for your email dated 3 October with a request for written evidence to the Committee in advance of their consideration of the Legislative Consent Memorandum with regard to the Prisons (Interference with Wireless Telegraphy) Bill.

Use of signal denial (mobile phone blocking) within prisons

The Prisons (Interference with Wireless Telegraphy) Bill was introduced in the UK Parliament on 20 June, with its provisions extending also to Scotland. We understand that the Scottish Prison Service is at the very early stages of considering how the provisions in the Bill will be implemented in Scotland and I write setting out some of the background and context for the work.

Mobile phone jammers

The use of any apparatus, whether or not wireless telegraphy apparatus, for the purpose of interfering with any wireless telegraphy, is an offence under the Wireless Telegraphy Act 2006. The unlicensed transmission of radio signals and the interference with licensed services would cause offences under, respectively, sections 8 and 68 of the Act.

Ofcom is not able to grant authority for the sale, purchase or use of mobile phone jammers in the UK. Placing them on the market and putting them into service are criminal offences under the Electromagnetic Compatibility Regulations 2006 (the
EMC Regulations), and their use would involve commission of a criminal offence under the Wireless Telegraphy Act 2006 (section 68). There is no provision in either piece of legislation that, in effect, enables Ofcom to authorise the sale, purchase or use of a jammer. We also have statutory duties to enforce the provisions of these Acts.

The Ministry of Justice’s (MoJ) National Offender Management Service (NOMS) has made its own legal assessment of the impact of the offences referred to above on the use of jammers in order to enforce legislation prohibiting the use of cellphones within HM prisons in England. We understand from them that the purpose of the Bill is intended to set a formal basis for such use within HM prisons and to facilitate the use of technology also within non-Crown prisons (i.e. those run by contractors) where the current provisions do not apply.

Technical support for NOMS has been provided by the Home Office’s Centre for Applied Science and Technology (CAST). NOMS/CAST have worked with industry and Ofcom to assess the impact of potential interference to radio use outside the prisons of the jammers deployed in the pilot schemes to date.

**Use of jammers in prisons**

A Memorandum of Understanding (MoU) between MoJ, the MNOs and Ofcom was signed in April 2010 and covers the definition, design, deployment, monitoring and complaint resolution for blocker deployments, in order to ensure 1) effectiveness of operation 2) availability of communications and other radio services external to the prisons (whether in the same or adjacent spectrum bands as the blockers) and 3) that Ofcom’s statutory duties for spectrum are not in any way compromised.

The requirement for a formal notification process (to mobile operators and copied to Ofcom) from an institution’s Governor/Director has been integral to the development of the MOU in order to address potential industry and consumer concern over interference external to a prison if systems were put into place without appropriate planning.

The MoU sets out the minimum standards that blockers must meet, periods of notice for commissioning and installation of new sites, the testing and monitoring requirements and the procedure to be followed in the event of interference to external radio use. The intention is that any blockers installed in prisons will have minimal effect on cellular networks outside the prison and that the mitigation of any potential effect on adjacent band services should be in line with existing specifications as would apply for radio systems.

**Ofcom’s role**

Ofcom licences the civil use of radio in the UK. Noting that we cannot sanction or authorise jammer use, we are unable to advise or assist with the design, procurement, and installation etc. of jammer systems. Our main concern is therefore the potential for such systems to affect radio use, including by the mobile networks, externally to the prisons.
Ofcom facilitated initial discussions with the mobile industry and there is now a direct dialogue between them and NOMS, both at the policy and operational levels. Following the development of the initial MoU, Ofcom has taken a mainly observational role. Enquiries received by Ofcom about the policy for jammers in prisons are therefore referred to NOMS.

Ofcom has statutory duties in relation to spectrum management and, against the possibility of interference being caused to networks or services external to the prisons, must ensure that its powers to act are not fettered which is a key principle of the MoU. In practice though, operational matters relating to deployments of the technology have been discussed and resolved directly between NOMS and the operators.

NOMS/CAST have conducted a considerable amount of technical work which is likely to be helpful to Scotland, to avoid duplication of effort. It is likely too that the mobile operators will prefer to maintain a consistent technical approach across the whole UK. NOMS have an established dialogue with the cellular industry, which may be helpful in developing a strategy for deploying the technology in Scotland.

