LEGISLATIVE CONSENT MEMORANDUM

PRISONS (INTERFERENCE WITH WIRELESS TELEGRAPHY) BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Prisons (Interference with Wireless Telegraphy) Bill introduced in the House of Commons on 20 June 2012, relating to the interference with wireless telegraphy in order to prevent the use of electronic communications devices (including mobile telephones) in, or detect or investigate the use of such devices within, prisons and young offender’s institutions, so far as these matters fall within the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(b) of the Parliament’s standing orders. The Prisons (Interference with Wireless Telegraphy) Bill (“the Bill”) is a Private Members Bill and was introduced in the House of Commons on 20 June 2012. It has received the support of the UK Parliament to date and is supported by the UK Government. The latest version of the Bill can be found at:

services.parliament.uk/bills/2012-13/prisonsinterferencewithwirelesstelegraphy.html

3. The presence of electronic communications devices, in particular illicit mobile telephones, presents serious risks to the security of prisons and young offender’s institutions as well as to the safety of the public. Mobile telephones are used for a range of criminal purposes in these institutions, including commissioning serious violence, harassing victims, organised crime and gang activity. Access to mobile telephones is also strongly associated with drug supply, violence and bullying. This legislation supports the Scottish Government Strategy, “Letting our Communities Flourish, A Strategy for Tackling Serious Organised Crime in Scotland”, which can be found at:


4. In Scotland section 41ZA of the Prisons (Scotland) Act 1989 provides that it is an offence to possess, or 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. It is also a disciplinary offence for a prisoner to possess a personal communication device such as a mobile telephone in a prison or young offender’s institution.

Content of Prisons (Interference with Wireless Telegraphy) Bill: Summary

5. The Bill confers powers on Scottish Ministers to authorise governors and directors of relevant institutions to interfere with wireless telegraphy in order to prevent the use of electronic communications devices (including mobile telephones) in, or detect or investigate the use of such devices within relevant institutions. In Scotland relevant
institutions are prisons and young offender institutions. This will be achieved through deployment of signal denial equipment. Clause 1(7) of the Bill provides that section 8(1) of the Wireless Telegraphy Act 2006 (requirement for a licence to establish or use a wireless telegraphy apparatus) does not apply in relation to the interference with wireless telegraphy authorised by the Bill.

6. The Bill provides that the detection or investigation of the use of such devices may be carried out by collecting ‘traffic data’ in relation to a communication. Traffic data is defined in clause 4(4) and (5) of the Bill and it does not include the content of the communication. The Bill provides safeguards to minimise any undue interference with wireless telegraphy outside of the relevant institution. The Bill also provides safeguards regarding the retention or disclosure of information obtained in the exercise of powers under an authorisation. In particular, the Bill provides that any information obtained by detecting or investigating the use of electronic communications devices in relevant institutions must be destroyed no later than three months after it was obtained, unless the governor or director of the relevant institution authorises continued retention as being necessary and proportionate on specified grounds. The information obtained may not be disclosed other than to specified persons unless such disclosure is considered necessary and proportionate on the grounds specified in clause 3(8) of the Bill.

Provisions Which Relate to Scotland

7. The Bill contains only five clauses, all of which relate to Scotland. The three substantive clauses provide for the:

- authorisation of interference with wireless telegraphy for the purpose of preventing, detecting or investigating the use of electronic communications devices (including mobile telephones) within prisons and similar institutions;
- safeguards which apply in relation to the granting of authorisations; and
- the retention and disclosure of information obtained in accordance with an authorisation.

8. Clause 1 of the Bill confers functions on Scottish Ministers to authorise governors and directors of relevant institutions to interfere with wireless telegraphy. Clause 2(1) of the Bill provides that Scottish Ministers must be satisfied that the equipment that will be used as a result of the authorisation is fit for purpose before granting the authorisation. Clause 2(2) provides that, where an authorisation is granted, Scottish Ministers must inform OFCOM of the authorisation.

