

CRIMINAL JUSTICE BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

Supplementary Memorandum by the Home Office

Introduction

1. The Government published a memorandum addressing issues under the European Convention on Human Rights (“ECHR”) on introduction of the Criminal Justice Bill in the House of Commons on 14 November 2023⁽¹⁾.
2. This supplementary memorandum addresses the issues under the ECHR from Government amendments, tabled on 19 December 2023 for Commons Committee stage. This memorandum has been prepared by the Home Office.
3. The amendments considered in this memorandum are:
 - a) New clause “*Terrorist offenders*” and new Schedule “*Notification orders*” enable the terrorism notification requirements under Part 4 of the Counter-Terrorism Act 2008 to be imposed on a limited group of past offenders and brings those offenders within the potential scope of sections 43B and 43C of the Terrorism Act 2000.
 - b) Amendments to clause 16 and new clause “*Testing of persons outside of police detention for presence of controlled drugs*” enable the police to drug test individuals aged 18 or over upon arrest at a place other than a police station (under the Police and Criminal Evidence Act 1984) and for persons who test positive to be required to attend an initial and/or follow-up assessment of their drug misuse (under the Drugs Act 2005).
4. It is not considered that any other amendments tabled on 19 December give rise to issues under the ECHR.

New clause “*Terrorist offenders*” and new Schedule “*Notification orders*”

5. New clause “*Terrorist offenders*” and new Schedule “*Notification orders*” enable the Secretary of State or the police to apply to a court to impose the notification requirements under Part 4 of the Counter-Terrorism Act 2008 on certain offenders who are not presently subject to them. The court will be required to make the order if it is satisfied that the offence had a terrorist connection, and that the offence was not eligible to be determined as having such a connection when it was dealt with by the courts.
6. An order will be available only in respect of serving prisoners or offenders who are released on licence. If the order is made, the offender will be subject to the notification requirements for a period calculated by reference to the length of their sentence.

¹ Accessible here: [ECHR memo \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

7. An offender who is the subject of an order will also become subject to the police powers under sections 43B and 43C of the Terrorism Act 2000 while they are released on licence. The offender can be arrested on reasonable suspicion of a breach of their licence conditions while a decision is made on whether or not to recall them to prison (if the arrest is considered necessary to protect the public). The offender can also be stopped and searched if it is a condition of their licence that they submit to such a search and the officer conducting the search considers it necessary to protect the public from a risk of terrorism.
8. The measure engages Articles 5 and 8 ECHR but is assessed to be compatible with the rights protected under those Articles.
9. The application of the notification requirements to persons who were sentenced in the past does not engage Article 7 ECHR. Although the notification requirements are directly linked to an offender's sentence, they do not constitute a penalty. In *Ibbotson*² the ECtHR held that the application of notification requirements that were very similar to these did not amount to a penalty. In reaching that conclusion, the court emphasised that the purpose of the notification requirements was to be preventative (i.e. in terms of managing the risk posed by the offender) rather than punitive.

Article 5

10. If, following an order bringing the offender within the scope of the arrest power (section 43B), the offender is arrested, it is possible that the person's Article 5 rights may be engaged.
11. Article 5 is engaged where an act of detention constitutes a deprivation of liberty rather than a restriction of movement. It is unclear whether an arrest under this power crosses the threshold of a deprivation of liberty given the maximum period of detention of 6 hours (or 12 hours in Scotland and in Northern Ireland) and the requirement to release the prisoner sooner if possible.³ However, the Government considers that there is a lawful basis for any deprivation of liberty. This power is provided by primary legislation and was introduced following a recommendation made by the Independent Reviewer of Terrorism Legislation. It is exercisable only in relation to prisoners serving their sentence while released on licence, in connection with the anticipated recall of the prisoner. Accordingly, the power falls under a combination of Article 5(1)(a), *the lawful detention of a person after conviction by a competent court* and Article 5(1)(b) *the lawful arrest or detention... to secure the fulfilment of any obligation prescribed by law*.
12. Any deprivation of liberty is justified by the need to protect the public from a risk of terrorism. The power contains sufficient safeguards against arbitrary use such that it is both "*prescribed by law*" for the purposes of Article 5(1) and is proportionate. In particular:

² *Ibbotson v UK* [1999] Crim. LR. 153. The Court made similar findings in *Gardel v. France* (Application no. 16428/05).

³ The case of *Beghal v DPP* [2016] AC 88 ("*Beghal*"), considered this question in the context of a power to detain, question and search a person passing through an airport. See paras 52-56.

- a) The power is available only in respect of a specified group of prisoners (i.e. terrorist offenders, including those who are subject to an order following the amendments made by this Bill) who pose a higher terrorism risk than other prisoners or members of the public;
- b) The power may be exercised only where the constable has reasonable grounds to suspect that the prisoner is in breach of a licence condition and to consider that the arrest is necessary to protect the public; and
- c) The detention cannot exceed 6 hours in England and Wales (or 12 hours in Scotland and Northern Ireland) and the prisoner must be released sooner if the decision is made not to recall them.