NOMS intends to revise the MoU to reflect the provisions of the Bill and this could be extended to include Scotland as a signatory or perhaps, given the different legislative arrangements, a parallel MoU for Scotland might be more appropriate. We note that the Scottish Prison Service are looking at this issue and that they will be working closely with the MoJ which has led the development work so far (for English prisons) with Ofcom facilitating the liaison with the cellular industry who will monitor and raise any issues involved. We have informed the mobile operators that Scotland is at an early stage of planning for the implementation of mobile phone blockers in prisons in order to facilitate discussions with them as policy for Scotland is developed.

Vicki Nash
24 October 2012

RESPONSE FROM THE SCOTTISH HUMAN RIGHTS COMMISSION

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission mandate is to promote and protect human rights for everyone in Scotland. The Commission is one of three national human rights institutions in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

Introduction

The Commission would like to thank the Justice Committee for the opportunity to provide written comments on the general principles of the UK Prisons (Interference with Wireless Telegraphy) Bill.

In this response, the Commission highlights the relevant human rights standards, particularly Article 8 of the European Convention on Human Rights, and its
application to the Bill. There are two crucial issues at stake here - the first is in relation to any potential interference with Article 8 rights of prisoners and young offenders. The second issue relates to the potential impact of the measures of the Bill on the rights of those living in the surrounding areas of prisons and young offenders’ institutions.

**Relevant human rights standards**

- European Convention on Human Rights
- Standard Minimum Rules for the Treatment of Prisoners
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty

**The relevant law**

- The Bill confers powers on Scottish Ministers to authorise governors and directors of relevant institutions to interfere with wireless telegraphy in order to prevent, detect or investigate the use of electronic communications devices (including mobile telephones) within relevant institutions.
- Clause 2(4)(c) of the Bill – “as to the circumstances in which the use of equipment for the purposes of an interference with wireless telegraphy authorised under section 1 must be modified or discontinued (and, in particular, directions aimed at ensuring that the authorised interference will not result in disproportionate interference with wireless telegraphy outside the relevant institution).”
- Section 41 of The Prisons (Scotland) Act 1989 provides that it is unlawful to bring a personal communication device such as a mobile telephone into a prison or a young offenders institution. It is also a disciplinary offence to possess a personal communication device such as a mobile telephone in a prison or young offenders institution.

**Article 8 of the Convention**

It is helpful to start by affirming the fundamental premise that prisoners, like other members of society, are entitled to the enjoyment of the rights set forth in the existing human rights framework. While prisoners no longer enjoy liberty, they retain the majority of their human rights, in particular prisoners have the right to be treated with humanity, dignity and respect while in detention. In particular, Article 8 of the European Convention on Human Rights (the Convention) as contained within the Human Rights Act 1998 is of relevance to the provisions within this Legislative Consent Memorandum.

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4 Approved by the UN Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. See also United Nations Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment.
5 Legislative Consent Memorandum Prisons (interference with wireless telegraphy) Bill para. 5
Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Private life is a broad concept that cannot be exhaustively defined. However, it concerns a sphere within which everyone can freely pursue the development and fulfilment of his/her personality. The European Court of Human Rights (the Court) has concluded that the effective enjoyment of a social life is a key aspect of private life. The importance of relationships with others also applies to prisoners and respect for private life requires a degree of contact (and association) for persons imprisoned.

In addition the right to respect for one’s correspondence is a right to uninterrupted and uncensored communications with others, including telephone communications and telexes. Human rights standards have given particular consideration to the importance of prisoners being allowed to communicate with the outside world at regular intervals, both by correspondence and by receiving visits.

In terms of the second part of the issue raised by the Committee - the potential impact of the measures of the Bill on the rights of those living in the surrounding areas of prisons and young offenders’ institutions - the Court has accepted, in various cases, that even if a particular measure has helped to detect or prevent crime...

"the question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests."

In the same case, the Court affirmed that:

“The protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.”

The loss of mobile phone service for the homes and businesses located near the prisons has already been a subject of concern in the U.S. In May 2012, the California

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6 Costello-Roberts v the United Kingdom Application no. 13134/87
7 McFeeley v the United Kingdom (1980) 3 EHRR 161.
8 Klass v Germany, 6 Sep. 1978
10 S and Marper v the United Kingdom, 4 Dec 2008
11 Ibid
Council on Science and Technology (CCST) released a report advising the State of California in the United States to carefully analyse the use of jamming technology in state prisons before investing millions in the untested technology. The CCST report found that:

“If the prison is in or near a populated area, RF leakage could be highly disruptive to cell phone usage by the non-prison population. Among other things, this disruption could greatly reduce the capability of public safety professionals to serve the community’s needs or the general public’s ability to access a 911 operator.”12

The Commission notes that many Scottish prisons are located in residential and densely populated areas such as Aberdeen, Greenock, Glasgow and Edinburgh as well as the Young Offenders Institution in Polmont.

