

**MEMORANDUM TO THE JOINT COMMITTEE ON HUMAN RIGHTS**  
**THE CORONAVIRUS BILL 2020**

**Contents**

Introduction.....	2
Clause 2-4 – Emergency registration of health and care professionals.....	3
Article 3 – Freedom from torture, inhuman or degrading treatment.....	4
Article 6 - Right to a fair trial .....	4
Clause 9 – Temporary modification of mental health and mental capacity legislation.....	4
Article 3 – Freedom from torture, inhuman and degrading treatment.....	5
Article 5 – Right to liberty and security.....	6
Article 8 – Right to private and family life .....	6
Clauses 21-22 – Investigatory powers.....	7
Article 8 – Right to private and family life .....	8
Clauses 23-27 – Food supply.....	8
Article 6 – Right to a fair trial .....	9
Clauses 31-33 – DBS and disclosure changes in Wales and Scotland .....	9
Article 2 – Right to life.....	9
Clause 34 – Vaccinations: Scotland.....	10
Article 2 – Right to life.....	11
Clause 35-36 – Schools, childcare providers etc. ....	11
Article 6 - Right to a fair trial .....	13
Article 8 – Right to private and family life .....	14
Article 11 - Freedom of Assembly and Association .....	14
Article 14 – Non discrimination, taken together with A2P1 (right to education).....	14
A1P1 – Right to peaceful enjoyment of possessions .....	15
A2P1– the right to education .....	16
Clause 47 - Protection of Public Health Scotland .....	16
Article 3 – freedom from torture, inhuman and degrading treatment .....	17
Article 5 – Right to liberty and security.....	18
Article 6 - Right to a fair trial .....	19
Article 8 – Right to private and family life .....	19
Clause 48 – Powers to suspend operations of ports.....	19
Clause 49 – Powers relating to potentially infectious persons.....	20
Article 3 – Freedom from torture, inhuman and degrading treatment.....	21
Article 5 – Right to liberty and security.....	22
Article 6 - Right to a fair trial .....	23
Article 8 – Right to private and family life .....	23
Clause 50 – Powers to give directions relating to events, gatherings and premises .....	23
Article 8 – Right to private and family life .....	24

Article 10 – Freedom of expression.....	25
Article 11 – Freedom of Assembly and Association .....	25
A1P1 – Right to peaceful enjoyment.....	25
Clauses 51-55 - Courts .....	26
Article 6 – Right to a fair trial .....	26
Clause 56 – Powers in relation to bodies .....	27
Article 3 – Freedom from torture, inhuman or degrading treatment.....	28
Article 6 – Right to a fair trial .....	28
Article 8 – Right to private and family life .....	29
Article 9 – Freedom of thought, conscience and religion.....	29
Clauses 57-67 – Postponement of Elections.....	30
A3P1 – Rights to free elections.....	30

## Introduction

1. This memorandum sets out the issues arising from the Coronavirus Bill (“the Bill”) with respect to the rights in the European Convention of Human Rights (“the Convention”) as set out in the Human Right Act 1998 (“the Convention rights”). It summarises our, the Department of Health and Social Care’s, assessment of the Bill’s compatibility with the Convention rights, in order to assist the Joint Committee on Human Rights with its analysis of the Bill.
2. This memorandum has been prepared in conjunction with the devolved administrations given it includes a number of provisions that are within devolved competence. We will be seeking Legislative Consent Motions from the devolved legislatures for those provisions.
3. This Bill contains a number of distinct provisions. Accordingly, the analysis below has been conducted on a provision by provision basis, and not by taking each Convention right in turn. Any Bill provisions not mentioned in this memorandum are considered to not raise any material Convention rights issues.
4. It is important to note that, once enacted, the lifespan of this Act, and the measures in it, is limited. It will only be in force for as long as necessary to deal with the Coronavirus. Wherever the analysis below covers interference with a qualified right, this is an important consideration which goes to the proportionality of the measure.
5. We also recognise that there is the potential for a cumulative impact of the provisions on certain persons’ qualified rights. Nevertheless, we consider that the overriding public health emergency that the Coronavirus presents, provides a very strong justification for any potential interferences caused by the Bill’s

provisions whether such interference is caused by one clause or multiple clauses.

6. The Bill is considered to be compatible with the Convention rights, and the Secretary of State for Health and Social Care has made a statement of compatibility under section 19 of the Human Rights Act 1998.

#### **Clause 2-4 – Emergency registration of health and care professionals**

7. These clauses allow for the temporary emergency registration of healthcare professionals. This relaxation of the regulatory regime is intended to address shortfalls in the required numbers of health and care professionals during the Coronavirus pandemic caused by increased illness, morbidity rates and deaths in the general population, and increased levels of sickness absence among such workers.
8. These provisions have the potential to interfere with the following rights:
  - a. Article 2 - Right to life
  - b. Article 3 - Prohibition of torture, inhuman and degrading treatment
  - c. Article 6 - Right to a fair trial
9. In relation to any decisions made under these provisions, section 6 of the Human Rights Act 1998 will continue to apply, requiring all public authorities to act compatibly with the Convention rights.
10. Article 2 may be relevant insofar as it imposes a positive obligation on the state to have in place a regulatory framework to protect life and to take preventative operational measures within the health system and the professional regulatory system to protect an individual whose life is at risk.
11. The Coronavirus emergency could occur and develop quickly and the state must take action to enable it to deal directly and quickly with such an incident. An increase in suitable staff would be required to address an increase in demand as well as replacement of current workforce affected by the emergency. Standard registration processes can take months. The introduction of temporary emergency registration provisions will address the risk to life that could be caused by a failure to act to deal with workforce shortages, arising from a pandemic emergency.
12. There will still be adequate safeguards in place across the system as a whole to ensure compliance with Article 2. We do not consider that any errors of judgement or negligent conduct on the part of individual health care professionals will breach Article 2 (Powell v UK (2000) 30 EHRR CD 362).

13. We do not consider that clauses 2 to 4 of the Bill breach Article 2.

#### Article 3 – Freedom from torture, inhuman or degrading treatment

14. Article 3 may be relevant if there were a failure to provide sufficient health and social care workers during a pandemic, or insufficient professional safeguards were in place to monitor the delivery of treatment by those registered under the emergency registration process. However, we note that the bar for what amounts to “inhuman or degrading treatment” is high.

15. For the same reasons as discussed in relation to Article 2, we have concluded that the emergency registration provisions to support the capability of the health and social care systems will not result in a breach of Article 3.

#### Article 6 - Right to a fair trial

16. The provisions in the Bill remove certain rights of appeal where the Registrar or regulator has revoked an individual’s emergency registration (or has refused to register a person under the emergency registration provision).

17. The right to carry out a business or enter a profession is a civil right under Article 6. It is relevant that these individuals would only be registered temporarily for the duration of an emergency. In addition, such registration would be on the understanding that it is for the sole purpose of responding to the increased need for healthcare treatment at a particular time, rather than as a professional vocation. The conditional and temporary nature of this right will have been clear to those registered to practise for the emergency period.

18. Furthermore, if Article 6 is engaged here we do not consider that there would be a breach of Article 6. The availability of judicial review in this context has been held to be a sufficient remedy (see *Stefan v United Kingdom* Application No 29419/95 (Commission Decision) in which a doctor challenged a fitness to practise direction).

#### **Clause 9 – Temporary modification of mental health and mental capacity legislation**

19. The Bill introduces temporary amendments to mental health legislation in the UK to allow certain functions relating to the detention and treatment of patients to be satisfied by fewer doctors’ opinions or certifications. These temporary amendments also allow for the extension or removal of certain time limits relating to the detention and transfer of patients.