Article 8

13. The application of the notification requirements to an offender who is the subject of an order constitutes an interference with their Article 8 rights. Similarly, if an offender is, following the order, later subjected to a stop and search (under section 43C), the search will also involve an interference with their Article 8 rights.

Notification requirements

- 14. The imposition of the notification requirements is in accordance with the law, is justified by the need to protect the public from the risk of terrorism, and is a proportionate means of achieving that justification.
- 15. Offenders will be subject to the notification requirements only if a court grants the order, which provides protection against the risk of the arbitrary application of the requirements.
- 16. In *Irfan*⁴, the Court of Appeal held that the terrorism notification requirements (the requirements were expanded in 2019, although the principles remain the same) were proportionate. The Court observed that terrorism offences fall into a special category of seriousness such that a precautionary approach is appropriate. Each requirement can clearly be linked to managing the risk associated with terrorist activity. For example, notification of foreign travel can help prevent a person travelling abroad to receive terrorist-related training.

Stop and search power

- 17. The interference that will arise if an offender is subject to a stop and search under section 43C is in accordance with the law, is justified by the need to protect the public from the risk of terrorism, and is a proportionate means of achieving the justified aim.
- 18. Section 43C was introduced following a recommendation made by the Independent Reviewer of Terrorism Legislation. It may be exercised without the need for reasonable grounds; and is therefore a so-called “suspicionless stop-and-search” power. Such powers may be in accordance with the law for the purposes of Article

⁴ *R (on the application of Irfan) v Secretary of State for the Home Department* [2012] EWCA Civ 1471.

8, provided that, considered in all the relevant circumstances, they provide adequate safeguards against arbitrary use.

19. In *Beghal*⁵ the Supreme Court held that the powers under Schedule 7 to the Terrorism Act 2000 that allow for persons to be detained, searched and questioned while passing through the UK Border, without the need for a basis of suspicion, were in accordance with the law for the purposes of Article 8.
20. In finding that the Schedule 7 power was in accordance with the law, the Court noted various factors, including that the powers could be exercised only against an identifiable group, and for a specific purpose. The power under section 43C may be exercised only in relation to terrorist offenders out on licence; and only those in respect of whom the Parole Board or the Secretary of State has concluded that it is necessary and proportionate to include this as a licence condition.⁶ The power is therefore restricted to persons who pose a substantially greater terrorism risk to the public.
21. In order to exercise the power, the constable carrying out the search must consider that the search is necessary for purposes connected with protecting the public from a risk of terrorism. While the constable does not have to have reasonable grounds for that view, he or she must honestly hold it; and if necessary be able to set out the reasons why he or she formed that belief. The officer must consider that the search is necessary rather than merely useful or expedient. Finally, officers must exercise this power in accordance with the relevant PACE Code of Practice.
22. These factors are sufficient to ensure that the search power, and its extension to this group of offenders, is proportionate.

Amendments to clause 16 and new clause “Testing of persons outside of police detention for presence of controlled drugs”

23. Amendments to clause 16 and new clause “*Testing of persons outside of police detention for presence of controlled drugs*” enable the police to test persons for controlled drugs, upon arrest, at a place other than a police station and, where a person tests positive, to require the person to attend an initial and/or follow-up assessment of their drug misuse.
24. The Government believes there is a clear link between drug misuse and crime, and that getting drug misusers into treatment can considerably reduce both their illegal use of drugs and their offending behaviour. Testing will help identify those who need treatment and facilitate a referral to the appropriate support services. Enabling this to happen following arrest in settings outside of the police station will ensure that the police have all the necessary powers to drug test those arrested where drug use is suspected to have caused or contributed to the offending

⁵ *Beghal v DPP* [2015] UKSC 79.

⁶ This may also be applied on a temporary basis, for example if the individual has been given permission to attend a particular event and the risk posed by the individual at that event was higher than it is in their everyday life.

behaviour, and swiftly carry out the testing and subsequently refer to support services.