The Bill

In determining whether measures taken by the State are compatible with Article 8 of the Convention the State is afforded a certain degree of discretion, known as a margin of appreciation.13 The margin of appreciation afforded to competent national authorities will vary according to the circumstances, the subject matter and its background. However, for an interference to be justified it must:

- be ‘in accordance with the law’ – it requires legal basis, clarity and foreseeability of the law.
- pursue a legitimate aim – they are set out in Article 8(2), including ‘the prevention of disorder or crime’ and ‘the protection of the rights and freedoms of others’. The legitimate aims are exhaustive, but widely drawn.
- be ‘necessary in a democratic society’ – which requires it to be corresponding to a pressing social need and a proportionate (and effective) means to achieve the legitimate aim.

It is clear that there are circumstances where interferences by a public authority with the exercise of a prisoner’s right to respect for their private and/or correspondence can be in accordance with the Convention. There will be a need to maintain a balance between the right to privacy of the prisoner and their family and the legitimate aim pursued. In Golder v the United Kingdom, the Court accepted that:

“the ‘necessity’ for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The ‘prevention of disorder or crime’, for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty.”14

It is also clear that there are circumstances where interferences by a public authority with the exercise of the right to respect for their private and/or correspondence is disproportionate and cannot be regarded as necessary in a democratic society. The

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13 Handyside v the United Kingdom, 7 Dec. 1976
14 17 June 1971
Commission is concerned that very little attention has been paid to the interference with Article 8 rights of those living in the surrounding areas of prisons and young offenders’ institutions.\footnote{See Public Bill Committee Debate Session \textit{Wednesday 17 October 2012}, available at http://www.publications.parliament.uk/pa/cm201213/cmpublic/prisonsinterference/121017/pm/121017s01.htm}

Any intentional interruption of wireless service by government authorities raises significant concerns and implicates substantial legal and policy questions.\footnote{Leander v. Sweden, 26 March 1987} Considering the potential restrictions, and data retention, of the use of mobile telephones outside the secure perimeter of these institutions it is vital that the appropriate safeguards (including procedural ones) are in place.

Some of the concerns and issues to be established, having regard to the relevant developments in international and domestic practice, are:

- the frequency of the interference
- the duration of such interruption
- the size of the affected area (which will indicate the number of people affected) and,
- the information provided to the general public regarding the retention, use or disclosure of any traffic data.

The Commission is concerned by the potential indiscriminate nature of the power of authorisation to interfere with wireless telegraphy in this context. Clause 1(4) allows for “the collection of traffic data in relation to an electronic communication and…such an authorisation permits the retention, use and disclosure of that data.” It is assumed that data of people living near prisons may be taken, retained and used. Although the retention is time-limited (Clause 3(1)), there is no provision for independent review of the justification for the retention according to defined criteria.

\textbf{Views}

This Bill should be considered by the Parliament against the criteria explained (above) in Article 8 of the Convention. While it would appear that the provisions of the Bill are a further legal basis which serves the same legitimate aims of the Prisons (Scotland) Act 1989,\footnote{Section 41ZA of The \textit{Prisons (Scotland) Act 1989} provides that it is an offence to possess, give to a prisoner in prison or use, without authorisation or outside of the designated area of the prison, a personal communication device such as a mobile telephone or any other portable electronic device capable of transmitting or receiving a communication.} the elements of necessity and proportionality are only considered having regard to the ordinary and reasonable conditions of prison life.

In particular, bearing in mind that the provisions of the Bill would affect Article 8 rights of those outside the prison walls and young offenders’ institutions (whose wireless telegraphy will presumably also be capable of being disrupted and collected) the Commission believes that level of interference is particularly intrusive for those living in the surrounding areas of prisons and young offenders’ institutions.
The Bill should also comply with the relevant Data Protection laws for the retention and disclosure of information obtained under Clause 1 of it.

Furthermore, the Commission is concerned that the provisions of the Bill would confer a blanket authorisation to national authorities, rather than an authorisation targeted to a specific suspicion, to interfere with Article 8 rights of those outside the prison walls and young offenders’ institutions. It also appears to the Commission that the Bill does not have the appropriate legal safeguards against arbitrary interference by public authorities. There is no provision for the oversight mechanism and/or appeal to challenge such an authorisation.