20. Further provisions will temporarily amend current legislation in respect of defendants and prisoners with a mental health condition. It will reduce the number of doctors' opinions required and modify time limits for detention and movement between court, prison and hospital. This will enable people to be admitted to hospital for treatment where there might otherwise be delay owing to shortage of qualified staff during the pandemic.
21. In Scotland, provisions will also permit the reduction in the number of members required to constitute a mental health tribunal, and permit a tribunal to make a decision without holding an oral hearing. Similarly, in Northern Ireland, a trust panel will be able to work remotely (if the decision is unanimous), and the time period in which the panel must take decisions is extended slightly.
22. These provisions have the potential to interfere with the following rights:
  - a. Article 3 freedom from "inhuman or degrading treatment".
  - b. Article 5 right to liberty and security, save as provided (note 1(e) the saving for unsound mind).
  - c. Article 8 right to private and family life.
23. In relation to any decisions made under these provisions, section 6 of the Human Rights Act 1998 will continue to apply, requiring all public authorities to act compatibly with the Convention rights.

#### Article 3 – Freedom from torture, inhuman and degrading treatment

24. Article 3 is relevant to mental health detention. However, whether treatment amounts to inhuman or degrading treatment will depend on the conditions in which the individual is kept and the level of care given. Case law has set the bar high and treatment will usually need to result in either mental or physical injury to be inhuman (*Kudla v Poland* 2000-XI; 35 EHRR 198) or debasement and humiliation to be degrading (see *Pretty v UK* 2002-III; 35 EHRR 1).
25. We do not consider Article 3 is breached by the amendments to mental health legislation in the Bill. We consider that the revised safeguards are sensible and pragmatic precautions in the circumstances and the Bill does not fundamentally reduce the important level of scrutiny that is given in cases where deprivation of liberty is under consideration. Existing safeguards will continue to apply in the event of a pandemic. Hospital managers will for example be required to periodically refer detained patients to the Mental Health Tribunal.<sup>1</sup> Further, the Mental Health Act 1983 Code of Practice, to which clinicians are required to have regard,<sup>2</sup> contains detailed guidance on protecting the privacy, safety and dignity

---

<sup>1</sup> Mental Health Act 1983, section 68.

<sup>2</sup> Mental Health Act 1983, section 118.

of detained patients.<sup>3</sup> To depart from this guidance unreasonably would breach the statutory duty to have regard to the Code. These provisions do not therefore authorise inhumane or degrading conditions of detention.

#### Article 5 – Right to liberty and security

26. The detention of someone against their will potentially can amount to a deprivation of liberty for the purposes of Article 5. However, pursuant to paragraph (1)(e) an individual can be deprived of their liberty, in accordance with a procedure prescribed by law, where a person is of “unsound mind” if it is proportionate to do so.
27. In the event of a pandemic emergency, the Bill reduces, in a measured way, some of the procedural requirements of the existing legislation. It also extends the maximum periods during which medical practitioners and nurses may detain inpatients pending applications for compulsory detention. However existing safeguards will continue to apply to these “holding powers”, including that such patients cannot be transferred to other hospitals or subjected to medical treatment without consent, and must be told about their rights of access to the Mental Health Tribunal and will continue to be able to challenge their detention as required by Article 5(4). The Bill does not permit indefinite detention; rather the outer limits of the holding powers of clinicians and nurses are extended by a certain number of hours during the pandemic emergency. These safeguards ensure that the detention powers, even while augmented by the Bill, remain proportionate and at the minimum required to achieve the policy. Without doing so there may be a risk of serious harm to the person or others.
28. The fact that the conditions giving rise to a power to detain patients will be provided for in primary legislation satisfies the requirement that the detention is in accordance with domestic law and that that law is sufficiently certain and ascertainable. In addition, the existing legislation contains safeguards against arbitrary application.

#### Article 8 – Right to private and family life

29. Article 8 protects the right to private and family life. Mental health detention often brings with it a lack of personal space, monitoring of correspondence, regulation of contact with family, instances of seclusion and the sharing of information about a patient with their nearest relative without consent.

---

<sup>3</sup> For example, “blanket restrictions” (that is, rules or policies whose application to patients is not dependent on individual risk assessments) are discouraged unless necessary and proportionate (paragraph 8.5); patients should have every opportunity to maintain contact with family and friends by telephone, email and social media (paragraph 8.16), and sleeping and bathroom areas should be segregated to protect the interests of patients of different genders (including transgender patients) (paragraphs 8.2 and 8.25).

30. However, Article 8 is a qualified right: interference can be justified “in the interests of public safety” and “for the protection of health” (both the health of the individual subject to detention, and of the wider public). This is provided that the measure is prescribed by law and necessary in a democratic society. The purpose behind the provisions is to ensure the on-going treatment of mental health patients when the number of medical professionals available to deliver it is significantly reduced by the effect of the pandemic.
31. In that light the measures are considered to be proportionate to the achievement of that legitimate end, given that the various safeguards described above will continue to apply in the event of a pandemic.

### **Clauses 21-22 – Investigatory powers**

32. These clauses create two regulation-making powers to ensure that the system for issuing and approving warrants relating predominantly to National Security and combatting serious crime can continue to operate effectively. The Investigatory Powers Commissioner (IPC) is the independent overseer of almost all investigatory powers. He is supported in this role by 15 Judicial Commissioners (JCs), all of whom have held, or do hold, high judicial office. The Investigatory Powers Act 2016 created the ‘double lock’ for all warrants sought for its powers, and for some powers in the Regulation of Investigatory Powers Act 2000. A warrant under the IPA has to be issued by the relevant Secretary of State and then approved by a JC for it to be lawful (other than urgent warrants, which are valid for only short periods of time). The JC are all (except 1) in the particularly at-risk group of over 70 year olds and these regulation making powers will make it possible to appoint temporarily JCs more easily, and to extend the time frames for urgent warrants to be approved by JCs, and the lifespan of the urgent warrants.
33. The first regulation making power enables the Secretary of State to permit the IPC to appoint temporary JCs for periods of six months. This will be a considerably faster process to appoint JCs than the current process of Prime Ministerial appointment on the joint recommendation of the four most senior judicial office holders in the UK. The Secretary of State can only exercise this regulation-making power if the IPC notifies the Secretary of State that there are too few JCs available to carry out their functions effectively, and that this is an effect of the Coronavirus.
34. The second regulation-making power enables the Secretary of State to extend the period of time in which a JC must approve an urgent warrant from 3 working days to not more than 12 working days, and the lifespan of an urgent warrant from 5 working days to not more than 12 working days. This regulation-making

power can only be exercised if the IPC notifies the Secretary of State that it is necessary as a result of the Coronavirus.

35. These provisions have the potential to interfere with Article 8 - Right to private and family life.

#### Article 8 – Right to private and family life

36. Any potential interference with Article 8 rights because urgent warrants will last for longer before they must be approved by an independent judge or former judge, is justified by the need to ensure that the functioning of the JCs is able to continue. We consider this to be necessary in a democratic society in the interests of national security and public safety. The options being pursued here are intentionally designed to preserve the safeguards in the Act (such as the 'double lock' of independent judicial approval of warrants, and the requirement even for urgent warrants to receive that judicial approval) in the face of potentially significant pressure on the system from the effects of the Coronavirus.
37. It is necessary to extend the time limits in this limited way in order to create more flexibility in the system and to seek to prevent backlogs of urgent and non-urgent warrants from building up due to too few JCs. The fact these regulation-making powers can only be exercised on notification that they are needed by the IPC is a further safeguard and helps to ensure that the exercise of the powers would be justified in the pursuit of a legitimate aim and will be proportionate, especially given that the efficient functioning of the warranty system is vital for the protection of national security and the prevention and investigation of serious crime. Section 6 of the Human Rights Act 1998 will also continue to apply, requiring all public authorities to act compatibly with the Convention rights.

