

CRIMINAL JUSTICE BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

Supplementary Memorandum by the Home Office and Ministry of Justice

Introduction

1. This memorandum supplements memorandums dated November¹, December² 2023 January³ and 8 May 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 Government amendments, tabled on 10 May 2024 for Commons Report stage. This memorandum has been prepared by the Home Office and Ministry of Justice.
3. The amendments considered in this memorandum are:
 - a) New clauses / Schedule:
 - a. *“Possession of pyrotechnic articles at protests”*,
 - b. *“Concealing identity at protests: offence”*,
 - c. *“Concealing identity at protests: designating localities and giving notice”*,

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

² Accessible here: [4240 \(parliament.uk\)](https://parliament.uk)

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

- d. *“Concealing identity at protests: procedure”*,
- e. *“Damage, disruption etc in course of protest: exclusion of defence of lawful or reasonable excuse”*,
- f. *“War memorials”*,
- g. new Schedule *“Specified war memorials”*, and
- h. *“Causing serious disruption to road transport infrastructure”*.

b) New clauses / Schedule:

- a. *“Cuckooing”*,
- b. *“Cuckooing: interpretation”* and
- c. new Schedule *“Cuckooing: Specified Offences”*.

c) New clause *“Automatic suspension of parental responsibility”*

4. It is not considered that any other amendments tabled on 10 May give rise to issues under the ECHR.

New clause: *“Possession of pyrotechnic articles at protests”*

5. This clause creates a new offence of knowingly possessing a pyrotechnic article, including fireworks and flares, when taking part in a protest event: including a public assembly or procession, or a one-person protest. Assemblies of two or more persons in public places which are at least partly open to the air, or those within the jurisdiction of the British Transport Police (as set out in section 31 of the Railways and Transport Act 2003), will fall within scope. The offence will be punishable on summary conviction by a level 3 fine. There is a reasonable excuse

defence, which is partially defined to include possession for use in connection with work.

6. The measure engages Articles 9, 10 and 11 ECHR, but is assessed to be compatible with the rights protected under those Articles.

Articles 10 and 11 ECHR

7. The new clause prohibits certain conduct at protest events by the creation of an offence, which may in some circumstances interfere with individuals' ECHR Article 10 (freedom of expression) and 11 (freedom of assembly) rights.
8. The offence is sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2), noting that European Court of Human Rights ("ECtHR") case law has established that the foreseeability requirement may still be satisfied where the person affected has to seek appropriate legal advice (*Liivik v Estonia* 12157/05).
9. A pressing social need for these measures is demonstrated by the need to deter disorderly and potentially dangerous conduct in public spaces involving pyrotechnics. For example, there have been instances where fireworks have been fired at police officers. ECtHR case law has established that states have a margin of appreciation in assessing whether such a need exists (*Sunday Times v UK* (No. 1) 6538/74).
10. The measures pursue the legitimate aims of preventing crime and disorder and of public safety. It is assessed that any interference with Articles 10 and/ or 11 will be justified and proportionate in achieving these aims, taking into account that:

- a. the offence prohibits very specific conduct by those attending public processions and assemblies (possession of pyrotechnic articles). It does not prevent protest participation or otherwise impose a blanket prohibition on exercise of freedom of expression or assembly rights.
- b. The offence will also not impact those exercising Article 11 rights in attending assemblies and processions with a cultural/ historic or customary focus, which do not involve protest – for instance Guy Fawkes Night or Chinese New Year celebrations. In addition, a defence will be available where a person charged can demonstrate possession in connection with work, to safeguard persons attending a protest event who possess fireworks because they are on their way to or from work-related commitments involving pyrotechnics.
- c. The interference is balanced against the fact that the measures will assist in preventing and deterring conduct which has the potential to cause very significant disorder, criminal behaviour (particularly in relation to property damage and personal injury) and risk to public safety.
- d. ECtHR case law on Article 10 has established that ‘compelling public safety considerations’ may be relevant and sufficient reasons for a domestic court to convict for acquisition of illegal fireworks (*Mikkelsen and Christensen v Denmark* 22918/08).

