Police, Crime, Sentencing and Courts Bill

European Convention on Human Rights

Supplementary Memorandum by the Home Office, Ministry of Justice and Department for Environment, Food and Rural Affairs (Defra)

Introduction

1. This memorandum supplements memorandums dated March and December 2021 prepared by the Home Office, Ministry of Justice and the Department for Transport which addressed issues arising under the European Convention on Human Rights ("ECHR") in relation to the Police, Crime, Sentencing and Courts Bill. This supplementary memorandum addresses ECHR issues that arise in relation to further Government amendments to the Bill tabled for Lords Report stage.

2. The Government considers that the amendments which are not mentioned in this supplementary memorandum do not give rise to any human rights issues. The Convention rights raised by the further Lords amendments are fair trial (Article 6); no punishment without law (Article 7); private and family life (Article 8); expression (Article 10); discrimination (Article 14); and peaceful enjoyment of property (Article 1, Protocol 1).

Home Office amendments

Football Banning Orders

3. New clause "*Football banning orders: relevant offences*" amends the Schedule of offences[1] that can be designated as football related for the purposes of football banning orders ("FBO") to include the offences under section 4 of the Public Order Act 1986[2], section 31 of the Crime and Disorder Act 1998[3], and communications offences under section 1 of the Malicious Communications Act 1988[4] and section 127(1) of the Communications Act 2003[5] where a court has determined they were aggravated by hostility on the grounds of race, religion, disability, sexual orientation or transgender identity[6]. This enables imposition of a FBO on conviction for remote, including online, hate offences related to football.

4. New clause "*Football banning orders: requirement to make order on conviction etc.*" amends the threshold test for imposition of an FBO on conviction under section 14A(2) and (3) (in respect of convictions in England and Wales) and section 22(4) and (5) (in respect of convictions outside of England and Wales). The amendments require the court to make a banning order on a person's conviction of a relevant offence unless there are particular circumstances relating to the offence or the offender which would make it unjust in all the circumstances to make the order.

---

[1] Schedule 1 to the Football Spectators Act 1989.
[2] Fear or provocation of violence.
[3] Racially or religiously aggravated public order offences.
[4] Sending letters etc. with intention to cause distress or anxiety.
[5] Sending messages/other matters that are grossly offensive or indecent, obscene or menacing.
[6] See section 66(1) of the Sentencing Code (racial hostility etc).

Article 6

5. The court's determination of whether to impose a FBO, following conviction, will engage Article 6. A football banning order is a civil order and consequently engages the civil limb of Article 6 ECHR (see *Gough v Chief Constable of Derbyshire Constabulary*[7]). The Government is satisfied that amendment of the threshold test for imposition of an FBO, on conviction, does not mean proceedings for making an FBO involve the determination of a criminal charge[8]. The domestic classification of an FBO is civil. The clear intention of a FBO is to protect the public by the prevention of violence or disorder, including where that violence or disorder has hate elements, at or in connection with any regulated football matches[9]. Notwithstanding the amendment, an FBO is not automatic upon conviction: rather the court must determine whether there are particular circumstances relating to the offence or to the offender which would make it unjust in all the circumstances to make the order[10]. In making this assessment, the court may consider the circumstances relating to the offender, as well as the preventative purpose of the FBO, and the mandatory and discretionary effects of the FBO. Further the imposition of an FBO is not a penalty: the mandatory restrictions imposed simply limit an individual from attending football matches, with the objective of preventing violence and disorder. Proceedings by which these orders are obtained therefore remain civil proceedings[11] and will engage the civil limb of Article 6.

6. Protections against any unlawful interference with Article 6 are built into the existing legislation (section 14A, 22 and 23 of, and Schedule 1 to, the Football Spectators Act 1989). These include the need for conviction of a relevant offence, in some circumstances a declaration of relevance by the court (Schedule 1 to and section 23 of the 1989 Act), and a determination by the court on the basis of evidence before it, which includes evidence led by the prosecution and the defence (per section 14A(3A) and 3B of the 1989 Act), that it would not be unjust to impose the FBO, taking account of all the circumstances. A right of appeal exists. As a public authority, in determining whether to impose an FBO the court must act compatibly with convention rights (section 6 of the Human Rights Act (HRA) 1998). These fair trial safeguards are not altered by the amendments.

Article 8

7. The amendments do not alter the mandatory and discretionary measures which can be imposed by an FBO. However, they increase the range of offences for which an FBO can be imposed and may alter the likelihood of an FBO being imposed for such offences.

