

POLICE, CRIME, SENTENCING AND COURTS BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled further amendments to the Police, Crime, Sentencing and Courts Bill for Lords Report Stage which includes two new delegated powers, and two amendments of existing delegated powers. This supplementary memorandum explains why the powers have been taken or amended, as the case may be, and the justification for the procedures selected.

New clause “Football banning orders: power to amend list of relevant offences” (1) – new section 14(9) of the Football Spectators Act 1989

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Draft affirmative resolution procedure

Context and purpose

1. New clause “Football banning orders: power to amend list of relevance offences” amends section 14 of the Football Spectators Act 1989 (“the 1989 Act”) to enable the Secretary of State, by regulations, to amend paragraph 1 of Schedule 1 to 1989 Act to add, modify or remove references to an offence or to a description of an offence, by way of the affirmative resolution procedure. This allows updates to the offences that should be considered ‘relevant’ for a football banning order (“FBO”) made on conviction. The purpose of the delegated power is to minimise the risk of disorder, violence and harm in relation to football and respond to changes of context promptly either when new relevant offences are created or when evidence supports the addition, removal or amendment of existing offences.
2. Football-related offences are those offences which subsequently may attract a FBO, following conviction, preventing further attendance at matches. These offences are listed in Schedule 1 to the 1989 Act (“the Schedule”).
3. The Schedule presently includes violent, public order and football-specific offences as well as generic descriptions of behaviours that are appropriate for consideration of the imposition of a FBO. In most cases, these offences become ‘relevant’ when committed in the circumstances stipulated in Schedule 1; this maintains the connection between the prescribed offences and the context so that only offences related to football are in scope for the imposition of a FBO.
4. As outlined, offences which are not, by their very nature, automatically football-related are captured in prescribed circumstances, for example where the offence occurred within a relevant period and/or the court has made a declaration that the offence was football related. Adding, modifying or removing offences from the Schedule may also involve amending or prescribing the relevant circumstances.

The reference in new subsection (9) to adding, modifying or removing a reference to “a description of an offence” puts beyond doubt that regulations amending the Schedule may also amend the description of circumstances relating to the offence which make it a relevant offence. Additionally, the power also permits consequential amendments to be made to the 1989 Act. This is to enable, for example, amendment to the definitions in section 14 (such as the meaning of a regulated football match or control period, or introduction of a new definition) consequent on an amendment to the Schedule. By virtue of new section 22A(3A) of the 1989 Act, such regulations may make different provision for different purposes, consequential, supplementary, incidental, transitional, transitory or saving provision. See further below.

Justification for taking the power

5. Having established the principle in legislation that a FBO may be imposed on conviction for a “relevant offence”, the Government considers that secondary legislation is the appropriate mechanism for specifying such relevant offences. The purpose of the power is to ensure that the Schedule is relevant and responsive to football-related disorder and harms and remains up to date. In the event of future modifications to offences listed within the Schedule it can be updated, subject to parliamentary approval, by secondary legislation rather than requiring primary legislation. In the event of it becoming necessary to add new offences to the 1989 Act in response to emerging football-related threats, such as the football-related communication offences that this Bill will add to the Schedule, amendment can be undertaken rapidly.

Justification for the procedure

6. By virtue of new subsection (11) of section 14 of the 1989 Act, the power is subject to the draft affirmative resolution procedure. The affirmative procedure is considered appropriate as the power is a Henry VIII power. Additionally, addition and/or amendments to the relevant offences in Schedule 1 could result in imposition of a FBO in new cases; dependent on the terms of the FBO this may result in restrictions on individual’s right to private life, and breach of an FBO is a criminal offence. Therefore, Parliament should have the opportunity to debate and approve any such amendments before they take effect.

New clause “Football banning orders: power to amend list of relevant offences” (4) – new section 22A(3A) of the Football Spectators Act 1989

Power conferred on: Secretary of State

Power exercisable by: Regulations and/or Order made by statutory instrument

Parliamentary procedure: As for substantive power (regulations - draft affirmative resolution procedure, order – negative resolution procedure).