Article 9 ECHR

11. Article 9 may be engaged because fireworks or other pyrotechnic articles are traditionally used at some events with a religious/ belief focus. Only persons

participating in protest events will fall within scope of the offence, so it is not anticipated that those in attendance at cultural or religious events incorporating pyrotechnic displays will be impacted. The defence available for protestors who are in possession for work purposes will safeguard persons attending a protest event on their way to or from working at such events.

12. In very specific circumstances where an event has both a protest and religious/belief focus, it is assessed that any interference with Article 9 rights will be necessary and proportionate for the reasons set out above.

New clauses: “*Concealing identity at protests: offence*”, “*Concealing identity at protests: designating localities and giving notice*” and “*Concealing identity at protests: procedure*”

13. These clauses create a new offence of wearing or otherwise using any item wholly or mainly for the purpose of concealing identity in a locality designated by police. A locality can be designated on the basis of reasonable belief that a public protest may take place or is taking place and has involved or is likely to involve offence commission; and that designation is expedient to prevent or control offence commission.

14. As this measure relates to the policing of assemblies and processions, it has the potential to interfere with individuals’ ECHR rights under Article 10 (freedom of expression) and 11 (freedom of assembly) as well as Article 9 (freedom of thought, conscience and religion). It also engages Article 14 (prohibition of discrimination) in combination with the aforementioned rights. However, the provisions are assessed to be compatible with the rights protected under the Convention. The requirement for the item to be worn for the purpose of concealing identity should

also assist in ensuring that those wearing face coverings for other reasons are not caught by the offence.

Articles 9, 10 and 11 ECHR

15. Articles 10 and 11 are qualified rights and the measure is a necessary and proportionate means of achieving the legitimate aim of protecting public safety, and the prevention of disorder and crime. Article 9 is also a qualified right in so far as it protects a person's right to manifest their religion, and interference with a person's Article 9 rights can be justified in the interests of public safety and for the protection of public order, provided it is necessary and proportionate. The offence is considered to be sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2) and by Article 9(2). There is a requirement on police to ensure that all reasonable steps are taken to notify the public of a locality's designation, and in relation to any time extension for designation, to assist in ensuring foreseeability; and an offence under the provisions is only committed if this requirement is complied with.

16. A pressing social need for these measures is demonstrated by the disorderly conduct witnessed at certain protests. There is evidence from the police that some protestors are using face coverings to conceal their identity as a means of evading conviction for criminal offences committed during protests, and that the existing police powers to require the removal of such face coverings are not effective in preventing this.

17. The measure is proportionate noting the very limited context in which wearing a relevant item will be a criminal offence. It will only be an offence where a police designation is in place, which requires a police officer of the rank of inspector or

above to have the reasonable belief that a public protest may take place or is taking place in a particular locality that is likely to involve (or has already involved) the commission of offences, and it is expedient to designate, in order to prevent or control offence commission. Such an authorisation can only last for 24 hours (unless extended by 24 hours on the basis that offences have in fact been committed or suspected to have been committed in connection with the protest).

18. Furthermore, under section 60AA of the Criminal Justice and Public Order Act 1994, the police already have the power to require a person to remove any item used to conceal their identity when a police authorisation is in place, and as such the Government's position is that this measure does not increase the interference with Convention rights in any significant way. It provides a more robust measure to ensure public safety and prevent crime and disorder by deterrence, whilst not going further than necessary.

Article 14 ECHR

19. There are a number of ways in which Article 14 may potentially be engaged in conjunction with Articles 9, 10 and 11. For example, it is possible that the police may take action against more people of certain religions, more women than men, more people with disabilities (who may be more likely to wear face coverings for health reasons than those who do not have a disability) and/or more people in urban areas than rural areas (where there is a greater prevalence of protests likely to involve the commission of offences) which may impact minority ethnic communities. However, any such impact, if it materialised, would be objectively justified; arrest and charge will be dependent on the offence being made out – and as such, action will only be taken against persons who are wearing the item wholly

or mainly for the purpose of concealing their identity. Those wearing face coverings for religious or health reasons are not within scope of the offence.