---

[7] [2002] EWCA Civ 351. See also *Commissioner of Police of the Metropolis v Thorpe* [2015] EWHC 339 (Admin).

[8] See *Engel v Netherlands (A/22) (1979-80) 6 EHRR 409*.

[9] See, by analogy, ECthR decisions in respect of the preventative and public protection purposes of sex offender notification orders in *Raimondo v Italy A 281A (Application no. 12954/87);* and *Ibbotson v United Kingdom (1998) 27 EHRR CD 332*.

[10] See *R v Boggild and others [2011] EWCA Crim 1928*

[11] See, by analogy, *McCann v Chief Constable of Manchester [2002] UKHL 39*; *Chief Constable of Lancashire v Wilson [2015] EWHC 2763;* and *Jones v Birmingham City Council [2018] EWCA Civ 1189.*

8. The core effect of an FBO is to prohibit a person, for the duration of the order, from attending regulated football matches in the UK and, in some cases, matches outside the UK. Attendance at a football match does not engage Article 8 ECHR: in attending a football match as a spectator, an individual engages in a leisure activity conduct in public with social aspects involving the wider community (see *Commissioner of the Metropolis v Thorpe*[12]). However, the discretionary conditions imposed by an FBO (either by the court, per section 14G(1), or the enforcing authority, per section 19(2) of the 1989 Act), the limited mandatory notification obligation (see section 14E(2) and (2A)) and potential reporting and passport surrender requirements (section 14E(3) and 19(2A)) may engage Article 8 ECHR[13]. Whether or not they will do will depend upon the particular facts.

9. The Government considers any interference, by the effects of an FBO, with an individual's private life to remain in accordance with the law and proportionate to achieve a legitimate aim. The amendments do not alter the existing scheme in this respect. There is, and will remain, clear provision governing the basis on which the court may make an order, setting out the notification requirements and conditions under which passport surrender may be required. The law will therefore be clear, foreseeable and adequately accessible. Any interference will be necessary in pursuit of the legitimate aims of public safety, preventing crime and disorder and for the protection of the rights and freedoms of others, by preventing violence or disorder, include hateful violence or disorder, at or in connection with regulated football matches.

10. In relation to proportionality, the court is not obliged to impose an FBO in all cases: it should not impose an FBO where it considers there are particular circumstances relating to the offence or the offender which would make it unjust to do so in all the circumstances (new sections 14A(2) and 22(5)). Under section 6 of the Human Rights Act 1998 the court must exercise this discretion in a manner compatible with convention rights, including Article 8. As outlined above, in determining whether it would be unjust to impose an FBO, a court may consider the mandatory effects of the FBO including the notification obligation. Additionally, passport surrender and ongoing reporting requirements are conditional upon the enforcing authority (the Football Banning Order Authority) being of the view that requiring the person to report and surrender their passport is "necessary or expedient in order to reduce the likelihood of violence or disorder at or in connection with the match" (section 19(2A) and (2B) of the 1989 Act). As a public authority, the enforcing authority must apply this test in an ECHR compatible way (per section 6 of the HRA 1998). Additionally, the enforcing authority has a power under section 20(4) to exempt a person from the requirements imposed under a banning order in respect of any match or matches where satisfied that this is justified by special circumstances. An appeal lies to the Magistrates Court against a refusal to grant an exemption. As such any surrender and/or ongoing reporting requirements remain capable of ECHR compatible application.

---

[12] Ibid: [2015] EWHC 339 (Admin). See also *R (Countryside Alliance and others) v Attorney General and another [2008] 1 AC 719.*

[13] See, by analogy, *Re Gallagher (2003) NIQB 26.*

11. As such, the Government considers the amendments are compatible with Article 8 ECHR.

Article 10

12. The addition of the offence under section 4 of the Public Order Act 1986 (using threatening or abusive or insulting words or behaviour) to Schedule 1 to the 1989 Act, meaning it is a "relevant offence" for which an FBO can be imposed on conviction, may engage Article 10 ECHR. Freedom of expression covers speech which offends, shocks or disturbs the State or a section of the population (*Handyside v UK*[14]*).* Conduct leading to relevant offences (such as threatening, abusive or insulting words or behaviour) may therefore engage Article 10 ECHR. However, the potentiality for an FBO to be imposed, following conviction, is not considered to create a heightened "chilling effect" on free speech over and above the chilling effect of the original conviction and criminal penalty. In any event, Article 10(2) makes the freedom of expression subject to restrictions or penalties as are prescribed by law and are necessary in a democratic society for the prevention of disorder or crime. As outlined above, the measures for imposition of an FBO are clearly prescribed in legislation, and interference is in pursuit of the legitimate aim of public safety, preventing crime and disorder and protecting the rights and freedoms of others, and is capable of proportionate application.