#### **Clauses 23-27 – Food supply**

38. These clauses enable the appropriate authority to require those in or closely connected with the food supply chain (but not including individuals) to provide information about their activities, where that activity is connected with the food supply chain. The information must be collected and processed for certain defined purposes.
39. If the person to whom the request is made fails to comply without reasonable excuse, or provides information that is false or misleading to a material extent, the appropriate authority may impose a financial penalty on that person.
40. These provisions have the potential to interfere with Article 6 right to a fair trial.

### Article 6 – Right to a fair trial

41. These provisions may engage Article 6 because they allow the imposition of civil penalties. However, we consider that these provisions are consistent with Article 6 for the following reasons.
42. Before imposing any financial penalty, an appropriate authority must serve a notice of intent. The person on whom that notice is served may then make written representations within 14 days. Furthermore, if a penalty is eventually imposed, the person on whom it is imposed may appeal against the notice to the First-tier Tribunal (in England and Wales), the sheriff court (in Scotland), or a county court (in Northern Ireland).

### **Clauses 31-33 – DBS and disclosure changes in Wales and Scotland**

43. These clauses make changes to the DBS requirements or disclosure requirements in Wales and Scotland.
44. Welsh Ministers will be able to issue a notice to modify the requirements imposed on registered providers of independent health care services and social care services. The purpose is to avoid the delays in new workers being able to start work.
45. Scottish Ministers will be able to disapply or modify the offences in sections 35 and 36 of the Protection of Vulnerable Groups (Scotland) Act 2007. The intention in doing so would be to not criminalise healthcare providers during a time of mass recruitment to tackle the Coronavirus pandemic.
46. Scottish Ministers will be able to treat applications for the Protection of Vulnerable Groups scheme record disclosure, and the Protection of Vulnerable Groups short scheme record disclosure, as a request for the disclosure of scheme membership. This would be a check of the barred lists only, and so no vetting information would be released.
47. These provisions have the potential to interfere with Article 2 right to life.

### Article 2 – Right to life

48. Article 2 may be relevant insofar as it imposes a positive obligation on the state to have in place a regulatory framework to protect life and to take preventative operational measures within the regulatory system for health and social care services to protect an individual whose life is at risk.
49. In relation to clause 31, the Coronavirus emergency could occur and develop quickly and the state must take action to enable it to deal directly and quickly with

such an incident. An increase in suitable staff would be required to address an increase in demand as well as replacement of current workforce affected by the emergency. Obtaining enhanced checks can take several weeks. However, there will still be adequate provision to ensure that checks have been applied for and that workers on the barred list are filtered out. Welsh ministers must also issue a notice stating why the change of a health or social care DBS provision is appropriate and proportionate action in all the circumstances relating to the pandemic.

50. In relation to clause 32, employers may employ someone who is barred from working with vulnerable adults or children and that poses a risk to those vulnerable adults and children. However, this risk currently exists as the Protection of Vulnerable Groups scheme is not mandatory. The offence provisions in relation to barred individuals attempting to do regulated work while barred will still apply, which is considered to be appropriate mitigation of any increased risk or adverse impact on vulnerable groups.
51. In relation to clause 33, the clause will accelerate PVG checks for healthcare providers, and so checks will still be carried out but in a more time efficient manner. The regulatory system and safeguards will still be in place, but the process will be temporarily accelerated. However, again there will still be adequate provision to ensure that checks have been applied for and that workers on the barred list are filtered out.
52. Section 6 of the Human Rights Act 1998 will also continue to apply, requiring all public authorities to act compatibly with the Convention rights.
53. As a result, we do not consider that these provisions breach Article 2.

#### **Clause 34 – Vaccinations: Scotland**

54. These clauses will allow Scottish Territorial Health Boards to deliver vaccination and immunisation programmes through health care professionals other than medical practitioners (and persons acting under the direction and control of medical practitioners). This will primarily be any programme against the Coronavirus itself, but may include any vaccination programme which is at risk of not being delivered due to the impact of the Coronavirus. The purpose of these provisions is to allow a wider range of health care professionals in Scotland to administer vaccinations and immunisations in order to respond flexibly and meet increased demand on services that may arise during a Coronavirus pandemic.
55. These provisions raise issues relating to Article 2 right to life.

## Article 2 – Right to life

56. These changes are intended to reduce the risk of harm that would result if people are unable to access immunisations and vaccinations during a Coronavirus pandemic. It is possible that extending powers to enable health care professionals other than medical practitioners (and persons acting under the direction and control of medical practitioners) could slightly increase the risk of a tragic or life-threatening accident occurring. However, we consider this risk to be minimal given that the health care professionals who might administer vaccinations under this power are subject to the qualifications, requirements, standards and safeguards of the regulated profession to whom they relate. We therefore do not consider that the clause breaches Article 2.

## **Clause 35-36 – Schools, childcare providers etc.**

57. Although there are some nuanced powers in each of the four nations, these provisions broadly encompass the following powers:
58. Temporary closure directions:
- a. A power for the Secretary of State (or an authorised delegate for some powers, such as local authorities and the Office for Students), Welsh Ministers (or an authorised delegate for some powers, such as local authorities and the Higher Education Funding Council for Wales), Scottish Ministers and the Department of Education in Northern Ireland (as the case may be) to give temporary directions requiring the closure, either partially or fully, of registered early learning and/or childcare providers, schools, boarding and student accommodation, further education institutions, higher education institutions and certain other education and training establishments.
  - b. These providers and institutions can be private or independent providers, as well as state maintained educational institutions.
  - c. A temporary closure direction is enforceable by way of an injunction, or interdict in Scotland, with or without notice.
  - d. Before giving a temporary closure direction, the appropriate issuing authority must:
    - have due regard to any advice from the Chief Medical Officer or Deputy Chief Medical Officers of the appropriate authority in each nation; and
    - be satisfied that giving the direction is a necessary and proportionate action in response to the incidence or transmission of coronavirus.
  - e. It is envisaged that guidance will be published by the appropriate authority in each nation about how to comply with a temporary closure direction. Educational institutions and childcare providers to whom the direction applies must have due regard to any such guidance. This will be an important measure in providing transparency to educational institutions

and childcare providers about the scope of this power and how it will be implemented.

59. Temporary continuity directions:

- a. A power to make directions in connection with the running of educational institutions, registered childcare providers and approved examination centres. For example, the direction may require that an educational institution or childcare provider stay open (at the same or different times) or re-open; staff, pupils or students attend different premises; term dates and examination dates are altered; attendance is controlled or restricted where there is a risk of spreading disease to others.
- b. Temporary continuity directions can require educational institutions and registered childcare providers to take on reasonable steps and additional functions. For example, taking on out of school care or using premises for the purpose of protecting public health.
- c. The temporary closure directions are enforceable by way of an injunction, or interdict in Scotland, with or without notice.
- d. Before giving a temporary continuity direction, the relevant issuing authority must:
  - have due regard to any advice from the Chief Medical Officer or Deputy Chief Medical Officers of the appropriate authority in each nation; and
  - be satisfied that the direction is a necessary and proportionate action for or in connection with the continued provision of education.

