

POLICING AND CRIME BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled amendments to the Policing and Crime Bill for Lords Committee stage. These include a number of new or modified delegated powers. This supplementary memorandum explains why the new powers have been taken and the reason for the procedure selected.

Amendments to paragraph 12 of Schedule 1 to the Bill will add new paragraphs “Conduct of fire and rescue authority” and “Regulations about complaints and conduct matters” to new Schedule A2 to the Fire and Rescue Services Act 2004 (“the 2004 Act”).

New paragraph “Conduct of fire and rescue authority” of new Schedule A2 to the 2004 Act – application of section 31 of the Police Reform and Social Responsibility Act 2011 (“the 2011 Act”) to a holder of the office of a relevant fire and rescue authority: Power to make provision about the making, handling, recording and investigation of complaints in relation to the conduct of a relevant office holder

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

1. As set out in the Government’s response to its consultation on emergency services collaboration, *Enabling closer working between the emergency services: consultation responses and next steps*, published on 26 January 2016, the Government intends to enable Police and Crime Commissioners (“PCCs”) to take on responsibility for fire and rescue services where it would be in the interests of economy, efficiency and effectiveness or public safety and where a local case is made. Chapter 2 of Part 1 of the Bill gives effect to these proposals.
2. Arrangements for the handling of complaints made against a PCC are set out under section 31 of, and Schedule 7 to, the 2011 Act. These arrangements deal with both serious (criminal) complaints and non-serious complaints (complaints made in relation to a PCC’s conduct). Under section 31 of the 2011 Act, the Secretary of State is able to make regulations relating to the making, handling and recording of complaints against a PCC.
3. Where a PCC takes on responsibility for fire and rescue governance, it will be important that there is a clear and consistent process for the handling of any complaints made against the PCC. New paragraphs “*Conduct of fire and rescue authority*” and “*Regulations about complaints and conduct matters*” apply the current provisions under section 31 of and Schedule 7 to the 2011 Act so that the existing PCC complaints process also applies to the PCC in relation to their fire

and rescue functions. As such, the existing provisions in section 31 of and Schedule 7 to the 2011 Act, allowing the Secretary of State to make regulations relating to the making, handling and recording of complaints against a PCC, will also apply in relation to a PCC's fire and rescue functions.

4. The Government does not intend to make separate regulations for the handling of complaints made against the PCC in respect of their fire and rescue functions. It is our intention that the current process for handling complaints made against a PCC in respect of their policing functions will be applied directly to a new section 4A fire and rescue authority, ensuring that there is a single, consistent way for handling complaints. This may require some technical amendments to existing regulations, principally the Elected Local Policing Bodies (Complaints and Misconduct) Regulations 2012 (SI 2012/62). Given this approach, the Government considers that the parliamentary procedure which applies to regulations made under section 31 of and Schedule 7 to the 2011 Act (namely the affirmative procedure - see section 154(2)(a) of the 2011 Act) should continue to apply.

Amendment to paragraph 5 of Schedule 1 - New section "*Application of fire and rescue provisions*" of the 2004 Act: Power to apply fire and rescue provisions to chief constables and other staff under "single employer" model

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure where amending or repealing primary legislation, otherwise negative procedure

Amendment to clause 8(2) - New section "*Section 107EA orders: application of fire and rescue provisions*" of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"): Power to apply fire and rescue provisions to chief constables and other staff under "single employer" model

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

5. Schedule 1 to the Bill amends the 2004 Act to provide for new PCC-style fire and rescue authorities ("FRAs"). Schedule 1 also makes consequential amendments to legislation relating to FRAs in other Acts to apply these to new PCC-style FRAs. The Bill also makes some provision, for example in paragraph 83 of Schedule 1 (amendments to the Public Service Pensions Act 2013), to reflect the operation of the single employer model. It is likely to be necessary to apply, with modifications, other relevant legislation that applies to FRAs to chief constables and their personnel where they have been delegated fire and rescue functions under the single employer model. Accordingly, subsection (1) of new section "*Application of fire and rescue provisions*" of the 2004 Act confers

power on the Secretary of State to apply (with or without modifications) or to make provisions corresponding or similar to any enactments relating to an FRA to:

- a) a Chief Constable to whom fire and rescue functions have been delegated under the single employer model,
- b) a member of fire and rescue staff transferred to the Chief Constable,
- c) a member of fire and rescue staff appointed by the Chief Constable,
- d) a member of the Chief Constable's police force to whom fire and rescue functions have been delegated,
- e) a member of civilian staff of the chief constable to whom fire and rescue functions have been delegated.

This includes a power to apply or make provision corresponding or similar to any provisions made by an order or regulations (subsection (3)) and to make consequential amendments, revocations or repeals to any enactment (subsection (4)).

6. These powers are required to enable the Secretary of State to apply provisions (in addition to those otherwise applied in Schedule 1) that currently apply to an FRA to a Chief Constable or his or her personnel to enable them to exercise the fire and rescue functions delegated or sub-delegated to them by virtue of a section 4H order. The provisions could, for example, concern matters such as treating the Chief Constable and his or her personnel as if they were employees of an FRA for the purposes of the powers under section 44 of the 2004 Act to (amongst other things) fight fires in an emergency. The provisions to be made by such an order are essentially consequential upon the single employer model provided for on the face of the Bill and the nature of the delegation provided for in each section 4H order and are therefore considered to be matters which may be appropriately left to secondary legislation. The order-making power is similar to that already provided for in new section 4L of the 2004 (inserted into that Act by paragraph 5 of Schedule 1 to the Bill) which confers a power to apply local policing provisions to an FRA created under a section 4A order.
7. Subsection (6) provides that the power to apply, with or without modifications, any provision of a fire and rescue enactment extends to future Acts. The provisions in Chapter 2 of Part 1 of the Bill are locally enabling, accordingly it would be open to a PCC to come forward at any time with a proposal to adopt the single employer model through the making of a section 4H order. The operation of the single employer model will vary between section 4A FRAs. While it is likely that some of the amendments made to enactments in exercise of these powers will apply to all single employer models; others will apply only to some single employer models. Accordingly, we cannot rely on future Bills that make fire and rescue provision to also make provision in that new primary legislation for how those powers and duties might operate in various locally driven single employer models. Consequently, the Government considers it necessary that the order-making power operates in relation to existing and future enactments. The same considerations apply to orders made under new section 4L of the 2004 Act applying local policing enactments and, accordingly, a Government amendment to that provision similarly provides for section 4L

orders to be capable of operating on existing and future enactments. This approach mirrors that in paragraph 12(6) of Schedule 5C to the Local Democracy, Economic Development and Construction Act 2009 (inserted by the Cities and Local Government Devolution Act 2016) which makes comparable provision for orders transferring, on a case-by-case basis, the functions of a PCC to a combined authority mayor.

8. New section "*Section 107EA orders: application of fire and rescue provisions*" confers equivalent order-making powers in the context of the operation of the single employer model by the mayor of a combined authority under the provisions of the 2009 Act, as amended by the Bill. An amendment to clause 8 also enables orders made under new section 107EF of the 2009 Act to apply, with or without modifications, any provision of a local policing enactment, whenever that enactment is passed.
9. By virtue of section 60(4) and (5) of the 2004 Act, the order-making powers in new section "*Application of fire and rescue provisions*" of that Act are subject to the affirmative procedure where regulations amend or repeal primary legislation (as befitting Henry VIII powers of this kind), but in any other case are subject to the negative procedure. Given the consequential nature of the provisions that may be made by an order under new section "*Application of fire and rescue provisions*" and the fact that such an order would be applying, with any necessary modifications, provision already set out in primary legislation, the Government considers that the negative procedure affords an adequate level of parliamentary scrutiny where no textual amendments to primary legislation are being made.
10. By virtue of section 117(2) of the 2009 Act, orders under new section "*Section 107EA orders: application of fire and rescue provisions*" of that Act are all subject to the affirmative procedure. This higher level of scrutiny in the case of a section "*Section 107EA orders: application of fire and rescue provisions*" order reflects differences in the procedure for making section 107EA orders as compared with that applicable to orders under section 4H of the 2004 Act, in particular the absence of a statutory duty to consult and the existing different legislative model for combined authority mayors. The application of the affirmative procedure for such orders is also consistent with the existing provisions in Part 6 of the 2009 Act where orders creating new combined authorities are similarly subject to the affirmative procedure. This approach mirrors that applicable to the analogous order-making powers in new section 4L of the 2004 Act and new section 107EF of the 2009 Act as inserted by the Bill.