13. The Government considers that the "online hate" offences are unlikely to engage Article 10, as speech which undermines fundamental Convention values such as tolerance and non-discrimination is not protected by Article 10[15]. To the extent the addition of online hate offences do engage Article 10 ECHR (which may depend on the individual facts), any interference is considered to be justified: the purpose of the ban on attending football matches, and related restrictions, is to prevent expression at a match, or wider violence or disorder, which could spread, incite, promote or justify hatred or intolerance[16]*.*

14. As such, the Government considers the amendments compatible with Article 10 ECHR.

Disregards

15. The provisions in new clause "*Disregard of certain convictions etc*" amend the scheme set out in section 92 to 101 of the Protection of Freedoms Act 2012 ('the Scheme'), which provides a mechanism for those who hold convictions or cautions under certain repealed offences (including buggery and gross indecency) to apply to have those convictions or cautions removed from their records (known as 'disregarded') if they meet the conditions set out in section 92. The purpose of the Scheme is to right past wrongs where individuals were convicted of same-sex sexual activity which would no longer be an offence today. The Government remains committed to doing all it can to right these historical wrongs.

---

[14] *Handyside v the UK (5493/72) [1976] ECHR 5*

[15] See *Payel Ivanov v Russia (Application No. 35222/04)* and *Norwood v UK (Application No. 23131/03).*

[16] See *Erbakan v Turkey (Application No. 59405/00).*

16. The Government has tabled an amendment to extend the Scheme to include in scope any repealed or abolished offences, where the offence expressly regulated consensual same sex sexual activity, or if not expressly, was used to convict or caution individuals for conduct involving same sex sexual activity. The amendments will extend the Scheme to ensure all individuals who hold cautions or convictions for these offences are eligible for a disregard.

17. The amended Scheme will not enable the disregarding of any convictions or cautions where the activity would amount to an offence if it was committed today and if the other party to the same sex sexual activity was not aged 16 years or over.

18. In addition, new clause "*Pardons for certain convictions etc.*" extends the existing pardons provisions in section 165 of the Policing and Crime Act 2017 so that pardons be granted to those who have been granted a disregard under the new extended Scheme. It also extends the posthumous pardons provisions in section 164 of that Act so that those who have died before the extension of the Scheme (and within twelve months after the date of commencement of the extended Scheme) are eligible for a posthumous pardon, where the individual would have been considered to meet the criteria for a disregard, had they applied for one whilst they were living.

Article 8

19. In the operation of the Scheme, the Government will be required to make decisions to approve or refuse applications to have convictions or cautions relating to same-sex sexual activity removed from an individual's record.

20. A refusal to disregard a conviction or caution, and therefore continued storage of information relating to an individual's private life, may interfere with an individual's Article 8 right to a private life. Such an interference may be lawful if it is:

    a. In accordance with the law;
    b. Pursues a legitimate aim; and
    c. Is necessary in a democratic society.

21. The particular conditions that an individual must meet to obtain a disregard and pardon will be set out in primary legislation, in a manner which is sufficiently precise to be foreseeable. Particularly, the provision will specify that the conviction must be for a same-sex sexual activity, under an offence which is now repealed or abolished, and would not amount to an offence if the activity was carried out today.

22. The provisions pursue a legitimate aim of providing recourse to those who were, in the past, persecuted simply for being gay, whilst maintaining safeguards to ensure that convictions or cautions for sexual activity will not be disregarded where they would still be an offence today.

23. The Government consider that the keeping of records of past sexual offences, other than those which clearly arise simply from the persecution of gay individuals,

is necessary in a democratic society in the interest of public safety and is therefore compatible with Article 8.

Article 14

24. Article 14 – the right to protection from discrimination (read in conjunction with Article 8) may be engaged on the basis of sexual orientation discrimination where an individual seeks a disregard in relation to an opposite-sex sexual activity, given that the Scheme is only open to those who were convicted or cautioned for same-sex sexual activity.

25. The Government considers such interference to be objectively and reasonably justified on the basis that the Scheme's purpose is to right the historical discrimination suffered by the LGBT community and to make reparations for the disadvantage that they faced simply on the basis of their sexual orientation.