60. Disapplication notices:

- a. A power for the Secretary of State, Welsh Ministers and the Department of Health in Northern Ireland to disapply existing requirements in education and childcare legislation. For example, the direction could remove or relax statutory requirements in relation to: staff ratios; qualifications of staff; teaching of the curriculum; timings of tests; specialist requirements in respect of children with special education needs and disabilities; school food regulation requirements.
- b. A disapplication notice must state why the appropriate authority of England, Wales or Northern Ireland (as the case may be) considers the issuing of the notice is an appropriate and proportionate action in all the circumstances including in relation to the incidence or transmission of coronavirus.
- c. In publishing a disapplication notice, the appropriate authority must take reasonable steps to bring the notice to the attention of those likely to be affected by it.
- d. Disapplication notices are enforceable by way of an injunction, with or without notice.

61. The appropriate authority of each nation exercising these powers will need to ensure in doing so that they comply with section 6 of the Human Rights Act 1998. This will ensure that the powers are exercised in a manner compatible with the Convention rights.

62. These provisions have the potential to interfere with the following rights:
- a. Article 6 right to a fair trial
  - b. Article 8 right to respect for private and family life
  - c. Article 11 freedom of assembly
  - d. Article 14 non-discrimination
  - e. Article 1 of Protocol 1 right to property
  - f. Article 2 of Protocol 1 right to education

#### Article 6 - Right to a fair trial

63. The right to property (including the use of private land by independent education establishments; discussed below) is a “civil right” that will fall within the remit of Article 6. For parents, caregivers and students, any contractual rights that exist and that are impacted by the exercise of powers would fall within the remit of Article 6 (See on the application of the law of contract; Buchholz v Germany A 42 (1981)). We do not however consider that the exercise of either power to temporarily close or make a continuity direction will be determinative of any civil right, given the temporary nature of the exercise of the relevant power.
64. The without notice application to enforce an injunction engages Article 6 and the right to an oral hearing. However, there are sufficient safeguards in place to ensure that right is only limited in appropriate circumstances. For example, Civil Procedure Rule 23 and Practice Direction 23A cover situations in which without notice applications may be accepted by the court (such as for reasons of exceptional urgency). In considering an application and whether to grant such an injunction, the courts would need to consider the proportionality of such a measure, and would act compatibly with Convention rights as required by section 6 of the Human Rights Act 1998.
65. Where the Department seeks to enforce a direction under these powers, the application for an injunction will not always be without notice. Notice will always be given where this is reasonably possible. The appropriate authority will issue guidance providing information as to the circumstances in which an injunction would be issued.
66. It is envisaged that a without notice application for an injunction would only be issued in exceptional circumstances. For example, a speedy response may be particularly important in respect of institutions that serve children and young people; as they can be particularly vulnerable/susceptible to illness, or at least liable to carry and spread viral illness. Further, the impact of even a single provider failing to comply with a relevant direction for a limited period of time could endanger lives.
67. The procedural measures and safeguards as set out above will ensure that the power is exercised in a proportionate and Article 6 compliant manner.

### Article 8 – Right to private and family life

68. For some further and higher education students, both domestic and international, student accommodation may be regarded as their home for a period of time. Although we would expect further and higher education providers to provide adequate alternative living arrangements, the directed closure of accommodation may result in interferences with the right to private and family life.
69. An interference with private and family life might also arise where the direction changes a child/student's normal educational attendance. This is because it may impact on both the private life of the child/student and, in the case of a child, most likely on the life of the child's family/carers.
70. We consider that any such interference is, however, justified and lawful on grounds set out in Article 8(2). The directions would be in pursuit of the legitimate aims of protecting public health and safety. The directions will be temporary and measured for the emergency period during which they are in force.
71. Indeed, for temporary continuity and closure directions, the appropriate authority is required to have regard to the advice of the Chief Medical Officer or one of the Deputy Chief Medical Officers. For all of the directions, the appropriate authorities must be satisfied that the direction is a necessary and proportionate action. These requirements will safeguard against the arbitrary and disproportionate exercise of this power. We therefore do not consider the clauses breach Article 8.

### Article 11 - Freedom of Assembly and Association

72. The exercise of the temporary closure power has the potential to affect various meetings and events such as student union meetings and sporting and cultural events provided by the institution. These practices may fall within the ambit of Article 11.
73. For the reasons explained above, we consider that the powers are necessary in order to protect public health and that any interference with Article 11 freedoms would be justified and lawful.

### Article 14 – Non discrimination, taken together with A2P1 (right to education)

74. It is possible that these powers, including the temporary closure power, will have a detrimental or disproportionate impact on people with disabilities. This could engage Article 14, taken together with A2P1 – the right to education. For example, if schools in a particular area are directed to temporarily close, or examinations are directed to take place at an alternative location, it may be more difficult for disabled pupils/students to attend the new setting than those who are not disabled. The new setting might not also cater for their adjustments.

75. A potential discrimination issue on the basis of disability might also arise because of a disapplication order, where the order disapplies duties in relation to the provision of education in accordance with a person's Education, Health and Care Plan, or in relation to the review of those plans.
76. We consider that any differential treatment in relation to disability, is capable of being justified. There is a clear, legitimate aim to these measures in relation to the protection of public health and safety. The Department considers that the measure are proportionate in striking a fair balance between the rights and freedoms of the disabled person and the general public interest.
77. The exercise of these powers will be carried out in awareness of these matters and in view of mitigating any detrimental impacts on pupils/students with disabilities, as far as possible. As above, section 6 of the Human Rights Act 1998 will also continue to apply, requiring all public authorities to act compatibly with the Convention rights.

#### A1P1 – Right to peaceful enjoyment of possessions

78. Childcare and early learning providers, academies, independent schools, non-maintained special schools, further education providers and higher education providers may have certain property rights capable of being interpreted as "possessions" for the purposes of A1P1. This may be because these providers and institutions own property or have rights to use the property in a particular way, for example under a lease agreement, or because they derive private income from allowing private or business activities to take place on their property.
79. The exercise of these powers, including temporary closure and continuity directions and temporary disapplication notices, could affect the way in which a person, provider or institution uses their property or the income that can be obtained. This could amount to a restriction on their enjoyment of that property.
80. We consider that any such a restriction would constitute a control of use, rather than a total deprivation of property.
81. We do not consider that A1P1 is engaged in relation to the governing bodies and local authorities responsible for state schools. This is because a governmental organisation cannot be a victim under the Human Rights Act 1998 or the Convention. Other educational providers, such as a higher education provider, may essentially be private in nature, and A1P1 might apply in that case.
82. The Department's view is that because a "possession" does not include the right to any particular amount of benefit, what is, in effect, a temporary adjustment to the rules of a non-contributory benefit does not constitute interference or deprivation.
83. In any case, to the extent that there may be an interference with A1P1, it will be lawful where it complies with the principle of lawfulness and pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised.

84. Given the legitimate aim of reducing the transmission of coronavirus between parents, children, students and education workers, and for the protection of public health and safety, the exercise of these powers is considered to be lawful and proportionate from an A1P1 perspective. The directions will be temporary and measured for the emergency period during which they are in force. In particular, the powers are drafted in such a manner to enable the appropriate authority to take into account specific and changing circumstances. The powers can therefore be used in a proportionate and evidence-based way, based on how the pandemic spreads.
85. The Department considers that the powers will therefore be exercised in a manner compliant with A1P1.

