Home Office

Ministry of Justice

Victoria Atkins MP
Minister for
Safeguarding

Chris Philp MP
Minister for Immigration
Compliance and Justice

Rt Hon Harriet Harman QC MP
Chair, Joint Committee on Human Rights
House of Commons
London
SW1A 0AA

9 March 2021

Dear Harriet,

POLICE, CRIME, SENTENCING AND COURTS BILL

We are pleased to inform you that today we introduced the Police, Crime, Sentencing and Courts Bill in the House of Commons. The measures proposed in the Bill, along with other multi-agency work which the government is leading on, will support our response to the recommendation in the JCHR report on *Democracy, Freedom of Expression and Freedom of Association: Threats to MPs* to ensure that the right to protest is balanced with the need not to disrupt the access to Parliament or Parliament's work.

Public Order

Freedom of assembly and freedom of expression are vital rights that the United Kingdom fully supports. The rights of an individual to express their opinion and protest are a cornerstone our democratic society.

There is, and will remain, a balance to be struck between the rights of the protestor and the rights of individuals to go about their daily business. However, there are instances where individuals go beyond acting on these rights and participate behave in a way that causes unjustifiable disruption or distress to others.

In recent years we have seen a significant change in protest tactics which have led to disproportionate amounts of disruption. The current legislation the police use to manage protests was written over thirty years ago. The Commissioner of the Metropolitan Police Service has called on the government to update this ageing legislation to allow the police to safely and effectively manage the highly disruptive protests we see today. The Home

Office has therefore engaged with Police Chiefs and commissioned Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services to conduct an inspection into the policing of protests to understand what needs to be done to ensure the police can safely manage highly disruptive protests whilst preserving citizens' freedoms of expression and assembly.

We are proposing several changes in the law which will improve the police's ability to proactively manage the most disruptive protests and provide punitive outcomes that reflect the seriousness of offences committed by protesters.
Legislation will be brought forward to:

- widen the range of conditions that the police can impose on assemblies (static protests), to match existing police powers to impose conditions on processions (moving protests);
- lower the fault element for offences relating to the breaching of conditions placed on an assembly or procession and increase the resulting maximum sentence;
- widen the range of circumstances in which the police can impose conditions relating to noise on an assembly or procession and introduce a delegated power enabling the Home Secretary to clarify "serious disruption to the life of the community", which is one of the thresholds for conditions being imposed on a protest should a senior police officer reasonably believe there to be a risk of such disruption;
- replace the existing common law offence of public nuisance with a new statutory offence as recommended by the Law Commission; and
- make it an offence to ignore a direction from a police officer to cease obstructing the passage of a vehicle into or out of a gate to the Parliamentary Estate.

Adult Sentencing

Following publication of 'A Smarter Approach to Sentencing' White Paper last year, and commitments made in our manifesto, the government is introducing legislation to ensure that we have a sentencing and release framework that takes account of the true nature of crimes. It must be robust enough to make sure the worst offenders spend as much of their time behind bars as possible, in order to protect the public from harm; but agile enough to give offenders a fair start on their road to rehabilitation.

It is crucial that serious sexual and violent offenders serve sentences that truly reflect the severity of their crimes – helping to protect the public and giving victims confidence that justice has been served. This legislation will abolish automatic halfway release for an additional cohort of serious sexual and violent offenders, requiring them instead to serve two-thirds of their sentence in prison. We are introducing a new power to prevent the automatic early release of prisoners who become of significant public protection concern, such as posing a terrorist threat. We are also making a Whole Life Order the starting point for the premediated murder of a child, and are giving judges the discretion to impose Whole Life Orders on offenders aged 18 to 20 in very exceptional cases.

However, delivering public protection and confidence across the system is not just about better use of custody. 'A Smarter Approach to Sentencing' set out our plans for more

effective community sentencing that both punishes and tackles the underlying drivers of offending, and we will now legislate to deliver these reforms. We will make community sentences tougher and better monitored, particularly through the extended use of electronic monitoring.

In addition, this legislation will reduce the time periods after which some criminal sentences become spent, so they do not have to be disclosed to employers for non-sensitive jobs or activities. This will aid rehabilitation by helping offender to move on with their lives.

