

CRIMINAL JUSTICE BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

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

New clause “Cuckooing” (4): Power to amend list of cuckooing specified offences in new Schedule “Cuckooing: specified offences”

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary procedure: Draft affirmative resolution procedure

Context and purpose

1. New clause “Cuckooing”, together with new clause “Cuckooing: interpretation” and new Schedule “Cuckooing: specified offences”, provides for a “cuckooing” offence. “Cuckooing” refers to the practice of when criminals take over the property of another person, who is often vulnerable, to perpetrate illegal activity. It is a common tactic used by county lines gangs to facilitate their illicit drug supply operations.
2. Subsection (1) provides that a person commits an offence if (a) they exercise control over the dwelling of another person, and (b) they do so for the purpose of enabling the dwelling to be used in connection with the commission of one or more specified offences listed in the new Schedule (by any person). The list of specified offences includes sexual offences, firearms offences and drug-related offences, among others. Subsection (2) provides for a defence for a person charged with the cuckooing offence in subsection (1) to prove that the occupant of the dwelling consented to the exercise of control for the purposes mentioned in subsection (1)(b). The maximum penalty for the offence, on conviction on indictment, is five years’ imprisonment, a fine, or both (subsection (5)). Subsection (4) confers a power on the Secretary of State, by regulations, to amend new Schedule “Cuckooing: specified offences” which contains the list of specified offences.

Justification for taking the power

3. New clause “Cuckooing” itself provides for the cuckooing offence and contains, in new Schedule “Cuckooing: specified offences”, a list of specified criminal offences which the control over the dwelling is to be for the purpose of enabling. This list of specified offences reflects the Government’s current understanding of the context in which cuckooing occurs. However, the contexts in which cuckooing occurs is still evolving and criminals may adapt their models. In order to respond quickly to tackle any cuckooing activity which emerges in future, the Government considers it appropriate to take a power for the Secretary of State to amend the list of specified offences, where appropriate. This is considered justified due to the need to respond to the emerging threat of cuckooing-related activity quickly, and on the

basis that any newly created criminal offences which may be added to the Schedule will already have been scrutinised by Parliament when being made into law. While it is the case that it could be expected that any new Bill creating a new cuckooing-related offence could itself amend Schedule “*Cuckooing: specified offences*”, the link to cuckooing activity may only emerge at a later date. The regulation-making power will also enable existing criminal offences to be added to the Schedule to reflect the expansion of cuckooing activity into new areas of criminality.

Justification for the procedure

4. By virtue of clause of clause 86(3)(a), regulations made under new clause “*Cuckooing*” (4) are subject to the draft affirmative procedure. This is considered appropriate as any such regulations would have the effect of expanding the application of the cuckooing offence in new clause “*Cuckooing*” (1). It is also befitting the Henry VIII nature of this power.

New clause “Possession of pyrotechnic articles at protests” (7): Power to exempt certain articles from the definition of “pyrotechnic article”

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

5. New clause “*Possession of pyrotechnic articles at protests*” makes it an offence to possess a pyrotechnic article at any time while taking part in a public procession that constitutes a protest, a public assembly which constitutes a protest or a one-person protest. It is a defence for a person charged with this offence to show that they had a reasonable excuse for possessing a pyrotechnic article at the time. In particular, if they were possessing the item in connection with their work. However, possessing a pyrotechnic article as part of or in furtherance of the protest is not a reasonable excuse.
6. Subsection (7) of the new clause defines a “pyrotechnic article” for the purposes of the offence. The definition is the same as that used in Regulation 3(1) of the Pyrotechnic Articles (Safety) Regulations 2015 (SI 2015/1533) and covers all items this offence is intended to apply to, including, in particular, fireworks, flares and smoke bombs. Matches are expressly excluded from the definition of a pyrotechnic article. Paragraph (b) of the definition of “pyrotechnic article” confers on the Secretary of State a power to exempt other specified articles, or articles of a specified description, from the definition of a “pyrotechnic article”. An identical power is contained in section 134 of the Policing and Crime Act 2017 (Possession of pyrotechnic articles at musical events).

Justification for taking the power

7. This is intended to be a reserve power. Regulation 3(2) of the Pyrotechnic Articles (Safety) Regulations 2015 lists a number of articles excluded from the definition in Regulation 3(1). These exclusions are not relevant in the context of this offence, for example, it is not currently proposed to exclude from the ambit of the offence the possession of sparklers or toy guns “firing” percussion caps (see Regulation 3(2)(e)), albeit that the regulation-making power could be used to this end. However, new products may emerge on the market which fall within the definition of a pyrotechnic article which do not present a risk of harm if used at a protest. This regulation-making power would enable the Government readily to exclude such a product from the definition of a pyrotechnic article.

