

PROTECTION FROM SEX-BASED HARASSMENT IN PUBLIC BILL

Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Home Office to assist with its scrutiny of the Protection from Sex-based Harassment in Public Bill (“the Bill”).
2. The Bill was introduced in the House of Commons by the Rt Hon Greg Clark MP as a ballot private member’s Bill on 15 June 2022 and had its second reading on 9 December 2022; Committee Stage on 22 February 2023 and Report Stage on 24 March 2023. This memorandum covers a provision of the Bill that, following amendments made at Report stage, confers a power to make delegated legislation. It explains why the power has been taken and explains the nature of, and the reason for, the procedure selected. It also covers the power to make commencement regulations.

B. PURPOSE AND EFFECT OF THE BILL

3. The Protection from Sex-based Harassment in Public Bill makes provision for a new offence of causing intentional harassment, alarm or distress to a person in public where the behaviour is done because of that person’s sex.
4. Section 4A of the Public Order Act 1986 makes it an offence to intentionally cause harassment, alarm or distress. It must be proven that the accused has used threatening, abusive, or insulting words or behaviour or disorderly behaviour, or displayed any writing, sign or other visible representation which is threatening, abusive or insulting; the person intended to cause another person harassment, alarm or distress by doing so; and they have caused that other person harassment, alarm or distress.
5. Section 4A offences are frequently charged for incidents that take place in the street, often when people have become abusive or argumentative, but there have been no threats of using unlawful violence. The offence may however be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.
6. Section 4A(3) provides two defences to this offence: that the defendant was inside a dwelling and had no reason to believe that the words or behaviour the defendant used, or the writing, sign or other visible representation the defendant displayed, would be heard or seen by a person outside that or any other dwelling; and that the defendant’s conduct was reasonable.
7. Section 4A(5) provides that a person who is guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.
8. The Bill provides that if a person commits an offence under section 4A of the Public Order Act 1986 in England and Wales and carried out the conduct in question because of the sex of the person to whom they intended to cause harassment, alarm or distress, then that person is guilty of an offence, whose maximum sentence is, on summary conviction, imprisonment for a term not exceeding the general limit in a magistrates’ court, a fine or both, or, on conviction on indictment, imprisonment for up to two years, a fine or both.

9. Clause 1 inserts a new section 4B into the Public Order Act 1986 that sets out (in subsections (1) and (2)) that a person commits an offence if they commit an offence under section 4A of the Public Order Act 1986 in England and Wales and carried out the conduct in question because of the sex of the person (or what they presumed the sex of that person to be, even if that presumption is in fact wrong) to whom they intended to cause harassment, alarm or distress.

10. Subsection (3) of the new section 4B confirms that it does not matter whether the conduct in subsection (1) was carried out for the purposes of sexual gratification or whether the conduct in subsection (1) was carried out for reasons additional to the sex of the person to whom it was intended to cause harassment, alarm or distress.

11. Subsection (4) of the new section 4B provides that a person who commits the offence in subsection 1 is liable: (a) on summary conviction (i.e. in the magistrates' court), to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both; or (b) on conviction on indictment (i.e. in the Crown Court), to imprisonment for a term not exceeding two years, to a fine, or to both.

12. Subsection (5) of the new section 4B states that if a person is tried on indictment (i.e. in the Crown Court) for the offence in subsection 1, and is acquitted of that offence, the jury may still find the person guilty of the offence in section 4A of the Public Order Act 1986.

13. Clause 2 requires the Secretary of State to issue guidance to the police about the new offence in section 4B of the Public Order Act 1986. It also requires that guidance to include provision about the application of the reasonable conduct defence in section 4A(3)(b) of that Act. This clause is the subject of this Memorandum and was inserted by amendment (tabled by Rt Hon. Greg Clark MP) at Commons Report Stage.

14. Clause 3 consequentially amends the Football Spectators Act 1989, the Police Act 1997 and the Elections Act 2022 to include a reference in those Acts to the offence in new section 4B of the Public Order Act 1986 (intentional harassment, alarm or distress on account of sex). This Clause was inserted by way of amendment (tabled by Rt Hon. Greg Clark MP) at Committee stage.

15. Clause 4 sets out the extent, commencement and short title.

C. DELEGATED POWERS

16. The Bill includes the following delegated powers.

Clause 2: Power to issue guidance to the police about the new offence in section 4B of the Public Order Act 1986

Power conferred on: Secretary of State

Power exercised by: Guidance

Parliamentary Procedure: None

Context and Purpose

17. Clause 2 provides that the Secretary of State must issue guidance to the police about the new offence in section 4B (intentional harassment, alarm or distress on account of sex) of the Public Order Act 1986. Chief officers of police and the chief constables of the British Transport Police Force, Civil Nuclear Constabulary and Ministry of Defence Police are

required to have regard to any guidance when exercising functions to which the guidance relates. The guidance must in particular include guidance about the reasonable conduct defence in section 4A(3)(b) of that Act. There is a power to revise guidance and a duty to arrange for guidance to be published.

Justification for taking the power

18. The power to issue guidance has been included in the Bill as a measure to support the police in the exercise of their functions in relation to the identification and prosecution of s.4B offences. As the police are the point of entry to the criminal justice system who will receive reports and who will decide in the first instance whether a viable prosecution could be brought, there is a clear case that they would benefit from statutory guidance.

19. Amongst other things, the statutory guidance will provide clear advice about the background to the new offence, its terms, examples of conduct likely to be covered by the offence, and the defences – and the amendment requires in particular that it would contain material about the ‘reasonable conduct’ defence. It is intended that the guidance will make it clear to officers that the ‘reasonable conduct’ defence relates to what an objective third party would consider reasonable, not what the defendant would consider reasonable.

20. It is important that guidance can be updated rapidly to keep pace with events and operational good practice. The requirement for the guidance to be published by the Secretary of State will ensure that it remains accessible to those who need to refer to it.

Justification for the procedure

21. The Government’s established position is that guidance should only be subject to a requirement to lay the guidance before Parliament or to the negative procedure in exceptional circumstances. (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.)

22. In this case the guidance will be of relatively narrow scope in that it will deal only with a single offence under the Public Order Act 1986 which builds on an existing offence under that Act. It will be prepared in consultation with practitioners. It will also be prepared in consultation with the Welsh Government, given that this offence is devolved in Wales (and has been added to the Bill following agreement by the Welsh Ministers to table a legislative consent memorandum before the Senedd Cymru). The police have a familiarity with the context of a s.4A offence, on which the new s.4B element relies, and of the ‘reasonable conduct’ defence, which is not new, so the guidance is intended to be a helpful aid that does not require scrutiny by Parliament. The power to revise the guidance provides the ability to modify and adapt it promptly if changes are required.

Clause 4: Commencement power

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and Purpose

23. Clause 4 contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

Justification for taking the power

24. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to issue guidance (including, in this case, the statutory guidance for the police described above), undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

25. As usual with commencement powers, regulations made under clause 4 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Home Office
29 March 2023