Criminal damages to memorials

There is widespread concern that the current law does not allow the court to deal effectively with the damage or desecration of war memorials and other statues. The issue re-emerged during summer 2020 when many statues and memorials were targeted causing great distress amongst the general public and we are grateful to Jonathan Gullis and James Sunderland for highlighting this issue through their Desecration of War Memorials Private Members' Bill. Statues and memorials are a source of great national pride, commemorating individuals and events of historical or cultural significance. While incidences of damage to memorials are typically of low monetary value, they very often carry a high sentimental and emotional impact. Under the current law, cases of criminal damage with a value less than £5,000 must be tried summarily and carries a maximum penalty of three months' imprisonment or a £2,500 fine.

The Bill will toughen the law where criminal damage is caused to a memorial, by removing the consideration of monetary value which would otherwise determine venue and limit sentencing powers, effectively increasing the maximum sentence from three months to 10 years' imprisonment for criminal damage of a memorial less than £5000. These changes will allow the court to consider all the impacts, not just financial, so that the sentence can reflect the full range of harm caused.

Throughout the last year, there has been an alarming increase number of assaults against emergency workers. Such behaviour is utterly disgraceful, and it is vital that those offenders face the full force of the law. The government will not tolerate these attacks and so we are legislating to double the maximum penalty for assaults on emergency workers from 12 months to two years' imprisonment.

Unauthorised Encampments

While the vast majority of travellers are law-abiding citizens, but illegal sites can cause distress and misery to those who live nearby.

The Bill will introduce a new criminal offence where a person who resides or intends to reside on any public or private land without permission and is causing, has caused, or is likely to cause, significant harm, obstruction, harassment or distress. We have taken steps to ensure that those exercising their rights to enjoy the countryside are not inadvertently impacted by these measures. In addition, the Bill amends the Criminal Justice and Public

Order Act 1994 to broaden the list of harms that can be considered by the police when directing people away from land; and increase the period in which persons directed away from land must not return from three months to 12 months. Amendments to the 1994 Act will in addition allow police to direct trespassers away from land that forms part of a highway.

Serious Violence Reduction Orders

Serious Violence Reduction Orders (SVROs) will give the police additional stop and search powers to target those convicted of knife and offensive weapons offences. SVROs will target those who pose the greatest risk of harm, will discourage offenders from carrying weapons again as there is a greater likelihood of being caught and brought to justice, and will help protect exploited individuals. SVROS will save lives and make communities safer. To ensure that SVROs operate as effectively as possible we will pilot SVROs before they are rolled out nationally.

Driving Offences

Whilst many deaths and injuries are the result of a tragic accident, too many of these incidents involve criminal behavior. The government is bringing forward changes to driving penalties to meet its longstanding commitment to ensure the courts have the powers they need to deal with those drivers who kill by dangerous driving or by careless driving when under the influence of alcohol or drugs.

Youth Sentencing

The Bill will reinforce the presumption that children should be remanded in the community unless there is no suitable alternative to custody. We will amend the provisions, known as the 'LASPO tests, that the courts must satisfy to remand a child to custody. These are currently set in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.

We agree with your belief that custody is only to be used as a last resort for children and the system includes high intensity community orders, as well as restrictions on the use of custody for younger children. Where custody is required, we are ensuring that sentences work fairly by removing the fixed lengths of the Detention and Training Order and ensuring that, for those children who commit serious crimes, the length of time spent in custody reflects the seriousness of the offence.

Community sentences cause less disruption to children's family connections and education and can be more effective than custodial sentences at reducing reoffending. This Bill makes a number of changes to the Youth Rehabilitation Order (YRO) with the intention of increasing courts' and the public's confidence in community sentences as a robust alternative to custody. It will also make changes to the YRO with Intensive Supervision and Surveillance (ISS), a high-intensity alternative to custody, which we believe will give courts the confidence that children can be supervised in the community

and that ISS can be used in place of short custodial sentences. These changes will be piloted to ensure that they are robust and effective before wider use. Finally, it will abolish the Reparation Order, a little-used community sentence, to redirect sentencers to other, more effective avenues for reparation, such as Referral Orders or YROs.