New clause: “*Damage, disruption etc in course of protest: exclusion of defence of lawful or reasonable excuse*”

20. This new clause provides that protest does not constitute a reasonable or lawful excuse in relation to the following criminal offences: criminal damage (section 1 of the Criminal Damage Act 1971) of any degree to private property and all more than minor damage; highway obstruction (section 137 of the Highways Act 1980); failure to comply with a police direction regarding activities prohibited in Parliament Square (section 143 of the Police Reform and Social Responsibility Act 2011); statutory public nuisance (section 78 of the Police, Crime, Sentencing and Courts Act 2022); ‘locking on’, causing serious disruption by tunnelling/ being present in a tunnel, obstructing major transport works and interference with key national infrastructure (sections 1, 3, 4, 6 and 7 respectively of the Public Order Act 2023).

21. Given the provisions exclude protest as a reasonable/lawful excuse from certain offences, they have the potential to render police action, prosecution and conviction more likely in relation to specific conduct during protests. As such, they potentially interfere with ECHR Article 10 (freedom of expression) and 11 (freedom of assembly) rights. However, the Government’s view is that the amended offences are compatible with the rights protected under those articles.

Articles 10 and 11 ECHR

22. In the first instance, the offences of locking on, tunnelling and being present in a tunnel involve acts causing, or being capable of causing, serious disruption and

are subject to a requirement of intention or recklessness as to that consequence. Public nuisance requires proof of an act or omission creating a risk of, or causing, serious public harm or obstructing the public (or a section thereof) from enjoying or exercising rights, subject to an intention/ recklessness requirement as to the consequences. Conduct which engages these offences is likely to fall outside the protections of ECHR Articles 10 and 11 (*Taranenko v. Russia* 19554/05; *Stankov and the United Macedonian Organisation Ilinden v. Bulgair*, 29921/95 and 29225/95; and *Galstyan v. Armenia*, 26986/03).

23. The amended offences will all be sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2). The amendments pursue the legitimate aims of prevention of crime and disorder, and protection of the rights of others. All of the relevant offences involve interference with, or obstruction of either specific projects with significant social benefit, or with everyday life. There is a pressing social need to enable police and the criminal justice system to effectively address (and thereby also deter) significant interference with people's everyday activities, in circumstances where protest action has frequently had a detrimental impact on the lives of a significant proportion of the law-abiding members of the public.

24. In the instance, anticipated to be in very limited circumstances, that conduct engaging the locking on and tunnelling offences or public nuisance falls within the protections of ECHR rights, the Government considers that the amended offences are very likely to fall within the state's margin of appreciation to define the offence so as to ensure the proportionality of prosecution and conviction. For example, the courts have determined that more than minor criminal damage and aggravated

trespass do not require proportionality assessments as the ingredients of the offences ensure that conviction will be proportionate.

25. Furthermore, the amendments do not prevent a proportionality assessment being carried out in individual cases by the police, prosecution or courts where appropriate in relation to arrest, prosecution and conviction, and in relation to sentence in cases where conviction is deemed proportionate. The Supreme Court confirmed its view, in considering the ECHR proportionality of the Northern Ireland abortion 'safe access zones' legislation (*Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32), that the necessity for a proportionality assessment in relation to criminal offences, and assessment as to whether the ingredients of an offence are inherently proportionate, does not hinge on the availability of a lawful or reasonable excuse provision.

New clause “*War memorials*”

26. The new clause prohibits the climbing of specified war memorials by the creation of an offence. The specified war memorials are set out in [schedule] and include war memorials which are designated as Historic England National Heritage Category I sites and which are publicly accessible. The measure potentially engages Articles 10 and 11 ECHR, but is assessed to be compatible with the rights protected under those Articles.

Articles 10 and 11 ECHR

27. Exercise of police powers in relation to the offence, prosecution, conviction and sentence may in some circumstances, where relevant conduct occurs during

protests, interfere with individuals' ECHR Article 10 (freedom of expression) and 11 (freedom of assembly) rights.