25. There are existing powers, in sections 63B and 63C of the Police and Criminal Evidence Act 1984 (“PACE”), for the police to drug test individuals upon arrest or charge. Clause 15 of the Bill makes amendments to those powers⁷. The powers are only available when an individual is in police detention (within the meaning of section 118 of PACE). These amendments make equivalent provision to enable persons to be tested, following arrest, outside of police detention for the purpose of ascertaining whether they have a “specified controlled drug” (Class A, B and C drugs under the Misuse of Drugs Act 1971, which have been specified in regulations made by the Secretary of State) in their body.
26. Similarly, Part 3 of the Drugs Act 2005 provides the police with powers to require certain persons (who have tested positive for controlled drugs following a test under section 63B of PACE) to attend an assessment and follow-up assessment in respect of their misuse of drugs. Clause 16 of the Bill makes amendments to these powers. These amendments provide for those provisions to also apply where an individual tests positive following a test outside of custody.
27. The new powers contain the safeguards applicable to drug testing in police detention including that persons can only be tested where a person has been arrested for relevant offences (“trigger offences”) or where a constable of at least the rank of inspector has reasonable grounds to suspect a link between the offence with which a person has been charged and the misuse of a specified drug and authorises the taking of the sample. Additionally:
 - a) only persons aged 18 or over may be tested;
 - b) the taking of samples is limited to non-intimate samples (as defined in section 65(1) of PACE), such as oral saliva swabs;
 - c) a sample can only be taken after a police officer has requested the person concerned to give a sample and they have consented to do so;
 - d) before requesting a test, an officer must warn the individual that if, when requested, he fails without good cause to provide a sample he may be liable to prosecution; and in the case where the drug misuse has caused or contributed to his offence, inform him of the giving of the authorisation and of the grounds;
 - e) only constables approved by the chief officer of police of the police force to which he belongs (“approved constables”) may exercise the powers;
 - f) individuals must be given a written notice specifying why, when and where they were tested, and the outcome of that test;
 - g) an individual can only be tested once and, if tested outside of police detention, cannot be “re-tested” if subsequently taken into police detention;
 - h) the police must have regard to the relevant PACE Code of Practice when exercising this power, and the Secretary of State is required to include content on this new power in the Code (see section 66(2) of PACE).

⁷ See paragraphs 70 to 75 of the ECHR memorandum dated 14 November 2023 for analysis relating to those amendments.

28. The measures may engage Articles 5, 6 and 8 ECHR but are assessed to be compatible with the rights protected under those Articles.

Article 5

29. Article 5 (right to liberty and security) provides that no one shall be deprived of his liberty except in the cases outlined in Article 5(1). The Government considers that Article 5 may be engaged as there will be an arrest (see section 30(1) of PACE) and keeping of a person in police custody, during which time they will be drug tested.

30. Article 5 is engaged where an act of detention constitutes a deprivation of liberty rather than a restriction of movement. The new power does not, itself, confer a power of arrest nor a power to detain a person, or extend the permitted duration of detention, for the purposes of drug testing. Rather, it enables drug testing of persons who have been arrested. It is likely that, in many cases, the threshold of deprivation of liberty will be crossed following the arrest⁸ (whilst noting the duration of detention from the point of arrest may vary, subject to a maximum period of 24 hours before charge or release).

31. The Government considers there is a lawful basis for any deprivation of liberty. The detention falls within Article 5(1)(c) of the ECHR: “*the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence...*”. The procedural safeguards required by Article 5(2) to (5) will continue to apply (as following any police arrest for an offence) and will not be adversely affected by these provisions.

Article 6

32. The expansion of drug testing on arrest to locations outside of the custody suite may result in more individuals facing a criminal penalty if they refuse to provide a sample or fail to attend or stay for the duration of a drugs assessment following a positive test result, and as such engage Article 6 ECHR.

33. Additionally, the carrying out of a test after arrest but prior to taking an individual to a police station may extend the time before which an individual is reviewed by a custody officer and/or is able to access legal advice at the police station. This may engage the individual’s fair trial rights relating to the offence for which they were arrested, and in particular the right to legal advice under Article 6(3)(c).

New criminal offences

34. The amendments make it a criminal offence to refuse to provide a sample, when requested (under new section 32A of PACE) and, if referred for an initial or follow up drug assessment (under sections 9 or 10 of the Drugs Act 2005), a criminal offence to fail to attend or stay for the duration of that assessment.

⁸ See, for example, *Krupko and Others v Russia*, (App. No 26587/07), *Foka v Turkey* (App. No 28940/95) and *Gillan and Quinton v the United Kingdom* (App. NO 4158/05).

35. The provisions contain express legislative safeguards: the individual must be reminded that refusal to provide a sample is a criminal offence and may not be tested more than once following arrest. Additionally, the usual safeguards, within the criminal justice system, which assure individuals right to a fair trial when investigated and/or prosecuted for a criminal offence will apply. As such, the measure complies with Article 6.

Access to legal advice

36. Article 6(3) provides the right of an individual to “*defend himself in person or through legal assistance of his own choosing*”. Access to legal advice is a fundamental aspect of the right to a fair trial.