We attach a memorandum which sets out our ECHR analysis of the Bill as a whole.

We stand ready to respond to any questions that your Committee may have. To ensure a prompt response, it would be helpful if any correspondence from you could be copied to the joint Home Office/Ministry of Justice Bill Managers:

Charles Goldie, email: Charles.Goldie1@homeoffice.gov.uk, tel: 07774 793166, and;

Rachel Stuart, email rachel.stuart@Justice.gov.uk, tel: 07976 766439).

We will ensure that the committee remains fully updated as to the progress of this Bill. As ever, we are thankful to the committee for all its hard work in rigorously scrutinising the policies of our departments in a collaborative and constructive manner. We hope you welcome this Bill and I look forward to discussing it with you in the coming weeks.

Best wishes,

Victoria Atkins MP **Chris Philp MP**

POLICE, CRIME, SENTENCING AND COURTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Police, Crime, Sentencing and Courts Bill. It has been prepared by the Home Office, Ministry of Justice and Department for Transport. On introduction of the Bill in the House of Commons, the Lord Chancellor and Secretary of State for Justice (the Rt Hon Robert Buckland QC MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

2. The purposes of the Bill are to:

    - Recognise the bravery, commitment and sacrifices of police officers by ensuring they have the support and protection they need.
    - Equip the police with the powers and tools they need to keep communities safe.
    - Create new duties on a range of specified agencies across different sectors, such as local authorities and health and probation services, to work collaboratively, share data and information, and put in place plans to prevent and reduce serious violence within their communities.
    - Establish a new, smarter approach to sentencing by providing for a sentencing regime that both takes account of the true nature of crimes and is robust enough to keep the worst offenders behind bars for as long as possible in order to protect the public from harm, but is also agile enough to give offenders a fair start on their road to rehabilitation.
    - Help modernise the delivery of criminal and civil justice by overhauling existing court processes to provide better services for all court users.

3. The Bill includes the following Home Office and Department for Transport measures:

a. Place a new duty on specified public authorities to collaborate with each other to prevent and reduce serious violence;
b. Place a duty on relevant homicide review partners to undertake a review of the circumstances of the death of a person aged 18 or over which involved an offensive weapon;
c. Create a statutory framework for the extraction of information from digital devices for the purposes of the prevention, detection, investigation or prosecution of crime, safeguarding purposes and the purposes of investigating deaths;
d. Reform pre-charge bail to better protect vulnerable victims and witnesses;
e. Amend the Crime (Overseas Production Orders) Act 2019 to ensure that it operates effectively so that the police and prosecutors have the power to obtain faster access to electronic data held overseas;
f. Streamline the police powers to require a convicted person to attend a police station for the purposes of taking their fingerprints, non-intimate samples and photographs;
g. Confer powers on the police to obtain information about the location of human remains where there is no on-going criminal investigation;
h. Strengthen police powers to tackle non-violent protests that have a significant disruptive effect on the public or on access to Parliament;
i. Strengthen police powers to tackle unauthorised encampments;
j. Enable the police in Scotland to issue fixed penalty notices on-the-spot to people who commit certain minor road traffic offences;
k. Make provision for Serious Violence Reduction Orders to confer on the police new targeted stop and search powers to tackle those convicted of offences involving knives or offensive weapons;
l. Strengthen the management of sex offenders, including by enabling the Secretary of State, or other-directed person, to establish and maintain a list of countries where children are considered to be at high risk of sexual abuse and exploitation from UK offenders;
m. Strengthen the management of terrorism risk offenders on licence in the community by introducing new police powers of premises and personal search and an urgent power of arrest

