EXPLANATORY MEMORANDUM TO

THE TELECOMMUNICATIONS RESTRICTION ORDERS (CUSTODIAL INSTITUTIONS) (ENGLAND AND WALES) REGULATIONS 2016

2016 No. 830

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Section 80 of the Serious Crime Act 2015 (Prevention or restriction of use of communication devices by prisoners etc.) provides for regulations to be made to confer powers onto a court to make a 'Telecommunications Restriction Order'. A Telecommunications Restriction Order' requires telecommunication providers to prevent or restrict the use of communication devices by persons detained in custodial institutions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Please see Annex.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 These regulations are made under section 80 of the Serious Crime Act 2015 which extends to England, Wales and Scotland. These regulations only apply to England and Wales because they apply to custodial institutions in England and Wales only – see Regulation 1(2).

3.4 This instrument does not have minor or consequential effects outside England and Wales.

3.5 In the view of the Department, for the purposes of House of Commons Standing Order 83P, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly, if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament, if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

4. Legislative Context

4.1 Section 80 of the Serious Crime Act 2015 provides for regulations to be made conferring powers on the court to make a Telecommunications Restriction Order.

4.2 This is the first use of that power and is being done in accordance with Parliamentary commitments to introduce measures to tackle the unauthorised use of mobile phones in custodial institutions.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 Mike Penning, the Minister for Policing, Crime, Criminal Justice and Victims made the following statement regarding Human Rights:

"In my view the provisions of the Telecommunications Restriction Orders (Custodial Institutions) (England and Wales) Regulations 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The use of unauthorised mobile phones in custodial institutions by prisoners threatens prison security and can enable prisoners to continue offending from behind bars. Recent convictions for serious crimes enabled by prisoners' use of mobile phones include: the importation of automatic firearms; the national distribution of Class A drugs, and the sale of re-commissioned firearms across London.

7.2 The use of unauthorised mobiles by prisoners not only enables crime, but threatens the safety and security of the prison estate. In 2013, two prisoners were convicted of using a mobile phone to facilitate their escape. Prisoners have also used mobile phones to harass and intimidate victims of crime. In February 2015, a serving prisoner was sentenced to life in prison for importing semi-automatic sub-machine guns into the UK, enabled by his use of an unauthorised mobile phone.

7.3 Section 40D of the Offender Management Act 2007 made it an offence to possess or use a mobile phone in a custodial institution without authorisation. There are no circumstances under which a prisoner has authorisation to possess or use a mobile phone.

7.4 However, prisoners can, and do, make use of a range of opportunities to communicate with others outside of prison. Prisoners can arrange face-to-face visits with their friends, family and legal representatives, correspond by letter and, if they wish to make telephone calls, access authorised fixed-line telephones.

7.5 The National Offender Management Service (NOMS) uses a range of measures to prevent, detect and seize unauthorised mobile phones in custodial institutions. However, the number of mobile phones and SIM cards seized by the National Offender Management Service in prisons in England and Wales is increasing. The number of mobile phones recovered in 2014 was considerably higher than in previous years: an increase of over 30% from those recovered in 2012 and in 2013.

7.6 As mobile technology advances, the size of handsets and SIM cards decreases, making those devices easier to conceal and move around the prison estate. It is therefore not always possible to attribute phone use to individuals, and prosecutions for possession or use are rare. New, cost-effective powers are needed to prevent the unauthorised use of mobile phones in custodial institutions, without the need to first take physical possession of the device. The new powers improve existing enforcement measures,

which rely on first taking possession of devices, or attributing the possession and use to individuals.

7.7 This statutory instrument provides law enforcement bodies with new powers to disrupt and prevent that offending by enabling law enforcement applicants to apply for a Telecommunication Restriction Order (TRO) which will require Mobile Network Operators (MNOs) to disconnect specified, unauthorised mobile phones without the need to first take physical possession of the device or attribute its use to individuals.

Telecommunications Restriction Order (TRO)

7.8 A TRO will not necessarily specify a single device and will be used to restrict the use of one or more mobile phones specified in the TRO application. The number of mobile phones specified in the application will depend on how many mobile phones are identified as being in use in the relevant custodial institution.

7.9 The TRO will list a unique identification number for each mobile phone to which its terms will be applied; the terms of the TRO will effectively require the communications service provider to blacklist the specified mobile phone(s) and to disconnect the SIM cards associated with that device.

7.10 We do not expect the law enforcement applicant for a TRO to know the identity of an affected party (unless they are a prisoner, in which case they will not have the right to become a party to the proceedings). Where the identity of the owner of the handset or SIM is known, we would ordinarily expect to refer such cases to the police rather than applying for a TRO, but this will not always be appropriate - for example, if someone were to register devices in their name for use by prisoners, we would reserve the right to serve the application on the owner.