28. It is the Government's view that the offence is sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2).

29. A pressing social need for this measure has been demonstrated by recent activity involving protestors climbing on war memorials, causing significant public concern about the regular and persistent presence of large numbers of protestors in close proximity to culturally and historically significant monuments. There is concern about the potential for damage as well as the fact that the activity implies a lack of respect for the importance of such monuments to the wider public.

30. The measure pursues the legitimate aims of preventing crime and disorder and of public safety, by reducing the risk of criminal damage to monuments of significant historical and cultural importance, as well as reducing the risk of injury. Any interference with Articles 10 and/ or 11 will be justified and proportionate in achieving these aims, taking into account that a person's right to freedom of expression (under Article 10) and freedom of assembly (under Article 11) will not be significantly restricted by a prohibition on climbing on specified war memorials, which are not designed for that purpose. It will remain possible for a person to exercise their right to protest on or near war memorial sites, provided they do not seek to climb them.

31. Furthermore, when considering proportionality in this context, the ECtHR has been shown to place significant weight on the possibility of harm or insult being caused to public monuments, such as in the case *Handzhiyski v. Bulgaria* 10783/14 and the case *Sinkova v. Ukraine* 39496/11. The war memorials specified in the offence

are all Grade 1 listed buildings on the National Heritage List for England, which are therefore already deemed to have legal protection given their historical importance to the country.

New clause: “*Offence of causing serious disruption to road transport infrastructure*”

32. This new clause amends the Public Order Act 2023 creating a summary only offence prohibiting acts causing, or capable of causing, serious disruption to two or more individuals’ or an organisation’s use or operation of road transport infrastructure, where those acts are intended to have that effect. ‘Serious disruption’ is defined in section 34 of the 2023 Act, i.e. physical obstruction preventing or hindering to a more than minor degree, day-to-day activities, construction/ maintenance works or related activities; prevention or more than minor delay to time-sensitive product delivery; or prevention or more than minor disruption to access to essential goods or services. There is a reasonable excuse defence, although acts carried out as part of, or furthering, a protest do not constitute such excuse. There will also be a statutory defence for acts done wholly or mainly in contemplation or furtherance of a trade dispute. The maximum penalty will be the summary maximum custodial sentence (currently six months) or a fine.

33. The measure will in many circumstances engage Article 10 (freedom of expression) and 11 (freedom of assembly) as the offence will be engaged by specific intentionally disruptive conduct by participants in public assemblies and processions taking place on roads.

Articles 10 and 11 ECHR

34. The offence is sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2) ECHR.

35. A pressing social need for these measures is demonstrated by the need to deter and prevent conduct on road transport infrastructure which interferes with the rights of others and may cause risks to public safety. For instance, persistent or continuous, intentional 'slow walking' or similar conduct causes delay to emergency services and may prevent people from accessing health or educational services or from attending religious worship.

36. The measures pursue the legitimate aims of protecting the rights of others, preventing crime and disorder and public safety. It is assessed that any interference with Articles 10 and/or 11 will be justified and proportionate in achieving these aims, taking into account that:

- a) the measure does not generally prohibit or prevent participation in public assemblies and processions. It only prohibits conduct intended to cause serious disruption to road transport infrastructure.
- b) Conduct for which there is a reasonable excuse is protected by a statutory defence. For instance, there are times when traffic is intentionally stopped, such as by lollipop persons.
- c) Conduct engaged in as part of strike action and trade disputes is also protected by a statutory defence.
- d) The measure will only prohibit participants in assemblies and processions from engaging in 'slow walking' and similar conduct on roads which is intended to cause serious disruption to the public and to

essential services which rely on the roads. This restriction is assessed to be a proportionate means of protecting people's rights to go about their day-to-day lives and access such services without delay, and to prevent public disorder.