4. The Bill also includes a range of Ministry of Justice measures, relating to sentencing and release, courts and positions of trust. The sentencing and release measures will:

    a. Make provision for starting points for whole life orders to include premeditated murder of a child and allow judicial discretion to impose a whole life order on 18-20 year olds in exceptional circumstances (clauses 101 and 102);
    b. Change the threshold criteria for disapplication of minimum sentences for repeat offenders (clause 100);
    c. Strengthen starting points for sentencing for serious offences, by altering the way discretionary life sentence minimum terms are calculated (for both adult and youth) (clauses 103 and 105);
    d. Increase the maximum penalty for serious driving offences to life imprisonment and create a new offence of causing serious injury by careless driving (clauses 64 and 65), doubling the maximum penalty for assault on an emergency worker to 2 years (clause 2), and increase sentencing scope for damaging memorials (clause 46);
    e. Make provision for new Problem-Solving Courts including a drug-testing measure (clause 128, 129 and Schedules 13 and 14);
    f. Simplify the out of court disposals framework (Part 6);
    g. Change minimum term starting points for mandatory life sentenced young offenders (clause 103);
    h. Change Youth Rehabilitation Orders, including increasing daily curfew hours, standalone electronic monitoring requirements and piloting mandatory location monitoring for intense supervision and surveillance requirements (clause 135 and Schedule 16);
    i. Allow change of the responsible officer for a Youth Rehabilitation Order electronic monitoring requirement to a Youth Offending Team member or probation officer (clause 126);
    j. Change the threshold for remand for young offenders (clause 131);
    k. Provision for secure 16 to 19 academies, and temporary release from secure children's homes (clauses 137 and 138);

l. Offenders sentenced to Standard Determinate Sentences (SDS) between 4 – 7 years for certain sexual or violent offences (where that offence attracts a maximum penalty of life) will serve two-thirds of their sentence in custody instead of half, (adults and youth) (clause 106);
m. Change the earliest point of Parole Board release from half to two-thirds for SOPCs (clause 107);
n. Prevent the automatic release of prisoners serving a standard determinate sentence if they are judged by the Secretary of State to be dangerous (based on statutory criteria and available evidence) and instead refer them to the Parole Board to assess their suitability for release (clause 108);
o. Make changes to multi-agency public protection arrangements to ensure automatic management of terrorist offenders and facilitate sharing of information (clause 162);
p. Make changes to strengthen community sentencing and supervision arrangements, including consultation on unpaid work, extending electronic monitoring requirements and increase in daily curfew hours and curfew period (clauses 124, 124 and 130);
q. Polygraph testing for service offences and repatriated offenders (clauses 120 and 121);
r. Alteration of the appropriate extension period for driving disqualifications, consequential on the recent changes to release arrangements for certain offenders (clauses 115-118);
s. Ensure responsibility for setting licence conditions lies with the body responsible for release (clause 110);
t. Strengthen the powers of the Parole Board to enable decisions to be set aside if they are found to be fundamentally flawed, or significant new information comes to light (clause 109);
u. Enshrine minimum term review entitlements in the legislative framework for young offenders serving a sentence of Detention at Her Majesty's Pleasure (clause 104).

The Bill also contains courts provisions to:

v. Enable greater use of video or audio live links in all criminal proceedings (clause 168);
w. Facilitate open justice where hearings are conducted using video or audio links in criminal proceedings, civil and family proceedings, and proceedings in tribunals (clauses 166 and 167);
x. Permit a sign language interpreter to be present during jury deliberations to assist a profoundly deaf juror (clause 164).

The Bill also created further positions of trust within the Sexual Offences Act 2003 by:

y. Adding those aged over 18 who knowingly coach, teach, train, supervise or instruct another person regularly in a sport or a religion, thereby making it an offence for them to engage in sexual activity with a young person (aged 16-17) (clause 45).

5. The Government considers that clauses of or Schedules to the Bill which are not mentioned in this memorandum do not give rise to any human rights issues. The Convention rights raised by provisions in the Bill are prohibition on torture, inhuman or degrading treatment or punishment (Article 3); liberty and security of person (Article 5); fair trial (Article 6); no punishment without law (Article 7); private and family life (Article 8); freedom of expression (Article 10); freedom of assembly (Article 11); discrimination (Article 14); and Article 1 Protocol 1 (peaceful enjoyment of property). The Home Office analysis relates to particular measures in the Bill. The Ministry of Justice measures in the Bill have been analysed by reference to the relevant Convention article.