7.11 To cater for the unlikely scenario where a known individual may be affected by the TRO (for example, because they are in contact with a prisoner via an unauthorised device or they have a phone contract and have allowed a prisoner to use the device), we have made provision for an affected party to join the proceedings. Such an affected person has the right to be made a party to the proceedings but it is for that person to decide whether to exercise that right - if they do, they will be a party to the proceedings; if not, they will not. Under these regulations, an individual detained in a custodial institution is an "affected person" only if they claim to have an authorisation to possess the device. In practice, a prisoner could not have any such authorisation, since there are no circumstances by which authorisation is given to prisoners to possess or use mobile phones.

7.12 NOMS (or other applicants) will properly test and calibrate the technology they use to identify unauthorised mobile phone in prisons, making sure only unauthorised phones in use in custodial institutions are identified and progressed through the Telecommunications Restriction Order (TRO) process. This is an important safeguard.

Resolution of errors

7.13 There is a very small risk that a mobile phone which is not in use inside a custodial institution without authority will be wrongly disconnected. The regulations provide important safeguards to minimise the impact on an affected person if their mobile phone is disconnected in error, by providing that an order may specify that some of its requirements are not to apply in certain circumstances. Regulation 3(3) provides for

an internal variation process to deal with those scenarios which it is intended will work in the following way:

- The Mobile Network Operator (MNO), on provision of the TRO issued by the court, will blacklist the specified device(s); disconnect the SIM cards associated with the device(s) and will suspend the account(s) associated with the specified device(s).
- The owner(s) of the device(s) will not be able to use it/them once that process has taken place. The device(s) retain the ability to connect to the emergency services should that need arise, which is an important safeguard.
- The owner will contact their MNO to find out what has happened to their account and the MNO will advise the owner that there is a TRO in place and provide the owner with the contact details of the applicant.
- The law enforcement applicant, once contacted by the owner, will conduct an investigation to determine whether the TRO should apply to the device in question, and will advise the owner that they can either apply to the court for a variation of the TRO or wait for the outcome of an investigation of their complaint. The investigation will take around 2 days.
- Where the owner wishes to apply to the court for a variation of the TRO, the applicant will explain that the owner needs to apply to the court to be made a party to the proceedings and will provide the owner with the name, address and case reference number for the relevant court.
- Where the owner wishes to wait for the outcome of the investigation, once the investigation has concluded:
    - if an error has been made, the applicant will inform the owner and MNO (in writing) that the terms of the TRO should not be applied to the relevant device;
    - if an error has not been made, the applicant will explain that the TRO will remain in place and, should they wish to challenge this, the owner will need to apply to be made a party to the proceedings. The applicant will also provide the owner with the name, address and case reference number for the relevant court.

7.14 This process has been designed to help anyone wrongly affected by a TRO in error, by enabling them to inform the MNO and applicant quickly and easily of that error, so that it can be investigated and rectified, without the need to return to court to vary the TRO. This is a safeguard to minimise, as far as possible, the impact on an affected person if an error is made.

7.15 A mobile phone that has been disconnected from the mobile telecommunications network as the result of a TRO cannot be used to make or receive calls, and is effectively put beyond normal use. However, the device retains the technical ability to connect to the emergency services, should that need arise. Again, this is an important safeguard.

TRO safeguards and oversight

7.16 As outlined above, Regulation 3(3) provides that when an error is made, it can be identified and quickly put right; limiting the impact that an error may have on an affected person.

7.17 Anyone affected by a TRO (where the identity of that person is known) has the opportunity to demonstrate to the applicant that they have authority to possess the mobile phone in the custodial institution, or that the device is not inside a custodial institution.

7.18 Anyone affected by a TRO (once it has been made) has the opportunity to make representations to the court and to demonstrate that they have authority to possess the mobile phone in prison, or that the device is not inside a custodial institution.

7.19 The draft Investigatory Powers Bill provides that the use of powers enabled by virtue of section 80 of the Serious Crime Act 2015, including TROs, will be overseen by the proposed Investigatory Powers Commissioner (IPC), once the Bill receives Royal Assent. It is important that the use of these powers are overseen in an independent and transparent way and oversight by the IPC will provide this.

Consolidation

7.20 This instrument does not amend existing legislation.

8. Consultation outcome

8.1 There was no consultation with the public. TRO regulations do not impact on the provision of services to, or otherwise affect, the general public. The main groups affected by TRO regulations will be individuals detained in custodial institutions and the MNOs. As it is illegal to use or possess a mobile phone in custodial institutions, there was no consultation with prisoners.