As a result of the above analysis, the Commission recommends the Parliament carefully scrutinise the provisions of this Bill: that is, to ensure that the proposed approach is in accordance with the law, pursues a legitimate aim and, particularly, is necessary in a democratic society.

Finally, it is important to note that States must have in place an adequate framework of safeguards offering minimum standards of protection in order to prevent the abuse of power and the violation of Article 8 rights.

The Commission would be pleased to answer any queries that you may have in relation to this response.

Scottish Human Rights Commission
24 October 2012

RESPONSE FROM FAMILIES OUTSIDE

Families Outside is an independent charity that works on behalf of families affected by imprisonment throughout Scotland. We do this through provision of a national freephone helpline for families and for the professionals who work with them, as well as through development of policy and practice, training, and face-to-face support.

We are grateful for the opportunity to comment on the issue of mobile phones in prisons. The response below summarises our views, but we are happy to elaborate on any of these should the Committee require additional information.

Overview

Families Outside recognises that prison security and consequently monitoring of telephone calls is important, both for security within the prison and for the protection of people outside. We are aware that the use of mobile phones in prison causes problems for prison security and carries potential risks for further criminal activity. In this sense we are supportive of the Legislative Consent Memorandum to interfere with wireless telegraphy in prisons.
Feedback from families

Families Outside has received very little feedback from families regarding prisoners’ use of mobile phones while in custody. The feedback we have received has included:

1) A family member who needed assistance because a prisoner was using a mobile phone to harass her from prison;

2) Concern regarding the punishments for prisoners imposed when found in possession of a mobile phone (or indeed any other contraband or breach of Prison Rules), particularly where this impacts on family contact; and

3) A prisoner who claimed to be using a mobile phone in order to work through marital difficulties with his wife (in this case, the contact with us was again with reference to the removal of parent-child visits as a punishment for this breach of the Prison Rules rather than specifically regarding the use of mobile phones).

In sum, families have expressed few concerns about the use of mobile phones in prisons per se and seem to be aware of the concerns for security that mobile phones raise.

Further considerations

In saying this, we wish to highlight issues in communication between family members that are likely to be relevant. First, we receive regular complaints from families about the cost of telephone calls from prisons and the financial impact on families who support prisoners to maintain contact in this way. We worked alongside Sacro and Consumer Focus Scotland on this from 2008 – 2010 and eventually received information that the cost of calls from prison is now commensurate with the cost of calls from other pay telephones. The cost is still high for families who wish to maintain contact with loved ones but are on limited budgets.

Second, complaints from prisoners about the lack of privacy in making telephone calls, as well as the surrounding noise, limited time for calls, and competition for use of telephones makes quality contact difficult on prison telephones. The recorded message, stating that the call is coming from a Scottish prison, can also be off-putting for some prisoners, who may wish to keep their whereabouts from their families. This is not unusual for prisoners with young children, especially where there is a risk of the child answering the telephone. We raised this concern in relation to petition of Stewart Potter in his application for judicial review against the Scottish Prison Service (2007-2010).

Third, families have no means of contacting prisoners directly by telephone. This can be very frustrating for them, particularly in the event of family emergencies or other major life events. I personally came across a prisoner who learned about the birth of his child from a prison officer two days after the family said they had left a message with the prison about it.
These situations do not justify the use of mobile telephone in prisons, though they explain some of the reasons prisoners use them for correspondence with family members.

**Alternatives**

Families do not depend solely on telephone calls to maintain contact with prisoners. Even where they do not have the means, ability, or inclination to visit, families may write to each other, and many prisons have adopted the ‘E-mail a Prisoner’ scheme. However, more satisfactory alternatives are also available for contact between families that may reduce the temptation to use mobile telephones. In England, HMP Dovegate has built-in telephones in every cell. This gives prisoners the quality of a private phone call while enabling the prison to monitor calls. Presumably prison staff can also transfer outside calls to prisoners in this way, though we have not verified this.

In 2012, the UN Committee on the Rights of the Child also recommended that “Supplemental to [regular visits], State parties should facilitate further regular contact between the child and the imprisoned parent through telephone, video conference etc. and ensure that any associated costs are non-prohibitive” (UNCRC Comments and Recommendations, February 2012, following the Day of General Discussion on 30 September 2011 on Children of Imprisoned Parents). Contact through video links or controlled use of Skype would again increase the quality of family contact and reduce the temptation to resort to wireless telegraphy for this purpose.