26. The same analysis applies in respect of indirect discrimination under the Equality Act 2010.

27. Additionally, Article 14 may be engaged on the basis of age discrimination, as an individual may only obtain a disregard or pardon for same-sex sexual activity where the other party to the sexual activity was aged 16 or over.

28. The Scheme largely relies on historical policing records. Many of the records have since been deleted or do not provide much detail on the circumstances of the conviction. A strict approach has therefore been taken so that anybody who engaged in same-sex sexual activity with an individual under 16 cannot obtain a disregard.

29. The Government therefore considers such interference to be objectively and reasonably justified because it is in the interest of public safety to put in place safeguards which ensure that convictions or cautions are not disregarded where those convictions or cautions arise from exploitation or abuse of minors.

Non-Crime Hate Incidents

30. 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.

31. 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.

32. 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*.

33. 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 Guidance that police forces are currently expected to follow when processing data on non-crime hate incidents.

34. 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. 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.

35. 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 may be expanded or amended during the formulation of the Code of Practice or in the future.

Article 10

36. On 20 December 2021, the Court of Appeal handed down its judgment in the matter of *Miller v College of Policing*[17]. The Court found that the current non-statutory Hate Crime Operational Guidance published by the College did interfere with an individual's freedom of expression.

37. Whilst it can be legitimate for the state to interfere with an individual's right of freedom of expression to prevent crime and protect the rights of others, the Court of Appeal found that the current guidance did not do so proportionately, and therefore was unlawful.

[17] Citation number: [2021] EWCA Civ 1929

38. In order to ensure the Secretary of State's Code only interferes with Article 10 in a proportionate manner, it will incorporate safeguards including the main safeguard outlined by the Court of Appeal: It will explicitly allow police officers to exercise a 'common-sense' discretion not to record irrational complaints, where no reasonable person would believe that the incident arose from hostility or prejudice.

39. As such, the Government considers the amendments compatible with Article 10 ECHR.

Ministry of Justice amendments - Voyeurism

40. The following Ministry of Justice-led Government amendments to the Bill raise notable ECHR issues:
    a. A new offence of breast-feeding voyeurism, triable each way and punishable with a maximum of two years' imprisonment, for those who take photographs, videos or live-streams a person breast-feeding a child without consent for the specified purpose of sexual gratification or humiliating, alarming or distressing the person breastfeeding.

Article 8

41. The breast-feeding voyeurism measures engage Article 8, the right to private and family life. As well as the criminalisation of specified conduct, sex offender notification requirements will attach to offenders on conviction, where the offence was committed for the purpose of obtaining sexual gratification.

42. The right to private and family life is a qualified right, and the Government's view is that any interference is a result of the offence committed, is in accordance with the law and is justified. Article 8 requires the state, in order to secure effective respect for a person's moral and physical integrity, to provide criminal law sanctions to deter private individuals from committing serious harm to others. The interference is also considered to be proportionate, as only sufficiently serious sexual conduct – in light of the age of the victim, or where the length of sentence by the court is 12 months or more, reflecting the seriousness of the offending – will be made subject to notification requirements. The Government is satisfied there is a rational connection between the offence itself and the objectives of notification requirements which provide necessary safeguarding measures for serious offenders to assist in the management and prevention of sexual re-offending.

43. This measure is therefore considered to be a proportionate interference with offenders' rights and to be compatible with Article 8.

Defra amendments – Hare coursing

44. The Government has tabled a package of measures to strengthen the powers and penalties available to the police and courts to tackle hare coursing, in particular:

    a. Amendments to the Game Acts (section 30 of the Game Act 1831 and section 1 of the Night Poaching Act 1828) to increase the maximum

penalties for offences under those sections to an unlimited fine and/or up to six months' imprisonment.

b. New offence of trespassing with intent to search for or pursue hares with dogs.
c. New offence of being equipped for searching for or pursuing hares with dogs.
d. Powers for the courts to make a disqualification order preventing an offender from owning or keeping a dog where the offender is convicted of certain offences involving dogs and seizure and disposal of dogs in connection with such an order.
e. Amendment to section 4A of the Game Laws (Amendment) Act 1960 amending court powers to order forfeiture of a vehicle where an offence has been committed under section 30 of the Game Act 1831.

Amendments to the Game Acts (section 30 of the Game Act 1831 and section 1 of the Night Poaching Act 1828) to increase the maximum penalties for offences under those sections

45. New clause "*Increase in penalty for offences related to game etc*" increases the penalties available to the courts for offences under section 30 of the Game Act 1831 and section 1 of the Night Poaching Act 1828 to an unlimited fine and/or up to six months' imprisonment (51 weeks where an offence is committed after the coming into force of section 281(5) of the Criminal Justice Act 2003).