Justification for the procedure

8. By virtue of clause 86(4), regulations made under the new clause will be subject to negative procedure. The core elements of the offence, namely that it applies to the possession of a pyrotechnic article (as defined in the clause) at a protest, will be set out on the face of primary legislation, as such, the Government is satisfied that the negative procedure affords an appropriate level of Parliamentary scrutiny when it comes to exercising the reserve power to exclude certain articles from the definition of a pyrotechnic article. The application of the negative procedure mirrors the approach taken in respect of the analogous offence relating to musical events (see section 134(6) of the Policing and Crime Act 2017).

New clause “*War memorials*” (5): Power to amend list of specified war memorials

<i>Power conferred on:</i>	Secretary of State
Power exercised by:	Regulations made by statutory instrument
<i>Parliamentary procedure:</i>	Draft affirmative resolution procedure

Context and purpose

9. New clause “*War memorials*” (1) makes it an offence for a person to climb on a specified war memorial. Subsection (2) provides for three defences, namely where the person charged with the offence: (a) had a good reason for climbing on the specified war memorial (but climbing on the memorial as part of, or in furtherance of, a protest does not constitute a good reason for these purposes (subsection (3)); (b) were the owner or occupier of the specified war memorial; or (c) had the consent of the owner or occupier of the specified war memorial, or other lawful authority, to climb on it. The maximum penalty for the offence is three months imprisonment, a level 3 fine, or both (subsection (6)).
10. The specified war memorials for the purposes of the offence are those listed in Part 1 of new Schedule “*Specified war memorials*” or the part thereof listed in Part 2 of the Schedule. The war memorials listed in the Schedule are those included on Historic England’s National Heritage List for England (NHLE) as a grade 1 listed memorials. A grade 1 listing covers memorials of exceptional interest. Subsection

(5) confers a power on the Secretary of State, by regulations, to add to the list of specified war memorials in new Schedule “*Specified war memorials*”.

Justification for taking the power

11. In recent protests related to the Gaza conflict there have been instances of protestors climbing on war memorials, including the Royal Artillery Memorial, Hyde Park Corner. Consultation with the police has revealed a gap in legislation. Legislating to address this gap would provide the police with clarity about how to treat individuals who climb on war memorials. The new offence of climbing on a specified war memorial seeks to do this.
12. There is no legislative definition of what constitutes a war memorial, but the Imperial War Museum maintains a [Register](#) of War Memorials which they deem to be a “comprehensive national database of UK war memorials and the names of the individuals they commemorate”. The Register, which contains over 100,000 memorials, include memorials commemorating members of the armed forces, civilians and animals from all conflicts, and those who died in service. Many of the memorials are not free-standing structures capable of being climbed on but plaques within or on the outside of buildings or stained-glass windows. Other war memorials include benches which are intended to be sat on if not climbed on.
13. Any offence criminalising climbing on a war memorial must be framed in a way that brings legal certainty for members of the public, the police and prosecutors. The offence in the Bill therefore lists the 26 memorials (or part thereof) included on Historic England’s National Heritage List for England (NHLE) as a grade 1 listed memorials which are located on land accessible to the public. This list covers the war memorials of the most exceptional interest and therefore the ones deemed to be in most need of further protection through this new offence.
14. The causes and locations of protests are multifarious and change over time as new issues emerge sparking new protests. It may well be the case that other war memorials either become the target or focal point of a protest or risk being climbed upon by virtue of being along the route of a public procession or within the vicinity of a public assembly. In such circumstances, it may be appropriate to expand the protection afforded by this offence to other war memorials. In such an event, it would be necessary to specify the further war memorials to which the offence is to be applied. It is considered appropriate for this to be done through secondary legislation given the detailed and technical nature of any additions to the list of specified war memorials. The power can also be used to remove or amend existing entries in new Schedule “*Specified war memorials*”, in the event that there is a demonstrable need to do so. This may be as a result of changes in the NHLE or where it is assessed that the description of a particular memorial listed in the Schedule requires amendment to ensure the offence functions as intended in practice.

Justification for the procedure

15. By virtue of clause of clause 86(3)(a), as amended, regulations made under new clause “*War memorials*” (5) are subject to the draft affirmative procedure. This is

considered appropriate as any such regulations would have the effect of expanding the application of the offence in new clause “*War memorials*” (1). It is also befitting the Henry VIII nature of this power.

Home Office / Ministry of Justice
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