**Conclusion**

In conclusion, Families Outside has no objection to interference with wireless telegraphy under the terms of the Legislative Consent Memorandum. However, we would encourage the implementation of inexpensive and better quality means of contact between families to reduce the perceived need prisoners may have to contact their families through mobile phones.

Professor Nancy Loucks  
Chief Executive  
Families Outside  
24 October 2012

**INFORMATION COMMISSIONER’S OFFICE**

Thank you for your e-mail invitation to provide the Justice Committee with the view of the (UK) Information Commissioner’s Office (ICO) in respect of the above UK legislation.

As you will be aware, the ICO regulates, inter alia, the Data Protection Act 1998 (the Act) which provides individuals with rights in relation to their privacy. The Act requires that personal data (i.e. information that has the potential to identify a living individual) shall be processed fairly and lawfully and must meet specific conditions within the Act prior to this taking place. The terms of the Bill refer to the data capture as ‘traffic data’ and Clause 4(b)(i) of the Bill defines this as including data which
‘...identifies, or purports to identify, any person...’. Even where the data do not identify directly any one individual, the rest of the data outlined in Clause 4 identifies the device or its location and could, thereby, identify an individual associated with either because of other information (e.g. cell number) in the possession of the relevant institution. The traffic data and its processing do, therefore, come within the locus of the Act.

To ensure fair processing, the Act requires that individuals are made aware of how their personal data are to be used. A Privacy Notice is normally used to provide individuals with relevant information to allow them to make an informed choice over the use of their data and is known as the subject information provisions. However, the Act provides exemptions to these provisions where alerting the individual to the processing might prejudice the purposes for which the processing is taking place. For example, Section 29 of the Act allows an exemption from the provisions where the processing is for the prevention or detection of crime or the apprehension or prosecution of offenders. Given it is an offence under section 41ZA of the Prisons (Scotland) Act 1989, for a prisoner to possess, be given or to use a mobile device, Section 29 of the Act may be relied on to exempt the activity from the fair processing requirement if this would be prejudicial to the purpose. However, and notwithstanding this, it would be appropriate for prisoners to be advised as part of the admission procedure and alongside guidance on prison rules that electronic checks for mobile phone possession (and use) may be carried out.

Lawful processing is about ensuring that an organisation is acting within its powers, which the Bill provides, and individuals' rights are upheld. Where, as in this case, the personal data relate to the commission or alleged commission of an offence, the Act requires that at least one condition from Schedule 2 and one from Schedule 3 of the Act are met prior to processing. The passing of the Bill will enable the Scottish Prison Service to undertake these checks in the 'exercise of a function conferred by or under an enactment', meeting the conditions under Schedule 2:5(b) and Schedule 3:7(1)(b) and, thereby, ensuring that the processing is lawful.

Please note that the above submission presupposes any interference is based on signal identification and does not involve listening in to the conversation itself. If the latter is the intention it raises major issues in terms of the rights of the individuals concerned, and not just about data protection but also in relation to human rights. Given possession or use of a mobile device by prisoners is in itself an offence, the ICO does not consider signal identification to be excessive or a 'fishing' exercise. However, there would be concerns if all conversations were to be monitored, especially if it captured legitimate personal conversations by non-prisoners in the vicinity. Therefore, if monitoring of conversations is to be facilitated by the proposed legislation, the ICO strongly recommends a full privacy impact assessment to be undertaken prior to the implementation by the Prison Service, focusing particularly on human rights legislation and the risks to the privacy of non-prisoners.

The ICO cannot make detailed comment on human rights other than to clarify that a breach of any other legislation would render the activity unlawful in terms of the Data Protection Act.

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The ICO cannot make detailed comment on human rights other than to clarify that a breach of any other legislation would render the activity unlawful in terms of the Data Protection Act.
I trust this submission assists the Justice Committee in its deliberations on the proposals and I would be happy to provide further evidence should the Convener think it would be helpful.

Dr Ken Macdonald  
Assistant Commissioner (Scotland & Northern Ireland)  
24 October 2012

RESPONSE FROM THE MOBILE BROADBAND GROUP

1. The Mobile Broadband Group (‘MBG’, whose member are Telefonica O2, Three, Vodafone and EE – which operates the Orange and T-Mobile brands in the UK) welcomes the opportunity to respond to the Scottish Parliament’s Justice Committee’s call for views on the Legislative Consent Memorandum on the UK Prisons (Interference with Wireless Telegraphy) Bill.