Ministry of Justice measures – Convention article analysis

Article 3

6. Article 3 provides no one shall be subjected to torture, inhuman or degrading treatment or punishment. The whole life order (WLO) measures in the Bill at paragraph 4(a) above engage Article 3 as these offenders will serve life in custody

without parole, and may only be released on licence if there are exceptional circumstances which justify the prisoner's release on compassionate grounds.

7. Domestic courts and the European Court of Human Rights (ECtHR) have confirmed the imposition of WLO for murder are compatible with Article 3 where they provide prospect of early release in exceptional circumstances (*Hutchinson v UK* [2016] ECHR 021, *R v McLoughlin* [2014] EWCA Crim 188, which reflect the United Kingdom's position post-*Vinter v UK* (Applications nos. 66069/09, 130/10 and 3896/10)). The new measures will continue to provide for a prospect of release for the offender under certain circumstances via section 30 of the Crime (Sentences) Act 1997. The exercise of the Secretary of State's discretion under section 30 is subject to the extra check of judicial review. The Government therefore considers the WLO measures are compliant with Article 3.

Article 5

8. Article 5 provides everyone has the right to liberty and security of person, nor be unlawfully deprived of their liberty.

9. Several of the sentencing measures engage Article 5. This requires that deprivation of liberty must not be arbitrary and there remains a causal connection between the conviction and the deprivation of liberty. In order for a sentence not to amount to arbitrary detention, the court must retain discretion and be able to take into account material circumstances (*R v Offen (Matthew Barry)* (No. 2) [2001] 1 WLR 253).

10. In relation to the WLO provisions at paragraph 4(a) above, the sentence is not determinative or mandatory and the court retains its discretion to determine whether it would be just to impose a minimum term order in the alternative, having regard to the circumstances of the offence and the offender.

11. Similarly, with the changes to minimum terms and minimum sentences which the Bill provides for (paragraph 4(b), (c), (g) and (u) above), the minimums are imposed by the court and are not mandatory. The court may depart from them, depending

on the seriousness of the offending, the offender's circumstances and nature of the case. A sentencing regime which allows for individualised assessments as the minimum term is fixed has been held to be compatible with the Convention (*R v McGill, Hewitt, Hewitt* [2017] EWCA 1228, *Venables v United Kingdom* App no 24888/94).

12. The measures at paragraph 4(h) and (p) will allow a court to impose increased curfews on offenders. The proposed changes will increase the maximum daily total available for adults and youths to 20 hours within the current weekly maximum hours of 112 and increase the maximum curfew period imposed from 1 year to 2 years for adults only.

13. In *SSHD v JJ & Others* [2007] UKHL 45, the House of Lords found that curfews of 18 hours or more can amount to a deprivation of liberty. *SSHD* and *SSHD v AP* [2010] UKSC 24 are authority that what amounts to a deprivation of liberty will depend on the other conditions imposed upon the offender and their circumstances as a whole.

14. It is the Government's view that the increase of curfew period will not amount to an unlawful deprivation of liberty under Article 5. Firstly, the curfew periods are set by the court as part of a sentence and therefore will be commensurate with the offending. Secondly, the measure contains safeguards – the setting of the curfew periods is not mandatory, nor is the judge's discretion fettered by the new measures. In relation to the daily curfew hours, the change simply increases the daily period without increasing the weekly cap of 112 hours which must be adhered to. Nor will this change affect the option to split the curfew hours into several periods during the 24 hours, nor the minimum which remains at 2 hours on any day where curfew is imposed. In relation to the curfew period, the court may impose a longer curfew period for adults up to a maximum of 2 years, if appropriate. Where an independent judiciary retains discretion to impose curfew requirements within a reasonable framework of minimum and maximum curfew limits and can consider personal circumstances in doing so, it is considered this is compliant with Article 5.

15. With all these sentencing measures, section 6 of the Human Rights Act 1998 will apply to discretionary sentencing exercises carried out by judges, ensuring these are undertaken in such a way that is compliant with that Act.

16. Several of the release measures in the Bill similarly engage Article 5. The measures at paragraph 4(l), (m) and (n) will result in offenders being detained in prison for longer pursuant to their sentence.