#### A2P1– the right to education

86. Depending on the severity and spread of the pandemic, temporary closure and continuity directions could mean that children, students and pupils are unable or prevented from accessing education for a temporary period.
87. A disapplication order may also temporarily give rise to issues with the A2P1 sphere where, for example, the order disapplies a local authority's duty to provide sufficient schools, or the provision of education in accordance with a person's Education, Health and Care Plan.
88. A limitation on the right will only be compatible with A2 P1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Broadly, it is lawful for the State to place limitations on access to education if it can be demonstrated that this is a proportionate measure in pursuit of a legitimate aim. Unlike other Convention rights (for example, Articles 8 to 11), the right to education is not bound by an exhaustive list of 'legitimate aims'.
89. Given the legitimate aim of reducing the transmission of coronavirus between parents, children, students and education workers, and for the protection of public health and safety, the exercise of these powers is considered to be lawful and proportionate from an A2P1 perspective. In this regard, we repeat our applicable analysis at Articles 8 and A1P1 above.

#### **Clause 47 - Protection of Public Health Scotland**

90. Clause 47 of, and Schedule 18 to, the Bill gives Scottish Ministers the power to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland. The threat can come from inside or outside Scotland.
91. Regulations under the powers can include provision for imposing or enabling the imposition of restrictions or requirements on or in relation to persons in the event of, or in response to, a threat to public health.

92. Restrictions or requirements could include such things as a requirement that a child is kept away from school, a prohibition or restriction relating to the holding of an event or a gathering and what is referred to as “a special restriction or requirement”.
93. A “special restriction or requirement” in relation to a person can include submitting to a medical examination, being removed or detained in hospital, or being kept in isolation or quarantine.
94. Regulations may not include provision imposing a restriction or requirement unless Scottish Ministers consider, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it. Regulations may not include provision enabling the imposition of a restriction or requirement on persons, unless the regulations provide that a decision to impose such a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is proportionate to what is being sought to be achieved by imposing it.
95. Regulations may not include provision enabling the imposition of a special restriction or requirement unless, the regulations are made in response to a serious and imminent threat to public health, or the requirement is expressed to be contingent on there being such a threat at the time when it is imposed.
96. Regulations must not include provision requiring a person to undergo medical treatment.
97. These provisions have the potential to raise issues concerning the following rights:
  - a. Article 3
  - b. Article 5
  - c. Article 6
  - d. Article 8

### Article 3 – freedom from torture, inhuman and degrading treatment

98. Article 3, the prohibition against inhuman or degrading treatment, is an absolute right meaning interference with it can never be justified.
99. In so far as Article 3 may be relevant, there are various safeguards built into the Bill in relation to these powers. The regulation-making powers imposing a restriction or requirement can only be used where the Scottish Ministers consider, when making the regulations, that the restriction or requirement is proportionate. Also any regulations enabling the imposition of a restriction or requirement cannot be made unless the regulations provide that a decision to impose a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is proportionate.

100. Further, for the imposition of a special restriction or requirement, (the potentially more intrusive requirements, such as a requirement for a person to submit to a medical examination), such provision can only be made, where the regulations are made in response to a serious or imminent threat to public health.
101. Finally, any regulations may not include provision requiring a person to undergo medical treatment. It must also be remembered that section 6 of the Human Rights Act will also continue to apply, requiring all public authorities to act compatibly with the Convention rights.
102. With all these safeguards in place, we do not consider that the use of the regulation-making powers in the Bill will breach a person's Article 3 rights.

#### Article 5 – Right to liberty and security

103. Any special restriction or requirement to be detained in a hospital, or kept in isolation or quarantine has potential to amount to a deprivation of liberty for the purposes of Article 5. However, Article 5 provides that an individual can be deprived of their liberty in accordance with a procedure prescribed by law for the purposes of the prevention of the spreading of infectious diseases (Art 5(1)(e)).
104. Article 5 requires that there is certainty in the application of the law permitting detention. It also requires that the measures being taken are necessary to deal with the risk presented, are a measure of last resort, and there must be a relationship between the place and conditions of detention and its purpose. The detention must be a proportionate response to the risk. Article 5 is concerned with the justification for the detention.
105. Any measures provided for would be considered to be the minimum necessary to help delay or prevent further transmission of Coronavirus which presents a significant risk of harm to human health.
106. Article 5(4) entitles those deprived of their liberty to "take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not lawful".
107. Regarding special restrictions or requirements (which might include detention or being placed in isolation or quarantine), it is provided that regulations must provide for a right of appeal to the sheriff court against any decision taken under the regulations by virtue of which a special restriction or requirement is imposed on a person. There are also time limits and provisions for reviews of these restrictions or requirements.
108. Given that the powers can only be used in certain circumstances and are subject to limitations, appeals and reviews, we consider that the measures will be lawful and proportionate. As above, section 6 of the Human Rights Act 1998 will also continue to apply, requiring all public authorities to act compatibly with the Convention rights in the exercise of these powers.

109. Accordingly, we are of the view that a person's Article 5 rights will not be breached should a restriction or requirement be imposed in the circumstances described.

#### Article 6 - Right to a fair trial

110. Article 6 states that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time".

111. As already mentioned above, regulations which impose special restrictions or requirements must make provision for time limits, reviews and appeals.

112. In as much as any of the restrictions or requirements imposed could amount to a determination of a civil right or obligation, the right to challenge the lawfulness of restrictions or requirements that are imposed under Regulations will ensure compliance with Article 6.

#### Article 8 – Right to private and family life

113. Article 8 provides a right to respect for private and family life. We consider that the power to detain a person or to impose other restrictions and requirements on that person is likely to interfere with Article 8 rights, meaning that interference would need to be justified. As a qualified right, any interference with Article 8 would be justified under Article 8(2) if it is prescribed by law, it meets a legitimate aim and is necessary in a democratic society (i.e. it is proportionate).

114. We consider that the powers to detain, isolate and impose other restrictions and requirements are appropriate and proportionate given the emergency circumstances we are dealing with. The purpose of these provisions is to allow for measures to be introduced to help delay or prevent further transmission of Coronavirus which presents significant risk of harm to human health. The measures are the minimum that are considered necessary to ensure the legislation is effective. The safeguards already mentioned above all serve to minimise the impact on a person's rights and to ensure that the powers are exercised in a manner compatible with the Convention rights.

115. In relation to personal information, the common law requirements under the duty of confidence (see *Campbell v MGN* [2004] UKHL 22, the Human Rights Act 1998), the Data Protection Act 2018 and the General Data Protection Regulation will continue to apply and provide important controls on the use and disclosure of personal information.

#### **Clause 48 – Powers to suspend operations of ports**

116. Clause 48 provided a power for the Secretary of State to direct the operator of a 'port of arrival' to suspend operations in respect of some or all arrivals. The

Secretary of State is also afforded the power to direct any person to take such steps as are necessary in connection with such a direction.

117. The power to make a direction under this provision is only exercisable in circumstances in which the Secretary of State considers that there is a real and significant risk that there will be insufficient immigration officers to maintain border security at one or more ports as a direct or indirect result of the incidence COVID 19. Failure to comply with a direction made under this provision without reasonable excuse is an offence.
118. Although Convention compliance analysis will need to be undertaken at the point at which the Secretary of State decides to make a direction under this provision, the Department considers that the power is capable of being exercised in a manner compliant with the Convention rights and given that appropriate procedural safeguards have been included in the drafting of the relevant clauses. Section 6 of the Human Rights Act will continue to apply, requiring the power to be exercised in a manner compatible with the Convention rights.

