

PROTECTION FROM SEX-BASED HARASSMENT IN PUBLIC BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Protection from Sex-Based Harassment in Public Bill (“the Bill”). This memorandum has been prepared by the Home Office. The Bill is considered compatible with the ECHR.

Summary of the Bill

2. The issue of whether the Government should create a new criminal offence specifically targeting public sexual harassment was subject to a consultation which concluded on 1 September 2022 (available here: [Public sexual harassment consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/public-sexual-harassment-consultation)). The consultation sets out why, for example, a hate crime solution was not followed, as the hostility element which is at the heart of hate crime often does not apply to sex-based harassment.
3. The Government’s view is that behaviour amounting to public sexual harassment is already covered by existing criminal offences (subject to the individual circumstances of the case). The Government would not seek to create a new offence if it would create overlap with new offences (because, for example, this would create uncertainty and additional work for police and prosecutors). Based on our own analysis that public sexual harassment behaviour is already covered by existing offences, we could not therefore propose creating a wholly new offence.
4. However, there is an option of adding to an existing offence, rather than creating a new one. It would be possible to provide that if a person commits an existing offence and does so on the basis of the complainant’s sex, then they could receive a higher sentence than if they had committed the offence without that motivation. This would avoid the problems which arise with overlapping offences.

5. 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, towards another person; the person intended to cause them harassment, alarm or distress; and they have caused that other person harassment, alarm or distress.
6. 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, but it may 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.
7. 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 he used, or the writing, sign or other visible representation he displayed, would be heard or seen by a person outside that or any other dwelling; and that the defendant's conduct was reasonable.
8. 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.
9. The Bill provides that if a person commits an offence under section 4A of the Public Order Act 1986 in England 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.
10. 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 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.

11. 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.
12. 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.
13. 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.
14. Clause 2 sets out the extent, commencement and short title.

ECHR issues raised by the Bill

15. The convention rights engaged by the Bill are as follows:

Article 5

16. The detention of someone against their will potentially can amount to a deprivation of liberty for the purposes of Article 5. The Bill provisions may engage Article 5 because it introduces a new aggravated element to a criminal offence which can result in the arrest and detention of an individual. A person has the right not to be

deprived of their liberty – ‘arrested or detained’ – except in limited cases specified in the article (e.g. where they are suspected or convicted of committing a crime) and provided there is a proper legal basis in UK law.

17. Pursuant to Article 5(1)(c) interference with the right to liberty is permitted for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence. The applicable power of arrest lies in section 24 of the Police and Criminal Evidence Act 1984: constables may only carry out an arrest if they have a reasonable suspicion of the commission of an offence. Any arrest for a criminal offence will usually result in a person being brought before a court within 36 hours (excluding Sundays and certain public holidays), where they have not otherwise been released on investigation or police bail, which satisfies the requirements of Article 5(3).

18. It is considered therefore that the Article 5 right not to be deprived of their liberty is adequately protected on the basis that the detention of a person in relation to the new offence would fall under Article 5(1)(c) in that it would entail the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Article 6

19. 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.

20. The offence under section 4A of the Public Order Act 1986 4A is summary only, meaning that it can be tried only in the Magistrates’ Court, not in the Crown Court. This means that the maximum sentences are six months in prison, or a fine not exceeding level 5 on the standard scale or both. However, the Bill provides that, if the defendant committed the offence because of the sex of the person to whom their action was directed, then they can also be tried on indictment in the Crown

Court. This means that they could receive a maximum sentence of two years in prison. A similar approach is taken with other protected characteristics under the Crime and Disorder Act 1998 and section 66 of the Sentencing Act 2020, where sentences can be uplifted if the action was motivated on the basis of transgender status, race, disability, religion or sexual orientation.

21. The criminal justice system will ensure a defendant is able to convey their case during the prosecution process. The offence is dependent on the person having been convicted under section 4A of the Public Order Act 1986, which contains defences that can be relied upon. The usual potential appeal routes would apply after any conviction. It is considered therefore that the Article 6(1) right to a fair hearing is adequately protected.

Article 14

22. Article 14, the right to the prohibition of discrimination may also be engaged in connection to the substantive articles set out above, though we note that the ancillary nature of Article 14 in no way means that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision.

23. There may be concern that offence will apply disproportionately to male perpetrators. There is significant evidence that women are disproportionately the victims of sexual harassment. For example, a Government Equalities Office survey 2020 about people's experience of sexual harassment both in the workplace and in public found that 51% of women had experienced sexual harassment in the previous year, compared to 34% of men. Given the nature of the crime, this is indicative of men being disproportionately perpetrators, which is backed up by significant anecdotal evidence. The survey also found that, of those women who had experienced sexual harassment, 72% had experienced it only from men and 1% only from women. This compares to 28% and 21% respectively on the part of men who had experienced sexual harassment.

24. It is hard to determine the overall proportion of perpetrators who are men, however, given, as detailed above, that many more women than men experience public

sexual harassment, it is likely the overall male perpetrator figure will be closer to 72% than to 28%, and the overall female perpetrator figure closer to 1% than to 21%. The study found that 63% of people who experienced public sexual harassment in the workplace experienced it from men. As such, to the extent that it could lead to their being fined or imprisoned, a new offence would affect men more than women.

25. We consider that any differential treatment in relation to sex is capable of being justified. In addition to the fact that the law is phrased sex-neutrally, it is in accordance with the law and any interferences with the perpetrator's Article 14 rights are in pursuit of the legitimate aim of preventing crime and disorder and necessary in a democratic society and the interferences are considered to be proportionate to that aim. We are of the view that it strikes a fair balance between rights and freedoms and the general public interest.

Home Office Legal Advisors
6 December 2022