New clauses: “Cuckooing”, “Cuckooing: interpretation” and new Schedule “Cuckooing: Specified Offences”

37. These provisions make cuckooing (i.e. the exercise of control over the dwelling of another person for the purpose of enabling the dwelling to be used in connection with the commission by any person of a specified offence) a criminal offence in England and Wales. It is a defence for the defendant to prove that the victim consented to the control of their dwelling for the purpose of enabling it to be used in connection with the commission of the specified offence.

38. The specified offences are listed in Schedule “Cuckooing: Specified Offences”, and include drugs offences, prostitution and sexual offences, modern slavery offences, organised crime offences, and firearms and offensive weapons offences (as well as the inchoate offences). There is a power for the Secretary of State to amend the list of offences (e.g. to add or remove offences) subject to the affirmative resolution procedure.

39. The offence is an either way offence, subject to a maximum penalty of 5 years' imprisonment or an unlimited fine (or both).

40. The provisions may engage Articles 6, 8 and Article 1 Protocol 1 ECHR, but are assessed to be compatible with the rights protected by those Articles.

Article 6 ECHR

41. Article 6 requires the right to a fair trial. The provisions include a defence for the defendant to establish that the victim consented to the control of their dwelling for the purpose of enabling it to be used in connection with the commission of the specified offence.
42. This is a reverse evidential burden attaching to the consent defence, which is compatible with Article 6(2). Article 6 does not prohibit such presumptions from operating, provided that the overall burden of proof remains with the prosecution⁴. It is now well settled that in deciding the issue the court should focus on the particular circumstances of the case and the balance between the public interest and the protection of the rights of the individual; Lord Bingham in *Sheldrake v DPP*⁵ set out relevant factors. Such presumptions must be within “reasonable limits” and “justified”⁶.
43. The Government’s view is that these provisions are within such reasonable limits as are permitted and are compatible with the Convention. The imposition of a reverse evidential burden is necessary to protect the public (and specifically vulnerable individuals) from the exploitation of individuals and their homes for the purpose of perpetrating serious crimes, including but not limited to drugs offences, modern slavery offences and sexual offences; and to successfully prevent the cuckooing of properties. The subject matter of the defence will be within the knowledge and ability of the accused to demonstrate (i.e. whether the occupier consented to the taking over of their property) and therefore it is not unfair to require

⁴ See for example *X v Germany* (1962) 5 Y.B. 193 at [199] and Lord Hope in *R v Lambert* [2001] UKHL 37

⁵ [2004] UKHL 43, [2005] 1 AC 264 at [21]

⁶ See, for example, *Salabiaku v France* 13 E.H.R.R. 379, *Sheldrake v DPP* [2005] 1 AC 264; *R v Foye* [2013] All ER (D) 248

them to adduce evidence to discharge this burden. As such, the clause is compatible with Article 6.

Article 8 (and Article 1 Protocol 1) ECHR

44. Article 8 provides that everyone has a right to respect for his private and family life, his home and his correspondence. Article 1 Protocol 1 (“A1P1”) concerns the right to peaceful enjoyment of property. As the clause concerns activities which take place within a victim’s dwelling, enforcement of the offence may involve use of existing powers to gain access to and search properties (and/or property within it), and so Articles 8 and A1P1 may be engaged.

45. Article 8 may only be interfered with in accordance with the law and where it is necessary under Article 8(2). Control of property, under A1P1, is permitted where in accordance with the general interest under paragraph (2) of A1P1. The clause is in accordance with the law as it will be prescribed in primary legislation and is sufficiently clear and foreseeable. As it is intended to combat the exploitative practice of cuckooing of individuals (primarily to safeguard the rights of victims), the Government considers it is a necessary and proportionate means to achieve the legitimate aim (and general interest) of the prevention of crime, the protection of public safety and the protection of rights and freedoms of others. The existing statutory safeguards applicable to police powers will also apply (such as under the Police and Criminal Evidence Act 1984 and/or the Misuse of Drugs Act 1971), which ensure that such powers are in accordance with the law and sufficiently clear and foreseeable. As such, the clause is compatible with Article 8 and A1P1.