2. The interference equipment that will be allowed within prisons as a result of this legislation has the potential to cause harmful interference to the customers of the mobile operators (the “Operators”) legitimately using their mobile devices in the vicinity of prisons and/or the network equipment of the Operators. Not only could this be extremely inconvenient to Operators’ customers, disrupting their personal and business activities, but interference could also put people at risk by preventing access to services such as 999.

3. It is therefore of great concern to us that the equipment is designed, tested and deployed in such a way that this does not happen.

4. For the last two years or so, the Prison Service in England and Wales has deployed interference equipment in a limited number of prisons (on the basis of Crown immunity). The MBG has worked with the Ministry of Justice’s (MoJ) National Offender Management Service (NOMS) and Ofcom to devise a Memorandum of Understanding and a testing methodology for each deployment.

5. The prime objective of this exercise has been to ensure that:
   - Equipment installed by NOMS is able to fulfil its intended function within Her Majesty’s prisons;
   - the Operators are able to continue to offer a commercial service and the provision of 999 access outside prisons; and
   - Ofcom can perform its statutory functions and duties relating to the electromagnetic spectrum.

   All the concerned parties have been in agreement that it is necessary to provide essential safeguards on the installation of Equipment and to set up a process for resolving complaints.

6. The MoU covers: definition, design, deployment, monitoring and complaint resolution.
Definition
7. The Equipment deployed has to meet the agreed requirements before it is commissioned into operation. The MoJ will not deploy, or will cease to deploy (as the case may be), Equipment that does not, or ceases to, meet the requirements.
8. The MoJ will inform Ofcom and the Operators of new equipment being deployed so that a complete list of all the prisons where Equipment is installed is maintained.

Design
9. In deploying Equipment in any prison, the MoJ will follow a process of design, installation and testing of Equipment in situ.
10. For each installation, the MoJ will certify to Ofcom and the Operators that the installation complies with the Requirements.

Monitoring
11. Ofcom and the Operators may, from beyond the prison perimeter monitor the impact of the Equipment and may test for any interference.
12. The MoJ has agreed to respond to any queries that may arise from such monitoring activity (as opposed to the complaint procedure set out below).

Complaint resolution
13. If public confidence in the use of the Equipment and access to 999 services is to be maintained, it is absolutely essential that there is an extremely quick response to Operators’ customer complaints (including those made to Ofcom) about interference. To this end the MoJ and Operators have agreed:
   • To provide a Single Point of Contact (SPOC) within NOMS and Operators respectively, to whom reports of interference can be made
   • The SPOC will take responsibility for managing any complaints through to resolution with the other party
   • To investigate expeditiously the cause of complaints that have been substantiated by an Operator and to take appropriate remedial action
   • To notify Ofcom of the steps MoJ proposes to take to resolve the complaint and the actions actually taken.
14. Our experience since the MoU has been in place has been satisfactory. Mobile operators have not had to deal with customer complaints arising from interference from this equipment and, to the best of our knowledge, the equipment, since the MoU has been in place, has not caused undue interference outside prison perimeters.
15. The mobile operators have not raised objections to this proposed legislation on the basis that an MoU, underpinned by appropriate technical specifications, covering design and testing methodologies, remains in place and is kept up to date.
16. The relevant parties will work to refresh the MoU to reflect the updated legislative underpinning. We welcome Mr MacAskill’s confirmation to your Committee that he intends that the Scottish Prison Service will also work under a MoU with the mobile operators and Ofcom to safeguard the interests of people using mobile
devices legitimately close to the outside prison perimeters. The MBG has also had an initial discussion along these lines with the person responsible within the Scottish Executive.

17. We expect to be discussing shortly with the concerned parties the detailed arrangements. Unless there are very good practical reasons otherwise, we would expect it would be most practical to have the same technical specifications and MoU to cover Scotland, England and Wales.

18. We also expect to be consulted closely on the contents of the Directions that Ministers must give to governors or directors of establishments to interfere with wireless telegraphy and in particular on how, from a technical point of view, the directions will provide that the authorised interference will not result in disproportionate interference with mobile phones outside the establishment. We expect this will reflect closely the terms of the MoU.

19. If there are any further questions that the Committee has on this subject, the MBG will of course be happy to answer them.

Hamish MacLeod
Chair
Mobile Broadband Group
26 October 2012