

## CRIMINAL JUSTICE BILL

### SUPPLEMENTARY DELEGATED POWERS MEMORANDUM (CJB27)

The Government has tabled amendments to the Criminal Justice Bill for Commons Committee stage. These amendments include two new delegated powers. This supplementary memorandum explains why the new powers have been taken and the justification for the procedure selected.

**New clause “*Power to seize bladed articles etc: armed forces*” – new section 93ZD(11) of the Armed Forces Act 2006: Power to make provision in respect of appeals against refusal of an application to a commanding officer for an order for delivery of seized bladed articles**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative procedure

Purpose of the power

1. Clause 18 creates a new police power to seize, retain and destroy legally held bladed articles from private property when a constable is lawfully on the private premises and they have reasonable grounds to suspect the bladed article will likely be used in connection with unlawful violence. Clause 18(6) to (8) enable a person claiming to be the owner of a seized bladed article to apply to a magistrates’ court to recover the article. A magistrates’ court may make an order for the return of the article if they are satisfied that the claimant is the owner of the article and it would be just to make such an order. In determining whether it was just to make an order, a magistrate would, amongst other things, be expected to consider whether the test for the seizure of the article has been made out, namely that there were reasonable grounds for suspecting that the relevant article would be likely to be used in connection with unlawful violence. Subsection (8) provides that a relevant article cannot be disposed of within six months of its seizure and then only on the conclusion of any proceedings in respect of the recovery of the article.
2. New clause “*Power to seize bladed articles etc: armed forces*” confers equivalent powers to those in clause 18 for the service police, that is the Royal Military Police, the Royal Navy Police and the Royal Air Force Police. Where the owner of a seized bladed article seeks to recover the article, an application is to be made to their commanding officer rather than to a magistrates’ court (new section 93ZD(7) of the Armed Forces Act 2006 (“the 2006 Act”). New section 93ZD(10) then provides for a right of appeal to a judge advocate (as defined in section 362 Armed Forces Act 2006) against a decision of a commanding officer regarding delivery of the relevant article. New section 93ZD(11) enables the Secretary of State, by regulations, to make further provision in respect to the practice and procedure which is to apply in connection with applications for a determination under section 93ZD(7) and appeals under section 93ZD(10). Such regulations may also make provision for conferring functions on judge advocates in relation to appeals under section 93ZD(10).

### Justification for taking the power

3. The Armed Forces Act 2006 allows the Secretary of State to make rules of court for the Court Martial, Service Civilian Court and Summary Appeal Court. Where it is not clear which Court would have jurisdiction, the 2006 Act generally confers functions on an individual judge advocate or upon a commanding officer. Where this is done, it is necessary to prescribe specific procedural rules which fall outside the individual court rules. An example of this is section 94 of the 2006 Act, and the Armed Forces (Disposal of Property) Regulations 2023 which were made under that section. New section 93ZD(7) deals with a similar issue to that dealt with in section 94 - the return of property that has come into the possession of the service police – and so similar powers are required.

### Justification for the procedure

4. By virtue of section 373(4) of the 2006 Act, regulations made under new section 93ZD(11) are subject to the negative procedure. The powers in section 93ZD(11) relate to procedure for appeals before a judge advocate. With the exception of rules as to the constitution of the Court Martial, and the sentencing powers of the Court Martial where a person elects for trial by Court Martial, which are subject to the draft affirmative procedure by virtue of section 373(3)(f) of the 2006 Act, all of the Secretary of State's powers to make procedural rules for the service courts are subject to the negative procedure. It is therefore considered appropriate that the power under section 93ZD(11) should be subject to the negative procedure.

### **New clause “Testing of persons outside of police detention for presence of controlled drugs” – new section 32C(1) of the Police and Criminal Evidence Act 1984: Powers to specify controlled drugs and trigger offences for the purposes of new section 32A of PACE**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative procedure for regulations specifying controlled drugs; draft affirmative procedure for specifying trigger offences

### Purpose of the power

5. Currently, the police have a statutory, discretionary power to drug test for specified Class A drugs in police detention, as provided for by sections 63B and 63C of the Police and Criminal Evidence Act (“PACE”) 1984 (as inserted by section 57 of the Criminal Justice and Court Services Act 2000 (the “2000 Act”). Specifically, section 63B(1) of PACE provides the police with the power to take a sample of urine or a non-intimate sample from a person in police detention for the purpose of ascertaining whether they have any specified Class A drug in their body. For this discretionary power to be triggered, certain conditions must be met, including the arrest condition or the charge condition. The arrest condition is that the person has been arrested but not charged for an offence and either that offence is a trigger

offence; or a police officer of at least the rank of inspector has reasonable grounds for suspecting the misuse by that person of a specified Class A drug caused or contributed to the offence and has authorised the sample to be taken (section 63B(1A)). The charge condition is that the person concerned has been charged with a trigger offence; or a police officer of at least the rank of inspector has reasonable grounds for suspecting that the misuse of that person of any specified Class A drug caused or contributed to the offence and has authorised the sample to be taken (section 63B(2)). Drug testing on arrest can take place if an individual is aged 18 or over; and drug testing on charge can take place if an individual is aged 14 or over. "Class A drug" has the same meaning as in the Misuse of Drugs Act 1971. "Specified" (in relation to a Class A drug) and "trigger offence" have the same meanings as in Part III of the 2000 Act (section 63C(6)). Section 70(1) of the 2000 Act provides that "specified" (in relation to a Class A drug) means specified by an order made by the Secretary of State; and "trigger offence" has the meaning given by Schedule 6 to that Act (which lists trigger offences). Section 70(2) of the 2000 Act confers a power on the Secretary of State to amend, by order, Schedule 6 to that Act so as to add, modify or omit any description of offence.