8.2 There are four MNOs in the UK. The MNOs own and operate the mobile telecommunication networks in the UK and they have the technical means to determine which mobile phones have access to those networks.

8.3 Detailed consultation with the MNOs took place over an 18 month period, prior to and during the drafting of the statutory instrument. These consultations involved regular meetings with representatives from all MNOs. Officials consulted with the MNOs on the technical feasibility of the proposals; the court order process; what actions the MNOs would be compelled to take once a TRO had been made by the court to comply with the TRO, and to set out an effective process between the TRO applicant and MNOs, to respond to errors. There were also further consultations with the MNOs as each iteration of the TRO regulations were drafted.

8.4 Officials requested and received detailed information from the MNOs in respect of costs that the MNOs may incur as they comply with the TRO regulations. Those costs are comprehensively referenced in the published Impact Assessment. The TRO regulations provide that the court can award the MNOs any costs that they incur in complying with the regulations. The Regulatory Policy Committee, an independent non-departmental public body, assessed the proposals as a low-cost regulatory measure and having a "zero net cost to business". All four MNOs support the prevention of unauthorised mobile phones in prisons and the statutory instrument as drafted.

8.5 As the TRO regulations impose regulatory measures on MNOs, the Home Office notified the European Commission under Technical Standards Directive 98/34/EC. The notification process provided that all EU members were given the opportunity, over a three month period, to comment on the TRO Regulations. No comments were received.

8.6 The Home Office and NOMS consulted with Her Majesty's Courts and Tribunal Service (HMCTS) over a 12 month period. These consultations involved regular meetings with officials responsible for civil court order processes.

8.7 The Home Office submitted a "Justice Impact Test" (JIT) to the Ministry of Justice, which outlined the likely financial impact that the TRO regulations will have on the courts and justice system. Ministry of Justice officials approved the JIT in November of 2014. The financial impact of the TRO regulations on the Ministry of Justice are referred to in the published Impact Assessment.

8.8 The Home Office and NOMS consulted with Circuit and District Judges. This consultation involved meeting with the Judiciary from the South East Region. HMCTS also consulted with the Judiciary on behalf of Home Office and NOMS officials. The Judiciary support the hearing of all TRO applications at a single County Court.

9. Guidance

9.1 The County Court will process the Telecommunications Restriction Orders under the Part 8 of the Civil Procedure Rules. Changes to the Practice Directions have been agreed by the Civil Procedure Rules Committee and will be implemented at the commencement of the regulations. The Home Office and NOMS have also consulted with court staff responsible for processing the orders.

9.2 The MNOs have agreed to produce internal guidance, where necessary, to advise staff in customer-facing roles.

9.3 NOMS has produced operational guidance and provided draft versions to the MNOs.

9.4 NOMS has agreed to produce internal guidance, where necessary, to advise prison (and other staff) on the Telecommunications Restriction Order process.

10. Impact

10.1 The statutory instrument confers regulatory measures onto the MNOs. The main impact on business arising from the statutory instrument will be when the MNOs incur costs by complying with the TRO, and blacklisting and disconnecting unauthorised mobile phones and SIM cards from their networks. The statutory instrument provides for the court to award those costs to the MNOs, and, as such, any cost that the MNOs incur will be temporary. Furthermore, a Regulatory Triage Assessment (RTA) was submitted to the Regulatory Policy Committee (RPC) for scrutiny. On 10 July 2015 the RPC agreed with the conclusions of the RTA and validated the impact on business as 'having a zero net impact on businesses'.

10.2 The statutory instrument does not create any additional burdens for charities or voluntary bodies nor will it have any adverse impact on small businesses or competition.

10.3 Impact on the public sector will fall primarily on the National Offender Management Service and Her Majesty's Courts and Tribunal Service. Resources will be made available to ensure effective implementation of the statutory instrument.

10.4 A Validation Impact Assessment is attached to this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 As the statutory instrument introduces regulatory measures onto MNOs, it includes a review clause at Regulation 11. This clause places an obligation on the Home Office to review the statutory instrument within five years of commencement. The review will consider if the statutory instrument achieved its intended aims, and to what extent. The review will additionally consider if the objectives of the statutory instrument remain valid, or if there are better ways of achieving the same aims and if there are, whether improvements can be made to reduce the regulatory impact on MNOs. The Home Office will publish a post-implementation review impact assessment in 2020.

13. Contact

13.1 Nick Barnett at the Home Office (tel: 020 7035 0766 or email: Nick.Barnett1@homeoffice.x.gsi.gov.uk) can answer any queries regarding the instrument.