

CRIMINAL JUSTICE BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
Supplementary Memorandum by the Ministry of Justice

Introduction

1. This memorandum supplements memorandums dated November¹ and December² 2023, and January³ 2024 prepared by the Home Office and Ministry of Justice, which addressed issues under the European Convention on Human Rights (“ECHR”) in relation to the Criminal Justice Bill.
2. This supplementary memorandum addresses the issues under the ECHR that arise in relation to further Government amendments, tabled on 18 January 2024 for Commons Committee stage. This memorandum has been prepared by the Ministry of Justice.
3. The amendments considered in this memorandum are:
 - a) New clause “*Sexual activity in presence of child etc*” amends the offences set out in sections 11, 18, 32, 36 and 40 of the Sexual Offences Act 2003, to expand the circumstances in which it is an offence for sexual activity to take place in the presence of a child or a person with a mental disorder.
 - b) New clause “*Administering etc harmful substances (including by spiking)*” replaces sections 23 – 25 of the Offences Against the Person Act 1861, modernising the language of the existing offences to make clear that ‘spiking’ is an offence. The clause also makes the relevant offences triable either way.
4. It is not considered that any other amendments tabled on 18 January give rise to issues under the ECHR.

New clause: “*Sexual activity in presence of child etc*”

5. New clause “*Sexual activity in presence of child etc*” amends the offences set out in sections 11, 18, 32, 36 and 40 of the Sexual Offences Act 2003 which criminalise sexual activity that takes place in the presence of a child or a person with a mental disorder, or where the child or person is in a place from which the perpetrator can be observed, in certain circumstances.
6. A common element of the existing offences is the requirement that for the purposes of obtaining sexual gratification, the defendant (A) was engaged in sexual activity with the knowledge or belief that the child or person with a mental disorder (B) was aware, or with the intention that they should be aware, that A was engaging in sexual activity. The clause amends the existing offences to remove this requirement.

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

² Accessible here: [Supplementary Memorandum \(publishing.service.gov.uk\)](#)

³ Accessible here: [ECHR \(publishing.service.gov.uk\)](#)

7. The measure engages Articles 5, 7 and 8 of the ECHR but is assessed to be compatible with the rights protected under those Articles.

Article 5

8. Article 5, which provides the right to liberty and security, sets out that no one shall be deprived of their liberty except in the cases listed under Article 5(1) and in accordance with a procedure prescribed by law. The relevant exception here is Article 5(1)(a), namely the lawful detention of a person after conviction by a competent court.
9. The penalties for the offences will remain unchanged by the amendments and are set out in primary legislation. As such they are in accordance with a procedure prescribed by law and would fall within the permissible grounds in Article 5(1). The defendant will be able to appeal against conviction and the resulting sentence in the usual ways.
10. In principle, matters of appropriate sentencing fall outside the scope of the Convention as it is for member states, not the Court, to decide what the appropriate sentence for any given offence is. It is acknowledged that for detention to be lawful there must not only be a basis in domestic law; it must also not be arbitrary. It is the Government's view that the broadening of the existing offences has no significant impact on Article 5 rights given the nature of the amendment. The additional behaviour that will be captured as a result of the amendments is culpable and may cause significant harm to the victim if they later become aware of the behaviour or where they are indeed aware of the perpetrator's behaviour at the time of the act (even if the offender did not intend, know or believe that the victim was indeed aware). The existing penalties are proportionate to the nature and the severity of the amended offences, and the causal connection between the conviction and the deprivation of liberty is maintained. The amendments are therefore compatible with Article 5.

Article 7

11. Article 7 provides that a punishment cannot be imposed other than where it is prescribed by law. The elements of the existing offences, and the maximum penalty for each offence, will continue to be clearly set out in a way in which a member of the public can understand. The amendments will not have any retrospective effect. The amendments are therefore compatible with Article 7.

Article 8

12. Article 8 - which protects the right to respect for family and private life - is engaged. The existing offences are listed in Schedule 3 to the Sexual Offences Act 2003, meaning that where the criteria are met, an offender will be made subject to notification requirements in accordance with Part 2 of that Act - which requires offenders to notify the police of various personal details, on an annual basis as well as whenever these details change, including: name, address, date of birth, passport and national insurance number.

13. The broadening of the existing offences means that some acts of sexual activity in the presence of a child or person with mental disorder that are not currently captured by the criminal law will be, once the amendments are commenced. As such, notification requirements will be imposed in respect of some behaviour where currently they cannot be.
14. Any interference with an offender's Article 8 rights is justified in accordance with Article 8(2). The amended offences will retain the requirement that the prosecution must prove a link between A acting "for the purpose of obtaining sexual gratification" and the presence or observation of B. As such, there is a clear and rational connection between the offences and the objectives of the notification requirements such that the imposition of notification requirements in these circumstances is a proportionate means of achieving a legitimate aim.

New clause: *Administering etc harmful substances (including by spiking)*

15. New clause "*Administering etc harmful substances (including by spiking)*" amends sections 23 - 25 of the Offences Against the Person Act 1861 ("the OAPA") to make clear that 'spiking' is caught by those offences. By 'spiking', we mean the surreptitious administration of a substance, whether by adding it to food or drink or otherwise, without a person's consent, and usually with an intent to cause some harm to, or incapacitate, that person.
16. The amendments do not substantively change the scope of the existing offences, and the maximum penalties will remain unchanged. The offences are currently indictable only, and the amendment will make them triable either way.
17. The measure engages Articles 5 and 7 of the ECHR but is assessed to be compatible with the rights protected under those Articles.

Article 5

18. Article 5 ECHR sets out that no one shall be deprived of their liberty other than in accordance with a procedure prescribed in law, and in certain specific scenarios. One such permitted scenario is detention following a conviction by a competent court. The measure therefore falls within one of the permissible grounds under Article 5(1). The offences, as clarified by the amendments, will continue to be set out in primary legislation. The measure therefore meets the procedural requirement.
19. For detention to be lawful there must not only be a basis in domestic law, but it also must not be arbitrary. The maximum penalties for the relevant offences (five years' imprisonment for section 24, ten years' imprisonment for section 23) are not changing. It is the Government's view that those penalties are not arbitrary and are proportionate to the nature and severity of the offending. They are in line with similar offences, for example section 61 of the Sexual Offences Act 2003 (Administering a substance with intent), which has a maximum penalty of ten years' imprisonment. The offences are being made triable either way, and in the case of a summary conviction, the maximum penalties will be the general limit in the magistrates' court for both offences, which is currently six months.

Article 7

20. Article 7 provides that a punishment cannot be imposed other than where it is prescribed by law. The maximum penalties for the offences are not changing and will remain clearly defined on the face of the provisions. The changes will only take effect prospectively.
21. The Government's view is that the amendments will improve the Article 7 position, given that the amended provisions will more clearly set out the elements of the offences compared to the current statutory language. This will improve public understanding of the scope of the criminal conduct caught by the offences, and of the nature of the penalties.
22. The amendments are therefore compatible with Article 7.

Ministry of Justice
18 January 2024