6. Clauses 15 and 16 of the Bill expand the drugs that can be tested for in police detention (on arrest for individuals aged 18 and over; after charge for individuals aged 14 and over), and the subsequent drug assessment regime for the misuse of drugs, to "specified controlled drugs", which includes Class A, Class B and Class C drugs.
7. Clause 15(2) and (3) substitutes "Class A" in each place it appears in section 63B of PACE, for "controlled". Clause 15(3)(b)(ii) replaces the definitions of "specified" and "trigger offences" in section 63C of PACE with the following definitions:
  - "specified controlled drug" means a controlled drug (within the meaning of the Misuse of Drugs Act 1971) specified in regulations under section 63CA;
  - "trigger offence" means an offence specified in regulations under section 63CA.
8. Clause 15(4) in turn inserts new section 63CA into PACE after section 63C of PACE which confers the power on the Secretary of State to specify controlled drugs and trigger offences for the purposes of section 63B. New section 63CA(2) enables regulations made under new section 63CA(1) to make different provision for different purposes or different areas; and make transitional, transitory or saving provision. Amongst other things, this would enable regulations to specify different trigger offences for the testing of Class A, Class B or Class C drugs. Clause 15(6) repeals Schedule 6 to the 2000 Act and the associated power to amend that Schedule as there is now no drug testing or assessment provision in the 2000 Act which relies upon the definition of trigger offences.
9. New clause "Testing of persons outside of police detention for presence of controlled drugs" inserts new sections 32A to 32D into PACE. New section 32A provides for the testing of specified controlled drugs where a person has been arrested for an offence which is a trigger offence or a constable of at least the rank of inspector has reasonable grounds for suspecting that the misuse by the person of a specified controlled drug caused or contributed to the offence and has authorised the sample to be taken at a place other than a police station. This is to

ensure the police have all the necessary powers to identify those whose drug use may have caused or contributed to their criminality and refer to treatment and support services, and allow for testing to take place swiftly following arrest. New section 32C enables the Secretary of State, by regulations, to specify “specified controlled drugs” and “trigger offences” for the purposes of new section 32A. New section 32C(2) enables regulations made under new section 32C(1) to make different provision for different purposes or different areas; and make transitional, transitory or saving provision.

#### Justification for taking the power

10. The amendments to PACE made by new clause “Testing of persons outside of police detention for presence of controlled drugs” will enshrine on the face of primary legislation the power to drug test a person upon arrest at a place other than a police station for any specified controlled drug. It is appropriate to then provide a power to the Secretary of State to specify in secondary legislation the particular controlled drugs for which arrested persons may be tested for as Parliament will have approved in principle of such drug testing at a place other than a police station during the passage of the Bill. Further, specifying the relevant controlled drugs in regulations enables the list to be readily updated in response to emerging drug trends and threats to ensure the police have the appropriate power to divert individuals to drug treatment and support services, alongside, development in new technologies, that will allow testing of additional drugs in the future. The power for the Secretary of State to specify the drugs within scope of drug testing at a place other than a police station is in line with the existing legislative framework for drug testing in police detention, where the Secretary of State can specify the Class A drugs that can be tested for. This approach also recognises that the list of controlled drugs in Schedule 2 to the Misuse of Drugs Act 1971 is itself open to amendment by secondary legislation (see section 2(2) of that Act). Further, the approach taken in new section 32C of specifying controlled drugs for the purposes of drug testing at a place other than a police station aligns with the approach taken in new section 63CA in relation to specifying controlled drugs for the purposes of drug testing in police detention.
11. As regards the power to specify what constitutes a trigger offences for the purposes of new section 32A of PACE, it is considered necessary for the list of trigger offences to be so specified in secondary legislation in order to tackle new and emerging drug-related criminality or the creation of a new offence. Again, this is analogous to the existing power in section 70(1) of the 2000 Act, albeit that that is a power to modify the list of trigger offences set out in primary legislation. It is envisaged that the regulations made under new section 32C(1)(b) of PACE will replicate the list of offences in Schedule 6 to the 2000 Act. Further, the approach taken in new section 32C of specifying trigger offences for the purposes of drug testing at a place other than a police station aligns with the approach taken in new section 63CA in relation to specifying controlled drugs for the purposes of drug testing in police detention.

## Justification for the procedure

12. By virtue of new section 32C(4) and (5) of PACE, the power to specify the controlled drugs within scope of drug testing in police detention is subject to the negative procedure while the power to specify trigger offences is subject to the draft affirmative procedure. This is in line with the existing powers in section 70(1) of the 2000 Act and the approach taken in new section 63CA in relation to specifying controlled drugs and trigger offences for the purposes of drug testing in police detention. The negative procedure for the power to specify controlled drugs is considered to afford an appropriate level of parliamentary scrutiny as there are existing processes for controlling substances under the Misuse of Drugs Act 1971, including the requirement to consult with the Advisory Council on the Misuse of Drugs and established Parliamentary processes prior to controlling a drug under the 1971 Act. The draft affirmative procedure is considered appropriate for the power to specify trigger offences as any regulations adding to the list of trigger offences would have the effect of bringing more persons within the drug testing regime without requiring a police officer at least the rank of inspector to authorise the drug test, where there are reasonable grounds to suspect the drug use caused or contributed to the offence.

**Home Office**

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