#### **Clause 49 – Powers relating to potentially infectious persons**

119. The clause on detention, screening and isolation permits restrictions and requirements to be imposed on a person who is, or may be, infected or contaminated with COVID 19, when there is a risk that they may infect or contaminate others. Restrictions and requirements may also be imposed if a person has been in an infected area (as defined by the Secretary of State) within 14 days of their arrival in the UK.
120. The Health Protection (Coronavirus) Regulations 2020 (S.I. 2020/129) (“the Regulations”) were made on 10th February 2020 to permit similar restrictions to those included in the Bill. It has been decided to put the powers in primary legislation to allow for greater scrutiny, including amendment during debate, as well as to deal with the issues on a UK-wide basis. When the primary legislation comes into force the Regulations will be revoked.
121. Constables and immigration officers will have the power to direct or remove a person they have reasonable grounds to suspect is potentially infectious to a hospital or other suitable place, or to keep them there, for the purposes of screening and assessment. Constables will have the power to enforce removal or detention by the Secretary of State.
122. The powers are exercisable in relation to children as well as to adults, although when the power is exercised in relation to an unaccompanied child reasonable endeavours must be used to contact a responsible adult and inform them of where the child is and the exercise of the power. There is a requirement for a person who is a responsible adult in relation to a child to secure, so far as reasonably practicable, that the child complies with the requirements.

123. A person, or a responsible adult in relation to a child, may appeal to a magistrates' court against the imposition of a requirement or restriction.
124. These provisions raise issues concerning the following rights::
- a. Article 3
  - b. Article 5
  - c. Article 6
  - d. Article 8

### Article 3 – Freedom from torture, inhuman and degrading treatment

125. Article 3, the prohibition against inhuman or degrading treatment, is an absolute right meaning interference with it can never be justified.
126. We consider that the powers of detention, to impose requirements to undergo screening, assessment, be held in isolation, or to impose other requirements or restrictions will not amount to inhuman or degrading treatment. Case law has set the bar high – and treatment will usually need to result in either mental or physical injury to be inhuman (*Kudla v Poland* 2000-XI; 35 EHRR 198) or debasement and humiliation to be degrading (see *Pretty v UK* 2002-III; 35 EHRR 1).
127. The provisions permitting isolation, or other requirements or restrictions, anticipate the person being kept in a hospital or other medical facility or other suitable place. There will be a requirement for the Secretary of State to have regard to a person's wellbeing before detaining them or imposing other restrictions or requirements.
128. The Bill does allow some limited compulsory medical interventions, i.e. the taking of samples, for the purposes of screening or assessment. It is an offence not to comply with such a requirement.
129. There are various safeguards built into the Bill. The powers can only be used once there has been a declaration of a serious and imminent risk to public health, and only for as long as the controls are reasonably considered to prevent the spread of the Coronavirus. The Secretary of State must have regard to the person's welfare before imposing any requirements or restrictions. Section 6 of the Human Rights Act will also continue to apply, requiring all public authorities to act compatibly with the Convention rights.
130. We therefore do not consider that the use of the powers in the Bill will breach Article 3.

## Article 5 – Right to liberty and security

131. Detention under these powers may constitute a deprivation of liberty for the purposes of Article 5. However, Article 5 is a limited right and provides that an individual can be deprived of their liberty in accordance with a procedure prescribed by law for the purposes of the prevention of the spreading of infectious diseases (Art 5(1)(e)).
132. The measures in the Bill are considered to be the minimum necessary to achieve the purpose of minimising the spread of infection. There will be time limits to the permitted periods of detention, which will ensure that it lasts for no longer than is necessary. A constable will be able to keep a person at a place for screening or assessment purposes for up to 48 hours (an initial 24 hours followed by a further 24 hours if approved by SoS or a senior officer). This maximum time period is considered necessary to ensure sufficient flexibility when public health officials' resources are likely to be limited by the need to respond to the risk. The Secretary of State or designated public health officer will then be able to detain a person for up to 48 hours in order for the person to be screened, assessed or for other restrictions to be imposed. Following assessment, the Secretary of State or designated public health officer will be able to impose isolation or other restrictions or requirements for up to 14 days, which may be extended if there is considered to be a further risk that the person has become infected or re-infected. If the 14 day period is extended then the restrictions must be reviewed every 24 hours to ensure the conditions for them are still met.
133. Article 5(4) entitles those deprived of their liberty to “take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not lawful”. There will be a right of appeal to a Magistrates court against any detention or restriction. Legal aid may be available through the exceptional case funding scheme subject to means and merits tests for the civil appeal elements. If criminal proceedings are brought against a person under this clause then criminal legal aid will be available as normal.
134. The fact that the conditions for detention will be provided for in primary legislation satisfies the requirement that the detention is in accordance with domestic law and in our view the legislation ensures that the conditions are sufficiently certain and ascertainable.
135. Detention or restrictions on personal liberty under the Bill will be for permitted for certain specified purposes, to allow for screening and assessment and/or to prevent the risk of spreading the Coronavirus to others. The conditions for detention, such as time limits, review, and the requirement to have regard to a person's wellbeing, will protect against the risk of the detention or restrictions being unlawful or arbitrary.
136. Given that the powers under the Bill will only be used in certain circumstances, once there has been a declaration of a serious and imminent threat to public

health, and only for as long as that threat continues and there is a reasonable prospect of the measures controlling the spread of the Coronavirus, we consider that the measures will be lawful and proportionate. Public authorities will also be required by section 6 of the Human Rights Act to exercise the powers in a manner compatible with the Convention rights.

#### Article 6 - Right to a fair trial

137. The urgent nature of the decisions being taken in the context of the Bill mean that people will not have the opportunity to challenge the decision before it takes effect. This is to ensure that the measures have the greatest chance of being effective to prevent the spread of the virus.
138. In so far as Article 6 may be engaged by these provisions, we consider that the requirements of Article 6 are satisfied. There will be an appeals process and a person who is detained, or who has restrictions or requirements imposed upon them, will be able to challenge those decisions in a magistrates' court.

#### Article 8 – Right to private and family life

139. We consider that the powers to detain a person or to impose other restrictions and requirements on that person (including screening and assessment measures) are likely to interfere with Article 8 rights. Such interference would therefore need to be justified in accordance with Article 8(2).
140. We consider that the powers to detain, isolate and undertake screening and assessment measures are appropriate and proportionate given the urgent circumstances we are dealing with. The purpose of these parts of the Bill is to try to minimise the risk to the public of widespread infection and this purpose would be undermined without these measures in place. The measures are the minimum that are considered necessary to ensure the legislation is effective. The safeguards, including the requirement for the declaration to trigger the use of the powers under the bill, the time limits for detention, and the requirements for screening to be undertaken by health professionals, all serve to minimise the impact on a person's rights. Public authorities will also be required by section 6 of the Human Rights Act 1998 to exercise their powers compatibly with the Convention rights.

#### **Clause 50 – Powers to give directions relating to events, gatherings and premises**

141. This clause gives the Secretary of State the power to make a direction to restrict or prohibit an event or gathering, and to order the closure of premises. The exercise of this power will be conditional on the Secretary of State having declared that the incidence or transmission of the Coronavirus constitutes a serious and imminent threat to public health and that the incidence or

transmission of the Coronavirus is at such a point that these measures may reasonably be considered as an effective means of preventing the further, significant transmission of the Coronavirus. Before issuing a direction, the Secretary of State is required to have regard to the advice of the Chief Medical Officer, or one of the Deputy Chief Medical Officers of the Department.

142. It will be an offence to fail to comply with a restriction or requirement under such a direction, without reasonable excuse.
143. A constable or other person(s) designated by the Secretary of State may take action reasonably necessary to ensure that a direction in respect of a gathering, event or premises is complied with. These provisions have the potential to interfere with the following rights:
  - a. Article 8 right to private and family life,
  - b. Article 10 freedom of expression,
  - c. Article 11 freedom of assembly and association,
  - d. A1P1 right to peaceful enjoyment of possessions.