Articles 6 and 7

46. Article 6, which protects individuals' rights to a fair trial, will be engaged by the investigation and prosecution of the relevant offences. However, the normal safeguards provided for in the criminal justice system will apply. The Government considers that this amendment will comply with Article 6.

47. The Government considers that this amendment will be sufficiently certain and predictable to meet the requirements of Article 7 (no punishment without law).

Offences of trespassing with intent to search for or pursue hares with dogs and being equipped for searching for or pursuing hares with dogs

48. New clause "*Trespass with intent to search for or to pursue hares with dogs etc*" creates a new offence of trespass with intent to search for or to pursue hares with dogs. A person commits an offence if they trespass on land with the intention of using a dog to search for or pursue a hare, facilitate or encourage the use of a dog to search for or pursue a hare or enable another person to observe the use of a dog to search for or pursue a hare.

49. New clause "*Being equipped for searching for or pursuing hares with dogs etc*" creates a new offence of being equipped for searching for or pursuing hares with dogs. A person commits the offence if they have an article with them in a place other than a dwelling with the intention that it will be used in the course of or in connection with the commission by any person of the offence of trespass with the intent to search for or pursue hares with dogs.

Articles 6 and 7

50. Article 6 will be engaged by the investigation and prosecution of both offences. However, the normal safeguards provided for in the criminal justice system will apply.

51. The "trespass" offence provides that it is a defence for a person to prove that they had a reasonable excuse for the trespass as set out in the offence. The burden of proof is placed on the defendant given the general nature of the defence and the facts as to whether the defendant has a reasonable excuse being within their knowledge. The prosecution must still prove all the elements of the offence to the criminal standard of proof.

52. The Government considers that both offences will comply with Article 6.

53. The Government considers that both offences will be sufficiently certain and predictable to meet the requirements of Article 7.

<u>Powers for the courts to make a disqualification order preventing an offender from owning or keeping a dog where the offender is convicted of certain offences involving dogs</u>

54. New clause "*Disqualification order on conviction for certain offences involving dogs*" gives the court the power to make an order disqualifying the offender from owning or keeping a dog where the offender is convicted of:
    a. the new offence of trespass with intent to search for or pursue hares with dogs etc;
    b. the new offence of being equipped for searching for or pursuing hares with dogs etc;
    c. an offence under section 1 of the Night Poaching Act 1828; or
    d. an offence under section 30 of the Game Act 1831.

55. New clause "*Seizure and disposal of dogs in connection with disqualification order*" provides for seizure and disposal of dogs in connection with disqualification orders, with new clauses "*Termination of disqualification order*", "*Section (Seizure and disposal of dogs in connection with disqualification order): supplementary*" and "*Disqualification orders: appeals*" covering supplementary provisions, termination of a disqualification order and appeals against a disqualification order.

Article 1, Protocol 1

56. An order of the court, following conviction for the offences at paragraphs 29(a) to (d) of this memorandum, seizing and removing dogs from the offender or their owner, will amount to a deprivation of a possession under Article 1, Protocol 1.

57. However, it is the view of the Government that any interference can be justified by the public interest in the prevention of crime and the protection of the rights of others. In particular, the policy aim of these orders is to prevent future activity

related to the pursuit of hares by dogs, which is associated with a range of other criminal activity and serious impacts on some rural communities. The relevant court will need to conduct a proportionality assessment in each individual case and the relevant orders will be subject to appeal rights.

58. The Government therefore considers there are sufficient safeguards in place to ensure these measures are capable of being exercised proportionately.

<u>Powers for the court to order forfeiture of a vehicle upon conviction for an offence under section 30 of the Game Act 1831</u>

59. Section 4A of the Game Laws (Amendment) Act 1960 already provides the courts with the power to order forfeiture of a vehicle upon conviction for an offence under section 30 of the Game Act 1831. This section is amended so that this is no longer limited to where a person is one of five or more persons liable, in line with amendments made to the Game Act 1831.

Article 1, Protocol 1

60. An order for forfeiture of a vehicle will amount to deprivation of a possession under Article 1, Protocol 1. However, it is the view of the Government that any interference can be justified by the public interest in the prevention of crime and the protection of the rights of others. The relevant court will also need to conduct a proportionality assessment in each individual case. The Government therefore considers these measures are capable of being exercised proportionately.

Home Office, Ministry of Justice and Defra
4 January 2022