Amendments to clause 28(2) and (3) and paragraph 2 of Schedule 7: revised sections 50 and 51 of the Police Act 1996 and section 3A of the Ministry of Defence Police Act 1987: Power to make regulations concerning disciplinary proceedings against former members of police forces, former special constables and former members of the Ministry of Defence Police.

Power Conferred on: Secretary of State

Power Exercisable by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative Resolution*

11. Sections 50 and 51 of the Police Act 1996 (“the 1996 Act”) provide powers to make regulations related to the “maintenance of discipline” of members of police forces and special constables respectively. The existing legislation and regulations apply to serving members of police forces and special constables and therefore cease to apply when the person has left the force through retirement or resignation. The Police (Conduct) Regulations 2012 (SI 2012/2632, as amended) are the relevant regulations. Before exercising the power, the Secretary of State is under a duty, by virtue of section 63 of the 1996 Act, to consult the Police Advisory Board for England and Wales and take into consideration any representations made.
12. As detailed at paragraphs 139 to 144 of the Government’s delegated powers memorandum, clause 28(2) and (3) inserts new sections 50(3A) and 51(2B) into the 1996 Act which, respectively, would allow for the procedures that are established by or under regulations made under those sections (‘disciplinary procedures’) to apply in respect of the conduct, efficiency or effectiveness of former members of police forces and former special constables in certain circumstances. These circumstances are where, at the time of the alleged misconduct, inefficiency or ineffectiveness, the person was a member of a police force or special constable, and either the person resigns or retires after the allegation surfaces or the person resigns or retires within a specified period of the allegation surfacing (the period to be specified in regulations – ‘the specified period’). Paragraph 2 of Schedule 7 to the Bill makes equivalent provision in relation to the Ministry of Defence Police.
13. Amended subsection (3A) and new subsections (3AA) to (3AE) of section 50 of the 1996 Act amend the circumstances in which regulations may allow for disciplinary procedures to apply in the case of former members of police forces. New subsections (3AA) and (3AB) essentially restate the existing provisions in new section 50(3A)(c) of the 1996 Act as inserted by clause 28(2).
14. New subsection (3AC) provides that in cases where the allegation surfaces after the person has resigned or retired *and* after the expiry of the specified period, regulations may allow for disciplinary procedures to apply provided the alleged misconduct, inefficiency or ineffectiveness is such that, if proved, the person could have been dealt with by dismissal if he or she had still been a member of the police force. However, in these cases, new subsection (3AD) provides that disciplinary proceedings may only be taken following a determination by the Independent Police Complaints Commission (“IPCC”). The provisions at subsection (3AD), in effect, create a new “exceptional circumstances” test that must be applied by the IPCC. The regulations may only provide for disciplinary proceedings to be taken in such cases if the IPCC concludes that taking such proceedings would be reasonable and proportionate having regard to the criteria specified at paragraphs (a) to (c), namely: the seriousness of the alleged misconduct, inefficiency or ineffectiveness; the impact of the allegation on public confidence in the police; and the public interest.