37. Drug testing, under the new powers, is not an investigative act relating to the offence for which the individual was arrested. As such, we do not consider there is a requirement for legal advice prior to the testing taking place (see *Srsen v. Croatia*⁹). An individual may challenge the fact of their testing through judicial review and/or a private law claim (where appropriate) and the requirement for the police to serve a notice on the individual relating to their test detailing where, when and why they were tested (new section 32A(7) of PACE) will ensure this right can be effectively exercised. The Government considers this assures compliance with Article 6 of the ECHR in respect of the act of drug testing.

38. Permitting drug testing to occur, following arrest, outside of police detention may, in some cases, result in a short extension of the time period before the individual is able to access legal advice. Whilst the right of access to a lawyer applies from the early stages of an investigation¹⁰ this does not necessitate that legal advice must be immediately available. In *Kennedy v CPS*, the court held that whilst the right to a fair trial is in play from the outset of a police investigation, that right “*does not spell out a right to legal advice at any particular stage*”¹¹. Additionally, a delay in access to legal advice, even in the absence of compelling reasons, does not breach Article 6 where it can be established that the proceedings overall are fair (see *Beuze v Belgium*¹²).

39. Whether there is, in practice, a delay will be fact sensitive. For example, the individual might not request advice, the police might enable access to legal advice by telephone or determine that the individual should be taken to the police custody suite instead of being tested or may decide that the act of testing does not result in unfairness to the individual. This will be a decision for the police to make on the individual facts of each case (and in light of section 58 of PACE which relates to access to legal advice).

40. Should a delay materialise, the Government consider this compatible with Article 6. In all cases where an individual is arrested outside of police custody, there will

⁹ Application No. 30305/13.

¹⁰ See *Simeonovi v. Bulgaria*, App. No. 21980/04, which held the right applies from the moment there is a “criminal charge” against an individual.

¹¹ [2002] EWHC 2297 (Admin) at paragraph [32]

¹² App. No. 71409/10

be a period of time taken to transport them to the police station. Section 30(1A) of PACE requires this to occur as soon as practicable following arrest. This requirement will apply to these new powers subject to the limited qualification that it does not prevent a delay for “*such time as is reasonable for the purposes of taking a sample*”. As such, any delay is expected to be short (the average test is expected to take between 13 to 35 minutes). There are existing frameworks for acts to occur which may delay that transportation (see e.g. sections 30(10A) and 32 of PACE). The Government therefore does not anticipate that drug testing will give rise to any unfairness to the individual in respect of the investigation of the offence for which they were arrested, noting the short period of time taken to carry out a test and the fact that the test is not an investigative act (e.g. it is not police questioning).

Article 8

41. The carrying out of a drug test for a specified controlled drug may constitute an interference with a person’s Article 8 rights to bodily and physical integrity. *Peters v Netherlands* and *X v Austria*¹³ show that the compulsory taking of a sample, even if of minor importance/interference, engages Article 8. If the testing is to occur in a public place, in the view of members of the public, this may further interfere with individuals Article 8 rights.
42. Additionally, the disclosure of information obtained from a sample taken from a person under the new powers for the purpose of informing decisions as to bail, conditional cautions, sentencing and/or drug misuse assessments, may interfere with their rights to private life.

Drug testing – bodily and physical integrity

43. The drug testing of an individual is in accordance with the law, as it will be prescribed in primary legislation (new sections 32A to 32D of PACE), with clear and detailed safeguards. These include the arrest condition, safeguards as to the types of samples which can be taken and by whom and the number of tests which may take place (one only).
44. The interference is justified by the need to prevent disorder or crime. Testing can only take place where an individual has committed either a trigger offence or another offence which an officer of at least the rank of inspector has reasonable grounds for suspecting drug misuse has caused or contribute to. The purpose of testing is to identify drug misusers who need treatment, so as to reduce both their illegal use of drugs and their offending behaviour.
45. The PACE Code of Practice will contain further guidance on how individual’s privacy can be protected, including the types of locations where testing should occur (such as enclosed locations and/or police vehicles, out of view of the general public). These safeguards will mitigate against the risk of arbitrary application of the power.

¹³ App. No. 21132/93 and 8278/78.

Disclosure of information

46. The disclosure of information obtained from a sample is in accordance with the law, as the circumstances in which such information may be disclosed (and for what purpose) are set out in new section 32D of PACE.
47. The interference is justified by the need to prevent crime and disorder and is a proportionate means of achieving that aim. Knowledge of the fact of an individual's drug misuse may inform any decision by the police or a court about granting bail, issuing a conditional caution, or the appropriate sentence or supervision or release requirements. Similarly, information relating to the outcome of the test will be relevant to any drug misuse assessment under the Drugs Act 2005 (or prosecution for failure to attend such assessment), or more generally ensuring that appropriate advice and treatment is made available to the person. This ensures that suspect and offender management can take account of, and where appropriate seek to address, individual's drug misuse, whether by conditions as to bail or requirements to attend treatment etc.

Home Office
19 December 2023