Context and purpose

7. New clause “*Football banning orders: power to amend list of relevance offences*” also amends section 22A of the 1989 Act, to enable an order or regulations made under Part II of that Act to make different provision for different cases and/or consequential, supplementary, incidental, transitory or saving provision (new section 22A(3A)).

Justification for taking the power

8. The purposes of this amendment is to enable, if appropriate, ancillary provision to be made consequent to regulations or orders under Part II of the 1989 Act.
9. An ability to make different provision for different purposes, and/or consequential, supplementary, incidental, transitory or saving provision, may be necessary to reflect the definitions (or changed definitions) of prescribed football-related organisations, persons with a prescribed connection to a football related organisation or a regulated football matched and/or addition or modification of the “relevant offences” in Schedule 1 to the 1989 Act.
10. For example, in relation to regulations adding a new offence to Schedule 1 to the 1989 Act:
 - (i) the power to make different provision for different purposes affords the flexibility to ensure that, for example, offences could be added in particular, and differing, circumstances such as particular nexuses to football matches or organisations;
 - (ii) the power to make incidental, consequential or supplementary provision, such as amendment to the definitions in section 14 of the 1989 Act, may be required;
 - (iii) the power to make saving, transitory or transitional provisions will be needed, for example, to clarify that the additions only apply to offences occurring after the date the amendments came into force, and to cater for offenders who committed offences prior to that date to ensure that such offenders are not adversely, or unfairly, affected.

Similarly, an order prescribing a regulated football organisation or person with a prescribed connection to a regulated football organisation, may need to make ancillary provision.

Justification for the procedure

11. This supplementary provision does not amend the parliamentary procedure for the existing or amended powers to make orders or regulations under Part II of the Act. The new power to amend Schedule 1 is subject to the affirmative resolution procedure (as above, per new section 14(11)). Existing (and amended) powers to prescribe matters for the purposes of Part II of the Act are exercisable by an order made by the Secretary of State, subject to the negative resolution procedure (section 22A(1) and (3)). The Government does not consider that the addition of this standard power to make different provision for different cases

and/or consequential, supplementary, incidental, transitory or saving provision materially alters the existing delegated powers in Part II of the Act such as to justify a change to the parliamentary procedure.

New clause: “Football banning orders: relevant offences”(7) and (8): new paragraphs 4(1A) and (3) of Schedule 1 to, and new section 14(2A) of, the Football Spectators Act 1989 - amended power to prescribe a football organisation or a person with a connection to a football organisation

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative Resolution

Context and purpose

12. The Bill adds to an existing power to prescribe matters for the purposes of Part II of the Football Spectators Act 1989 by an order made by the Secretary of State (section 22A(1) of the 1989 Act).
13. The Bill adds specified remote hate offences to Schedule 1 to the 1989 Act, with the effect that they are “relevant offences” for the purposes of imposing a FBO on conviction (Schedule 1 to, and section 14A of, the 1989 Act). These remote offences (i.e. offences occurring away from a football match) are only relevant offences where the court makes a declaration that the offence related to a football match, to a football organisation or to a person with a prescribed connection to a football organisation (new paragraphs 1(v) to (y) of Schedule 1 to the Act) – a declaration of relevance. These amendments introduce new concepts of “football organisations” and persons with prescribed “connections to such organisations” to enable hate offences connected to, but not at, matches to be captured. Section 23 of the 1989 Act, which makes provision for declarations of relevance, is amended accordingly.
14. New paragraph 4(1A) of Schedule 1 to the 1989 Act provides that a “football organisation” for the purposes of the Schedule is an organisation which is a regulated football organisation for the purposes of Part II of that Act. New section 14(2A) provides that a regulated football organisation is an organisation which relates to association football and is a prescribed organisation, or an organisation of a prescribed description. New paragraphs 1(v) to (y) of Schedule 1 to the 1989 Act, and new section 23(1) and (5), accordingly make provision for declarations of relevance where an offence “related to a football organisation” or “related to a person whom the defendant knew or believed to have a prescribed connection to a football organisation”. New paragraph 4(3) of Schedule 1 makes clear that an order which includes provision that a person has a prescribed connection with a football organisation may include where a person had such connection in the past, or will or may have such connection in the future. Per section 22A(1), prescribed means prescribed by an order made by the Secretary of State.