#### Article 8 – Right to private and family life

144. Article 8 right to private and family life is a qualified right, any interference with Article 8 would be justified under Article 8(2) if it is prescribed by law, it meets a legitimate aim, and is necessary in a democratic society (i.e. it is proportionate).
145. The notion of “private life” under Article 8(1) is wide enough to encompass activities of a professional or business nature. The power to make a direction regulating events, gatherings and premises has the potential to interfere with existing businesses and to restrict their ability to conduct business on the way in which a person might carry out their business
146. In so far as Article 8 may be engaged, we consider that any infringement is justified by the public interest aims of enabling the Secretary of State to take swift action in the event that the incidence or transmission of the Coronavirus constitutes a serious and imminent threat to public health.
147. The power is only exercisable once the Secretary of State has declared that the incidence or transmission of the Coronavirus is at such a point that the power to make directions under this clause may reasonably be considered as an effective means of preventing the further, significant transmission of the Coronavirus. The Secretary of State is also required to have regard to the advice of the Chief Medical Officer or one of the Deputy Chief Medical Officers of the Department. The restrictions on the Secretary of State’s use of this power are considered to be proportionate

### Article 10 – Freedom of expression

148. The right to freedom of expression is a qualified right; any Article 10(2) if it is prescribed by law, it meets a legitimate aim, and is necessary in a democratic society (i.e. it is proportionate).
149. The power to make a direction restricting or prohibiting an event or gathering, or restricting the opening of premises, or requiring the closure of premises, has the potential to affect a wide range of events, including music festivals, theatres and political rallies. As such, Article 10 may be engaged. Article 10 encompasses, for example, political and public interest speech, and artistic expression. The power could be used, for example, to prohibit events such as music festivals or political gatherings, or to close theatres or music venues.
150. We consider, for the same reasons given for the Article 8 above, any infringement of Article 10 is justified by the legitimate aim of protecting public health. Similarly, the restrictions on the Secretary of State's use of the power are the same for Article 8, and so we consider that this clause is proportionate.

### Article 11 – Freedom of Assembly and Association

151. The right to freedom of assembly and association is a qualified right; any Article 10(2) if it is prescribed by law, it meets a legitimate aim, and is necessary in a democratic society (i.e. it is proportionate).
152. The power to make a direction restricting or prohibiting an event or gathering, or restricting the opening of premises, or requiring the closure of premises, has the potential to affect a wide range of events, including music festivals, theatres and political rallies. As such, Article 11 may be engaged.
153. We consider, for the same reasons given for the Articles 8 and 10 above, any infringement of Article 11 is justified by the legitimate aim of protecting health. Similarly, the restrictions on the Secretary of State's use of the power are the same for Article 8 and 10, and so we consider that this clause is proportionate.

### A1P1 – Right to peaceful enjoyment

154. A1P1 permits the state to implement and enforce laws where they are necessary in the public interest. Any interference with property rights must, however, be proportionate to that interest.
155. The power to make a direction restricting or prohibiting an event or gathering, or restricting the opening of premises, or requiring the closure of premises, may engage A1P1.
156. We consider, for the same reasons given for the Articles above, any infringement of Article 11 is justified by the legitimate aim of protecting health. Similarly, the

restrictions on the Secretary of State's use of the power are the same for Articles above and so we consider that this clause is proportionate.

157. As outlined above, section 6 of the Human Rights Act will also continue to apply, meaning that public authorities will be required to exercise the powers in a manner compatible with the Convention rights.

### **Clauses 51-55 - Courts**

158. The clauses expand the availability of video and audio hearings in criminal proceedings, and in appeals to magistrates' courts against the imposition of a requirement or restriction under clause 49 to give magistrates' courts, the Crown Court and the Court of Appeal more flexibility in managing these proceedings.
159. These provisions have the potential to interfere with Article 6 right to a fair trial.

### **Article 6 – Right to a fair trial**

160. For the purposes of this Memorandum, we have assumed that in principle it is possible that Article 6 is engaged throughout the process by which criminal charges, rights or obligations are ultimately determined. Whether in fact Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question.
161. The Ministry of Justice considers that, in relation to criminal proceedings, sufficient safeguards are in place to ensure compatibility with the Article 6 right to an oral hearing, or that the right is only limited in appropriate circumstances. If a matter is heard through video or audio technology, then there should generally be no issue as to compatibility with Article 6 given that an oral hearing is still taking place, albeit through remote means.
162. Under these clauses the court will only be able to order that a matter is dealt with via a video or audio hearing if it is satisfied that it is in the interests of justice to do so, after considering any representations from the parties. Furthermore, in making such an order, the court will have to act in accordance with the overriding objective of the Criminal Procedure Rules to deal with cases justly, which explicitly includes recognising the rights of a defendant, particularly those under Article 6, (see Rule 1.1(2)(c)). As a public authority, the court will in any event be required by section 6 of the Human Rights Act 1998 to act compatibly with the Convention Rights, and in particular to ensure that any video or audio hearing is compatible with Article 6.
163. These provisions provide that, where proceedings are conducted by a wholly video or wholly audio hearing, the court or tribunal can direct that the proceedings are to be broadcast for the purposes of enabling members of the public to see and/or hear the proceedings.

164. The intention is that wholly video or wholly audio hearings will only take place where the court is satisfied that appropriate arrangements can be made to facilitate access. Listing practices will ensure that interested members of the public or press are able to find out about video and audio hearings and how to observe them. These practical steps meet the requirement of publicity. To protect the solemnity of the court as well as victims, witnesses and others, the Bill creates new criminal offences that prohibit unauthorised recording or transmission of video and audio proceedings, similar to existing prohibitions on photography and sound recording that apply in physical courts.
165. The current statutory safeguards that apply to youths and proceedings in the youth court will remain. Therefore, for example, the court may not decide to utilise viewing screens in court premises in respect of proceedings in the youth court in light of section 47 of the Children and Young Persons Act 1933 (“CYPA 1933”) which provides that access to a hearing in the youth court is restricted to certain categories of person, or other such individuals who have been specifically authorised by the court.<sup>4</sup>
166. We are therefore content that no issue of compatibility with Article 6 arises in so far as open justice is concerned and the principle of open justice is maintained.

#### **Clause 56 – Powers in relation to bodies**

167. These provisions allow information to be gathered to ascertain capacity locally and nationally in respect of the transport, storage and disposal of dead bodies. This is achieved by a power for local authorities to require persons to give information, and by empowering national authorities to require local authorities to give information to a specified person or body (e.g. a local authority). Restrictions are placed on use and disclosure of the information and offences created in relation to failing to comply with a requirement to provide information, using or disclosing in contravention of provisions or knowingly or recklessly providing false information.
168. Further, the provisions allows national authorities to designate a local authority area where there is likely to be insufficient capacity within that area to transport, store or dispose of bodies. Once an area is designated a local authority can give directions to companies or corporations.
169. These provisions have the potential to interfere with the following rights:
- a. Article 3 freedom from torture, inhuman and degrading treatment,

---

<sup>4</sup>Under section 47 CYPA 1933 and Rule 24.2 (1) Criminal Procedure Rules access is restricted to the parties and their legal representatives, a defendant’s parents, guardian or other supporting adult, a witness, anyone else directly concerned in the case, and a representative of a news-gathering or reporting organisation.

- b. Article 6 right to a fair trial,
- c. Article 8 right to respect for private and family life, and
- d. Article 9 freedom of thought, conscience and religion.