15. New subsection (3AE) allows regulations to make provision about matters to be taken into account by the IPCC for the purposes of subsection (3AD)(a)-(c). It is the intention that the determination made at subsection (3AD) will only allow disciplinary proceedings to be brought in relation to the most serious matters which are considered of an exceptional nature where serious and lasting harm has been caused to public confidence in policing as a result of the wrongdoing. It remains the case that regulations made under new section 50(3A) will not operate retrospectively.
16. These provisions are replicated for former special constables by virtue of amended subsection (2B) and new subsections (2BA) to (2BE) of section 51 of the 1996 Act, and in respect of former members of the Ministry of Defence Police by virtue of amended subsection (1B) and new subsections (1BA) to (1BE) of section 3A of the Ministry of Defence Police Act 1987.
17. At present, the regulations establishing disciplinary procedures for serving members of police forces and special constables are subject to the negative procedure (see sections 50(8) and 51(4) of the 1996 Act and section 3A(4) of the Ministry of Defence Police Act 1987). As these provisions allow for these procedures to be applied in certain circumstances in the case of former members of police forces, former special constables and former members of the Ministry of Defence Police, the Government considers that, in the interests of consistency, the same level of parliamentary scrutiny should apply.

New clause “*Possession of pyrotechnic articles at musical events*” (4)(b): Power to exempt certain articles from the definition of “pyrotechnic article”

New clause “*Possession of pyrotechnic articles at musical events*” (5): Power to define “qualifying musical event”

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

18. New clause *Possession of pyrotechnic articles at musical events* makes the possession of pyrotechnic articles at qualifying musical events, such as live music festivals and concerts, an offence. The offence does not apply where the organiser of the event has consented to such possession (this exemption would cover, for example, pyrotechnics used as part of a performance).
19. Subsection (4)(a) 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. Subsection (4)(b) confers on the Secretary of State the power to exempt other specified articles, or articles of a specified

description, from the definition of a “pyrotechnic article”. 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 live musical event (or any associated place providing sleeping facilities). If such a product had an everyday use, for example a form of camping equipment, it might be appropriate to exclude it from the definition of a pyrotechnic article. This regulation-making power would enable the Government readily to give effect to such an exclusion.

20. Subsection (5) of the new clause confers on the Secretary of State the power to set out in regulations the definition of a “qualifying musical event”. The power is constrained in that the definition must relate to live musical events; events which only play recorded music would therefore fall outside of the definition. Such regulations may specify particular live musical events, or events of a specified description. Live musical events can take many forms, ranging from outdoor popular music/rock festivals attracting tens of thousands of visitors, to indoor classical performances in front of relatively small audiences. It may not be necessary or proportionate for the offence to cover the full spectrum of live musical events as there will not be the same level of risk arising from the misuse of fireworks, flares and smoke bombs at all such events. Leaving the definition of a qualifying musical event to secondary legislation will afford the necessary flexibility to target the offence at those events where there is a risk of misuse of fireworks etc and will enable the definition to be revised over time to reflect changing levels of risk at different types of musical event. Moreover, if the approach taken were to list particular live musical events, it would be unattractive to include such a (potentially lengthy) list on the face of primary legislation. This approach mirrors that taken with the existing analogous offence of possession of a firework etc at a designated sporting event contained in section 2A of the Sporting Events (Control of Alcohol etc) Act 1985 (inserted into that Act by the Public Order Act 1986). A designated sporting event is one designated, or of a class designated, by order (see section 9(3) of the 1985 Act)¹.
21. By virtue of subsection (6) of the new clause, regulations made under subsections (4)(b) and (5) 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 qualifying (live) musical event, 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

¹ The classes of sporting event designated for the purposes of the 1985 Act are set out in the Sports Grounds and Sporting Events (Designation) Order 2005 (SI 2005/3204)

Parliamentary scrutiny when it comes to defining a qualifying musical event or 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 sporting events (see section 9(8) of the 1985 Act).

Home Office
September 2016