17. The Supreme Court case of *Brown v The Parole Board for Scotland and others* [2017] UKSC 69 is authority that the whole of the determinate sentence is the penalty imposed by the Court. *Brown* also confirmed the Supreme Court case of *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39, which found that Article 5(4) did not apply to recall to custody for standard determinate sentences during any part of the sentence because the whole of the sentence was covered by the original sentence of the court under Article 5(1)(a) as the penalty/punishment for the offending. Where release provisions are altered which do not alter the overall sentence imposed by the court then any detention during that period is therefore, in the Government's view, in accordance with Article 5.

18. Additionally, the Bill provision at paragraph 4(n) will enable offenders identified as high risk to be subject to referral by the Secretary of State to the Parole Board. These offenders will become subject to release at the discretion of the Parole Board and therefore may be detained until the end of their sentence.

19. However, it is the Government's position that the principles in *Brown* et all apply in the same manner. Further authority on recall cases supports this approach. In *R (Bektas) v Secretary of State for Justice* [2009] EWHC 2359 (Admin), the Court dismissed the claimant's challenge to a recall decision and held there does not have to be a causal link between the reasons for recall and the original sentence of the court in the case of a determinate sentence.

20. The changes will additionally not unduly interfere with the sentence passed by the judicial authority owing to the principle that early release, licence and their various ramifications are irrelevant considerations on sentencing (*R v Round* [2009] EWCA

Crim 2667, *R. v Bright* [2008] EWCA Crim 462). Changes to early release is within the remit of statute or executive policy as Parliament directs.

21. Further, in respect of paragraph 4(n) the measures have sufficient safeguards in place to prevent interference with Article 5. The referral to the Parole Board must be based on evidential material. The prisoner will have the ability to make representations and the Secretary of State must rescind the referral at any time up until conclusion of the Board review if they are satisfied the offender is not a danger to the public. A High Court review mechanism is built into the provision if there is unreasonable delay in executing the referral after the prisoner's automatic release date has passed.

22. It is, therefore, the Government's position that where the sentencing and release measures engage Article 5, the processes and safeguards in place prevent any Bill measures from an unlawful interference with Article 5.

Article 6

23. Article 6 protects individuals' rights to a fair trial.

24. The polygraph provisions at paragraph 4(q) may engage Article 6 as information from polygraph tests can be shared with police where there is lawful authority to do so. Protections against any unlawful interference with Article 6 in relation to criminal charges are built into the existing legislation. The Bill limits the testing to questions that aim to monitor compliance with other conditions of the offender's licence, and questions that will improve the way the offender is managed in the community.

25. Article 6 could be engaged in relation to civil rights if information from the tests was used to apply for a civil order against the offender, for example a terrorism prevention and investigation measure. However, it is the Government's position that this would not breach the offender's Article 6 rights as the evidence presented would need to meet the relevant test for the order, and the result of a failed polygraph test would not be the only evidence provided in such an application but

would be supported by other evidence. There would be also be further safeguards in the judicial process, as the court would be able to assess the evidence as presented and could refuse to grant the order or make the evidence inadmissible, if it would be unfair to the offender to admit it. In considering these issues the court would be bound to act in compliance with the Human Rights Act 1998. Therefore, in the Government's view there is no interference with Article 6 rights for this measure.

26. The problem-solving courts measures at paragraph 4(e) engage Article 6 as they empower the courts to review and vary criminal sentences. It is important that any determinations made by the court with respect to those sentences must be fair for Article 6 purposes. Safeguards are in place which mirror those generally in operation in criminal proceedings (such as restrictions on penalties, judicial discretion in relation to sanctions, legal representation, appeals and procedural safeguards for the offender to challenge evidence) and it is considered that these are sufficient to comply with Article 6 requirements.