#### Article 3 – Freedom from torture, inhuman or degrading treatment

170. The powers of direction relate to the storage and disposal of dead bodies. In so far as Article 3 may be relevant, we note that there is a high threshold to meet. This threshold is a relative one that takes into account all the circumstances of the case (*Kudla v. Poland* 2000-XI; 35 EHRR 198, paragraph 91 GC).
171. In the case of *Sabanchiyeva and others v. Russia*: hudoc 2013, following a terrorist attack, there were many corpses in a very short period of time. The Government admitted that local refrigerated storage had been insufficient in the early days and not all bodies were kept there. This was not found to infringe Article 3. In coming to its decision, the Court took into account that the treatment was unintentional and a logistical issue in difficult circumstances.
172. In light of the above case law, we consider that these provisions are compatible with Article 3.

#### Article 6 – Right to a fair trial

173. There is an offence (summary only) of failing to comply with directions (companies only) or provide information or misuse of information (individuals and companies). The criminal offence will be tried in the relevant existing criminal justice system in England and Wales, which contains the necessary procedural guarantees set out in Article 6(3) of the Convention.
174. The offences are necessary to ensure national authorities get the information they need to manage excess deaths appropriately. They are there to encourage and act as a deterrent for people failing to follow directions designed to deal with the additional deaths anticipated.
175. The ability to deal with capacity issues is not met unless information is provided and therefore it is appropriate to ensure people comply with requests for information.
176. In respect of the offence related to directions, the power is limited to the Coronavirus pandemic and the purposes of this provision (broadly managing capacity issues in transport, storage and disposal of dead bodies). If these tests are met, a national authority can designate a local authority to make directions and the offences come into play for failure to act properly in relation to a direction given.
177. The offences are proportionate in that they are limited to the Coronavirus pandemic, the directions offence is limited to companies/corporations and local

areas with identified capacity needs. Further, these are summary only offences and time limited and will operate only for so long as is necessary to contain the outbreak. We are therefore content that the provisions are compatible with Article 6.

#### Article 8 – Right to private and family life

178. Whilst these provisions engage Article 8 they do not breach Article 8 which is a qualified right. These provisions meet a legitimate aim of public safety and the protection of public health. Further, they are considered necessary to try to mitigate the effect of additional deaths in a short period of time. They are designed to ensure that there is as much respect as possible in death by speeding up the processes for dealing with dead bodies, so that they are not stored inappropriately and there is not unnecessary delay between death and funerals.
179. In extremis it may be necessary to bury or cremate bodies out of the area desired by the family and if that is not possible it may be necessary to bury or cremate even if the family wished the alternative (cremate rather than bury or bury rather than cremate). However, this would be a last resort, where there is not an identifiable alternative and if health and safety requirements on storage/disposal of bodies require that. In any event, we note the Court recognises the state's wide margin of appreciation in such cases (*Elli Poluhas Dödsbo v. Sweden* 2006).
180. Our view is that the policy is a proportionate way of responding to a legitimate aim of public safety and dignity in death in the wake of the Coronavirus pandemic given the need to strike a balance between the public interests and the interests of family life. Section 6 of the Human Rights Act will also continue to apply, requiring public authorities to exercise the powers compatibly with the Convention rights.

#### Article 9 – Freedom of thought, conscience and religion

181. These provisions engage Article 9 because there may be a need to bury and/or cremate a body contrary to the religious beliefs of the dead person and/or their family.
182. Article 9 contains two strands: the right to hold a belief and the right manifest it. While the former is absolute, the latter is qualified and any interference with it can be justified if it is prescribed by law, it meets a legitimate aim and is necessary in a democratic society. The powers do not affect the first strand of Article 9, instead they relate to the right to manifest a belief.
183. The powers would be exercised in such a way that religious wishes are respected as far as possible, recognising that it may not be possible to hold a service within the time limits that some faiths adhere to normally, given the expected excess demands. In terms of type of death service (i.e. funeral or cremation) these

wishes will be given priority which means that if that is the preference and it is not available in a particular area, arrangements for out of area service will happen before any decision on going against these wishes.

184. The proposals strike a fair right balance between freedom of religion and the interests of society. They are necessary and proportionate as they will only be used as a last resort in the time of an excess of deaths and to meet health and safety obligations at a time of pandemic. Section 6 of the Human Rights Act will also continue to apply, requiring public authorities to exercise the powers compatibly with the Convention rights.

### **Clauses 57-67 – Postponement of Elections**

185. These provisions enable the postponement of elections due to be held between the clause coming into effect and 5 May 2021.

#### A3P1 – Rights to free elections

186. A3P1 therefore requires free elections to be held at reasonable intervals. The next scheduled ordinary general elections to the Scottish Parliament and the National Assembly for Wales are 6 May 2021. The next scheduled ordinary general election to the NI Assembly is 5 May 2022. None of these elections are being postponed by the clauses.
187. The result of a by-election to a devolved legislature being postponed would be that a seat remains vacant potentially until 6 May 2021. A vacancy remaining for that length of time is not considered to be an interference with the right to free and fair elections at reasonable intervals.
188. In any event, the delay of a by-election for up to one year is considered to be in pursuit of a legitimate aim and to be a proportionate response in light of the circumstances. In particular, delaying a poll where otherwise it may be difficult for electors to vote or for local authorities to successfully deliver the poll, seeks to achieve the aim of protecting the right to free and fair elections by ensuring that when elections are held they are well administered and the outcome is sound.
189. Furthermore, it is not without precedent for a vacancy to be allowed to remain for a length of time. For example, in relation to the Scottish Parliament and the National Assembly for Wales, if the seat of a constituency member falls vacant a by-election will be held within three months. If the latest date for holding the by-election would bring it within three months of the next ordinary election the vacancy will remain unfilled until that election. In relation to regional member vacancies, these are either filled from the next person on the party list, or where the member was an independent member, the vacancy remains unfilled until the next general election. As a result, where an independent regional member seat

becomes vacant during the five year term of the legislature this could remain vacant for a number of years.

190. These provisions postpone the electoral canvass in Northern Ireland scheduled for 2020 until 2021. Currently the 2020 electoral canvass is required by the Representation of the People Act 1983 to be completed by December 2020 and will need to be well underway by May. It will be a resource intensive exercise involving the recruitment and training of large numbers of staff to process applications, who must work centrally in the Electoral Officer for Northern Ireland's Belfast office. In addition the exercise requires door to door canvassing, printing and postage of large volumes of canvass forms and the implementation of a new computer system. It is anticipated that much of this exercise will coincide with the projected peak of the Coronavirus and the above steps would be, for obvious reasons, significantly impacted. It is therefore considered unlikely that the canvass can be effectively delivered this year.
191. This delay may have a knock-on effect on the boundary review of Parliamentary constituencies that is scheduled to take place in January 2021. The boundary review process is required to use data from the 2020 electoral register, which would have been updated by the 2020 canvass. However, if the 2020 canvass does not go ahead it is arguable that the boundary review will be based out of date elector information. Inaccuracies in that data could lead to a sub-optimal division of constituencies (i.e. proportionally too many or too few voters might be allotted to a particular constituency).
192. Article 3 of Protocol 1 (right to free elections) to the ECHR requires the equality of treatment of all citizens in the exercise of their right to vote. It might be argued that the effect the canvass delay would have on the boundary review would interfere with that requirement. However, the ECtHR has found that it does not follow that all votes must carry equal weight as regards the outcome of the election (See para 54 of *Mathieu-Mohin and Clerfayt v. Belgium* (App 9267/81)). Indeed, in *Bompard v France* (App 44081/02) the Court found that an electoral boundary review giving rise to constituencies of unequal population did it not breach A3P1 as it did not curtail the applicant's rights to the extent that it deprived them of their effectiveness (the applicant could still vote etc). In any event, interferences with A3P1 can be justified and, in current circumstances, there is a clear and compelling justification for delaying the canvass process.
193. We are therefore of the view that these provisions are compatible with A3P1.