15. Presently, football-related offences are subject to a “relevant time period” which is set out as 24 hours either side of a regulated match. The meaning of “regulated football matches” for the purposes of Part II of the 1989 Act are prescribed by order, subject to the negative resolution procedure (sections 14(2) and 22A(1) and (3)). Football-related remote hate offences are different to physical acts of disorder as they often take place outside this time period and may have no connection to a particular match, but are still football related: a remote hate offence may be targeted at a particular football organisation, such as a football club or football governing body, or a particular person because of their status or involvement in football as a part of a “relevant football organisation”, such as a player, coach, match official etc., rather than their connection to a specific regulated football match. Accordingly, a power is required to prescribe football organisations and prescribed connections to such organisations for the purposes of the Schedule, to capture the harms introduced by the Bill.
16. By virtue of new section 22A(3A) (inserted by new clause: “*Football banning orders: power to amend list of relevant offences*”(4)), such an order may make different provision for different purposes, consequential, supplementary, incidental, transitional, transitory or saving provision. This would allow, if appropriate, organisations and/or persons to be included only for certain purposes, such as capturing persons when, or within a set time-frame of, their employment as a player for a particular football team. It would also allow consequential, supplementary, incidental, transitional, transitory or saving provision to be made in light of any changes to the organisations or connections listed.

Justification for taking the power

17. Presently, the meaning of “regulated football matches” for the purposes of Part II of the 1989 Act are prescribed by order, subject to the negative resolution procedure (sections 14(2) and 22A(1) and (3) of the 1989 Act). The Government similarly considers it appropriate to prescribe “football organisations” and “persons with connections” to such organisations by secondary legislation.
18. This flexibility will enable the Government to quickly respond to changes to the organisations which constitute elite football and/or the persons with particular connections to such organisations. This will enable amendments in light of changes to any change of name or alteration of standing of such organisations, for example if new organisations participate in elite football. It may also be the case that in light of experience and/or emerging threats of hatred, violence or disorder related to football, it is appropriate to amend the organisations listed or persons with a connection who are being targeted. Such changes and/or threats will change over time, and so prescribing these definitions on the face of the Bill would not be appropriate and would quickly become out of date. Additionally, the prescription of organisations and/or connections to organisations will necessarily involve specifying detail on organisations / organisational structures and/or employment or voluntary involvement in such organisations, which are technical and detailed matters which are properly a matter for secondary legislation.

Justification for the procedure

19. The existing power, section 22A(1) of the 1989 Act, is subject to the negative resolution procedure. This is unamended by the expansion of the power. The power to prescribe football organisations and connections is already constrained by the requirement in the 1989 Act, as amended, that a football organisation must relate to association football (new section 14(2A)). Consequently, the negative procedure is considered to continue to provide the appropriate level of parliamentary scrutiny for this narrowly focused power to prescribe the detail of football organisations and/or connections to such organisations. This is consistent with the existing parliamentary scrutiny of the use of the power to prescribe regulated football matches for the purposes of the 1989 Act (sections 14(2) and 22A(1) of the 1989 Act).

New clause “Code of practice relating to non-criminal hate incidents” (1): Power to issue a Code of Practice about the processing by the police of personal data relating to a hate incident other than for the purposes of a criminal investigation.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution on first exercise of the power, negative thereafter

Context and purpose

20. Non-crime hate incident (“NCHI”) recording is used by the police to collect intelligence on ‘hate incidents’ occurring in communities which do not, by themselves, breach the criminal threshold, but could escalate into more serious harm. The police regard NCHIs as an important tool to record patterns of individual behaviour or local incident ‘hotspots’ which could give rise to safeguarding risks or community tensions.

21. During Committee stage, Lord Moylan and others suggested that guidance for the recording of NCHIs, and the retention of personal data in relation to these incidents, should be subject to parliamentary oversight.