27. The out of courts disposal regime at paragraph 4(f) engages Article 6 as this involves the offender's criminal matter being determined by police officers and prosecutions authorities and must therefore be fair for Article 6 purposes. There are a number of safeguards in the legislation to ensure fairness which will be further supplemented by the Code of Practice. These include the need for there to a be sufficiency of evidence to charge the offender, an admission of guilt by the offender and the aim of this framework being to address very low level or first time offending. In the context of these safeguards, and the fact the new regime consolidates existing Article 6 compliant disposals, it is considered that the need for an optional acceptance of the disposal by the offender constitutes an effective waiver of Article 6 rights. The Government therefore considers that these safeguards result in proceedings which are fair overall as required by Article 6.

28. The criminal courts changes, and open justice changes also engage Article 6. These measures contain safeguards to ensure a fair trial or hearing.

29. Where a British Sign Language interpreter is permitted to accompany a deaf juror into the jury deliberation room as provided for by the measure at paragraph 4(x), the judge retains the power to discharge such a disabled person's summons if it is considered they are incapable of acting effectively as a juror in a particular case. Challenge is also permitted from the defendant and Crown Prosecution Service where any question of suitability arises in relation to the BSL interpreter. It is therefore the Government's view that these measures serve to preserve a defendant's right to a fair trial in accordance with Article 6.

30. The new powers to make a greater range of live link directions in most criminal proceedings at paragraph 4(v), includes provision for "remote juries" which contains relevant safeguards to ensure Article 6 fairness to defendants. A court may only make a live link direction where the interests of justice are satisfied having regard to certain criteria including any guidance from the Lord Chief Justice. The court is required to ensure due process for the defendant where live links are used (*Marcello Viola v Italy* ([2006] ECHR 1215). A defendant must be given notice of an intended live link direction, and will be able to make representations opposing the direction. These must be considered by the decisionmaker when assessing whether the defendant will be able to participate and present his case effectively.

31. The open justice provisions in the Bill at paragraph 4(w) engage Article 6. Both the common law (*Scott v Scott* [1913] AC 417) and Article 6 (*Axen v Germany* (Application no. 8273/78) require that hearings be in public, because of the public interest in scrutiny of the judicial procedure; and it is not enough that the proceedings are theoretically open to the public - practical steps must be taken to ensure that the public is informed and effective access is granted (*Riepan v Austria* (Application no. 35115/97)).

32. Measures are in place to ensure the open justice measures meet those criteria. The intention is that there will be viewing screens in court premises to facilitate access. Virtual hearings will also be accompanied by listing practice which enables interested members of the public or press to attend an observation suite. These practical steps meet the requirement of publicity. The judge or Tribunal member

will be able to close the proceedings by directing it not be broadcast taking into account the seven-step interests of justice test as applied for live links.

33. It is therefore the Government's position that the criminal courts measures and open justice provisions are compliant with Article 6.

Article 7

34. Article 7 provides that no one shall be subject to a heavier penalty than that which was available at the time the criminal offence was committed.

35. The sentencing measures at paragraph 4(c), (g), (h), (j), (p) and the release measures at (l) and (m) may have the appearance of retrospective effect in as far as they apply to offenders who have committed offences pre-commencement, but not yet been sentenced. In relation to all those measures, Article 7 is not breached as none of these measures give rise to the availability of a higher maximum penalty and the maximum penalty that may be imposed before and after commencement remains the same (in compliance with the principles in *Coeme and Others v Belgium* (2000) and *R v Uttley* [2004] UKHL 38).

36. The release measures at paragraph 4(i), (k), (n), (o), (q), (r), (s), (t) and (u) will apply to offenders who have been sentenced before the commencement date.

37. In respect of the new power at paragraph 4(n) to override a standard determinate sentence offender's automatic release date if they are considered to be high risk, some prisoners currently serving the custodial part of their sentence will now spend longer in prison until they can be considered for release. However, these measures are more appropriately cast as a change to the execution of the penalty within the sentence 'envelope'. When imposing a determinate sentence, the entirety of the fixed term is the punishment element of the offence. There is an established body of case-law to the effect that release provisions are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 - *Uttley v UK* (Application No. 3694/03), *Csoszanski v Sweden*

(Application No. 22318/02*), M v Germany* (Application 19359/04), (*Hogben v United Kingdom* (Application No. 11653/85, 3 March 1986); *Del Rio Prada v Spain* (Application No 42750/09, 21 October 2013, *Abedin v the United Kingdom App* 54026/16). Consequently, any changes to relevant early release schemes is not an additional penalty.