9. Clause 2(4) of the Bill provides that certain directions must be given by Scottish Ministers to the governor or director of a prison or young offender’s institution, who is authorised to interfere with wireless telegraphy. Clause 2(4) sets out what matters such directions are to cover. These include (a) requirements to provide information to OFCOM; (b) the circumstances in which the use of the equipment under the authorisation must be modified or discontinued and, in particular, directions aimed at ensuring that the authorised interference will not result in disproportionate interference outside the relevant institution.

10. Clause 3 of the Bill provides for the retention and disclosure of information obtained in accordance with an authorisation. This information is termed “traffic data” and includes data which is comprised in, attached to or logically associated with an electronic communication and which identifies (i) the person or apparatus or location to
or from which the communication is transmitted; (ii) the apparatus through which the communication is transmitted; or (iii) the time at which an event relating to the communication occurs. It does not include the content of the communication.

11. Clause 3 also provides important safeguards in relation to the retention and disclosure of information obtained. Clause 3(1) provides that such information must be destroyed no later than 3 months after it was obtained unless the governor or director of the prison or young offender’s institution has authorised its retention. Where information is retained, the person in charge of the relevant institution is under an obligation to review whether its retention continues to be justified. Such reviews must take place every 3 months.

12. Clause 3(5) provides that information obtained to detect and investigate the use of items specified in clause 1(3) may be disclosed to the persons specified in that clause. Clause 3(6) provides that information cannot be disclosed to any other person unless the person in charge of the relevant institution has authorised that disclosure.

13. The governor or director may not give an authorisation unless satisfied that the retention or disclosure of information is proportionate to what is sought to be achieved by that retention or disclosure and that such retention or disclosure is necessary on any of the grounds specified in clause 3(8). These grounds are: (1) in the interests of national security (2) the prevention, detection, investigation or prosecution of crime (3) the interests of public safety (4) securing or maintaining security or good order and discipline in the prison or young offender’s institution (5) the protection of health or morals.

**Reasons for seeking a legislative consent motion**

14. In the year 2011 there were 959 mobile telephone handsets found in Scottish prisons. In addition more than 800 component parts of mobile phones were found. More will have escaped detection. Whilst wireless telegraphy is a reserved matter under paragraph C10 of Schedule 5 to the Scotland Act 1998, the management of prisons is devolved. As the Bill confers functions on Scottish Ministers, the Bill is a ‘relevant’ Bill as defined in Standing Orders Chapter 9B, Rule 9B.1 (1). Other legislative mechanisms for the Scottish Parliament to achieve the provisions of this UK Bill have been considered namely a Scottish Bill with a corresponding section 104 Order made under the powers of the Scotland Act 1998. Whilst this route would be possible it would be more complex, take more time and would involve substantially more resource. As the UK Bill has already been introduced, the LCM route offers a more resource efficient and timely legislative vehicle by which to confer the required powers.

**Consultation**

15. The Bill is a Private Members’ Bill and was introduced to the House of Commons by Sir Paul Beresford. There has been no formal consultation. However the UK Government have engaged with the Scottish Prison Service, Northern Ireland Prison Service, mobile phone operators and OFCOM throughout the development of the legislation.
Financial Implications

16. The Bill will impose no financial obligations on the public sector. However, the Bill will make it possible for deployment of signal interference equipment to take place where the Scottish Prison Service considers that the benefits of such deployment provide suitable justification for the costs. There will be financial costs in the procurement of signal interference equipment.

Conclusion

17. It is a priority for the Scottish Government to tackle serious and organised crime and we are committed to limiting the extent to which prisoners can maintain their criminal lifestyle from within our prisons. The measures in the Bill will provide an additional tool to do this. The Scottish Government therefore considers it to be in the best interests of the people of Scotland that this LCM be passed and recommends the motion to the Parliament.

Scottish Government
September 2012