22. The Government recognises the sensitivities around the recording and retention of such information by the police and also recognise the strength of feeling on this issue amongst Parliamentarians. On 20 December 2021, the Court of Appeal found in *Miller v College of Policing* that the recording of NCHIs amounted to a significant interference with an individual’s right to freedom of expression, and so had to be justified in every instance in order to be lawful. Any such recording must also be proportionate. To strike the right balance between ensuring that the practice is subject to greater parliamentary scrutiny, whilst respecting the operational importance of this type of recording for the police, the Government has tabled new clause “Code of practice relating to non-criminal hate incidents” to

enable the Home Secretary to issue statutory guidance to the police about the recording and retention of personal data relating to NCHIs. The Code will reflect the Court of Appeal judgment in *Miller*.

23. The new statutory Code, once in effect, will replace the non-crime hate incident section of the College of Policing's non-statutory Hate Crime Operational Guidance¹ that police forces are currently expected to follow when processing data on NCHIs.
24. The statutory Code will only apply to incidents which the police have designated to be a NCHI. Where police are carrying out investigations with a view to there being a prosecution, or where they assess a prosecution is likely, the Code will not apply. This is vital to ensure that the Code will not inhibit the police's abilities to gather evidence that is fundamental to the role of policing. It will also not apply to data which contains no personal data at all – for instance, location data would not be in scope of the Code.
25. Subsection (3) of the new clause prescribes some of the key provisions that will be addressed in the Code. In particular, the new clause provides that the Code may cover:
 - a. whether personal data relating to a hate incident should be recorded;
 - b. the persons who are to process such personal data;
 - c. the circumstances in which a data subject should be notified of the processing of such personal data;
 - d. the retention of such personal data, including the period for which it should be retained and the circumstances in which and the procedures by which that period might be changed;
 - e. the consideration by a relevant person of requests by the data subject relating to such personal data.

This is not an exhaustive list, and it may be expanded or amended during the formulation of the initial Code of Practice or subsequently in any future revision of the Code.

26. Relevant persons (namely police officers, relevant police staff, community support volunteers, policing support volunteers and National Crime Agency (NCA) officers) must have regard to the Code when processing personal data relating to a hate incident.

Justification for taking the power

27. Having established the principle that the Secretary of State, rather than the College of Policing, will from now on publish the Code of Practice, the Government considers that secondary legislation is the appropriate mechanism for providing detailed operational guidance to police forces and the NCA on the recording of personal data relating to NCHIs. Including such guidance in a Code

¹ [Responding to non-crime hate incidents \(college.police.uk\)](https://college.police.uk)

of Practice will ensure that it remains relevant and responsive to the types of data police forces process in practice. The guidance provided to forces in the Code of Practice will also reflect, and be consistent with, the statutory framework contained in the data protection legislation.

28. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice in the recording of personal data relating to NCHIs. The guidance will be prepared in consultation with the Information Commissioner and others.

Justification for the procedure

29. By virtue of new clause "*Further provision about a code of practice under section (Code of practice relating to non-criminal hate incidents)*", the first iteration of the Code of Practice will be subject to the draft affirmative procedure while subsequent iterations of the Code will be subject to the negative procedure.

30. It is the Government established position (see the letter from the Leader of the House of Lords to the Chair of the DPRRC reproduced at Appendix 1 to the Committee's 35th Report of session 2017/19) that "In certain exceptional circumstances it may be appropriate for guidance to be laid before Parliament or be subject to the negative procedure." On this occasion, given the clear view expressed during the debate on Lord Moylan's amendment at Committee stage that the Code should be debated and approved by Parliament, and in view of the sensitivities around the processing of personal data relating to NCHI further highlighted by the recent Court of Appeal judgment, the Government considers that, exceptionally, the first iteration of the Code should be subject to the high level of parliamentary scrutiny afforded by the affirmative procedure. In line with the Government's general approach to statutory guidance and Codes of Practice, the negative procedure is considered appropriate for any re-issue of the Code.

Home Office
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