New clause: “Automatic suspension of parental responsibility”

46. New clause “Automatic suspension of parental responsibility” places a requirement on the Crown Court to make a prohibited steps order, restricting the exercise of parental responsibility, against a parent who has been convicted of the murder or voluntary manslaughter of the other parent (unless, in the case of a manslaughter conviction, it appears to the court that it is not in the interests of justice to do so), or of rape of a child. The clause also places a duty on the local authority to apply to the family court (or the High Court, and references below to the family court should be read as including the High Court in such a case) within 14 days after the order of the Crown Court was made or after a verdict of the offender’s acquittal on appeal was entered, to review the prohibited steps order; thus enabling the family court to consider the best interests of the child.

47. The new clause engages Articles 6 and 8 ECHR but is considered compatible with those Articles.

Article 8 ECHR

48. Article 8 protects the right to respect for a person’s private and family life, their home and correspondence. It is a qualified right and may not be interfered with except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

49. The rights of parents to exercise parental authority over their children constitutes a fundamental element of family life. The automatic restriction of the exercise of parental responsibility engages the Article 8 rights of the offender and of the child.

50. The automatic restriction will be followed swiftly by a review in the family court to consider whether the restriction is in the best interest of the child. In the event the offender is acquitted on appeal and such an order is still in place, the restriction will be swiftly reviewed again in the family court to consider whether the restriction is in the best interests of the child. An offender may also apply to vary or discharge the restriction.

51. Any interference with Article 8 rights will be in accordance with the law. The restriction of parental responsibility on sentencing following conviction of specific offences will be clearly set out in primary legislation. This will enable the automatic restriction of the parental responsibility of a convicted parent via a prohibited steps order, which an order under section 8 of the Children Act 1989, and limit an offender's ability to frustrate the child and the family's life. In cases of voluntary manslaughter, the Crown Court has the discretion to not make an order restricting parental responsibility where it is in interest of justice to do so. This could include cases where the offender has been subject to domestic abuse by the victim and is convicted of voluntary manslaughter of their abuser.

52. Further, it is considered that any interference with the Article 8 rights of an offender, or child, is necessary in a democratic society as it is necessary for the protection and welfare of the affected child or children. The amendment applies to specific offences, namely murder and voluntary manslaughter of one parent by the other and rape committed against a child. The amendment places a duty on the responsible local authority to apply, within 14 days after the order of the criminal court or after the entry of a verdict of the offender's acquittal, to the family court to review the prohibited steps order. The family court will review the appropriate order, including whether the order should be varied to enable a bespoke order tailored to

the particular circumstances of the case or whether the order should be discharged in the light of the best interests of the child. The welfare of the child will be the paramount consideration of the family court when deciding whether to continue the restriction of parental responsibility.

53. The Secretary of State will be under a duty to review the operation of the provisions after three years from its implementation and publish a relevant report which will be laid before Parliament. The Secretary of State may repeal the provisions in full, or in relation to cases of rape, within 6 months of the date on which the report was laid before Parliament.

Article 6 ECHR

54. Article 6 provides a right to a fair trial which includes the ability of a parent to challenge a decision in a court determining a key aspect of their relationship with their child.

55. Whilst the order restricting parental responsibility in the Crown Court, subject to the interests of justice discretion in voluntary manslaughter cases, will happen automatically the offender will have the right to challenge this restriction in the family court including when the court is reviewing the order and considering the best interests of the child(ren). The offender may also apply to the family court to vary or discharge the order of the Crown Court. Further, the offender will be a respondent to the application made by the local authority to review the restriction following the order of the Crown Court and subsequently were there to be an acquittal of the offender on appeal. The offender will have the right to provide evidence and make submissions on the continuation of the order made.

56. The provisions meet the requirements of Article 6 and ensure that the persons affected by the automatic suspension of parental responsibility of the offender in

circumstances within the scope of the amendment have access to a decision-making process and a mechanism to challenge this restriction and provide evidence to the family court.

Home Office and Ministry of Justice
10 May 2024