38. In respect of paragraph 4(k), Article 7 is not breached because there is no alteration of the penalty imposed on children but rather provision for their management during the term of their sentence via temporary release.

39. In respect of paragraph 4(r), where a custodial sentence is imposed along with a discretionary disqualification from driving, the disqualification is made up of the discretionary disqualification period and the appropriate extension period. The discretionary disqualification period is the length of ban that would have been imposed were no custodial sentence being served, and its length is at the court's discretion. The extension period is fixed in legislation. Owing to the changes to sentencing and release provisions in the last 12 months, some offenders who were sentenced to custody and a driving disqualification received an inappropriate extension period. The measures at paragraph 4(r) ensure that the correct release point is reflected in the provisions to provide for an appropriate extension period, including for those already sentenced.

40. Although these measures may affect the overall amount of time some offenders will spend disqualified, this will only impact on any custodial period of their sentence where they are not in any event able to drive. Strasbourg and domestic authority has established that measures which are not a substantive penalty but are for the administration of the sentence do not form part of the penalty for the purposes of Article 7. These measures are not a change to the substantive penalty imposed by the court which is the driving disqualification itself, but rather are a change in the application of that penalty so it has effect as intended by the court – bringing the disqualification penalty into force at point of release. This is therefore procedural in nature, and is not part of the penalty.

41. With paragraph 4(q), offenders currently serving their custodial sentence, or who have already been released on licence will be subjected to mandatory polygraph testing as part of their licence conditions. With paragraph 4(s), the measure changes the body responsible for imposition of conditions in some serving offender's cases. As a licence condition is an execution or enforcement component of the sentence which has been handed down by the court, they are not an additional or new penalty being imposed retrospectively for the purposes of Article 7.

42. The curfew measures at paragraph 4(h) and (p) are capable, via the Sentencing Act 2020 provisions, of allowing a court to revisit an offender's community order requirements in certain circumstances and applying these measures retrospectively to offender already serving an applicable order. However, as above, this does not breach Article 7 as it does not give rise to a heavier maximum penalty than was available to the court at the time of sentencing (being a sentence of imprisonment). Any supplementary curfew requirements will be judicially imposed at its discretion on considering the particular circumstances, and the court will be required to have regard to Article 7 under section 6 of the Human Rights Act 1998.

43. In respect of paragraph 4(u), this measure reflects the current case law in relation to offenders serving a sentence of Detention at Her Majesty's Pleasure (DHMP) by restricting eligibility to apply to the High Court for a review of their minimum term to those sentenced when under 18. This measure will retrospectively apply to those already sentenced but is in effect putting the case law on a statutory footing and giving the power to the High Court to make such decisions. The measure brings the minimum term review mechanism in line with judicial authority that there is a duty of review of minimum terms in cases of children (*R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] A.C. 407, *V v United Kingdom* (2000) 30 E.H.R.R 121; *R v Secretary of State for the Home Department, ex parte Smith* [2005] UKHL 51) and children are to be distinguished from adults in these cases.

44. It is therefore the Government's position that Article 7 is not breached.

Article 8

45. Many of the sentencing and release measures engage Article 8, the right to private and family life. However, the right to private and family life is a qualified right, and the Government's view with all these measures is that any interference is a result of the sentence imposed and the offence committed by the offender in accordance with the law and justified.

46. Those who will be subject to drug testing under paragraph 4(e) may suggest that these changes are a breach of their Article 8 rights. However, the right to private and family life is a qualified right, and any interference is a result of the sentence imposed and the offence committed by the offender. It is considered that any interference is necessary and proportionate for law enforcement and public protection purposes, and necessary and proportionate for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, because it aims to address people's drug use which is known to contribute to offending and would only be imposed on those with drug misuse issues.

47. The polygraph testing measures at paragraph 4(q) are in pursuit of a legitimate aim, namely: public safety, the prevention of crime/disorder, and the protection of the rights and freedoms of others. It is considered the measures are a justified interference where the measure is imposed during a sentence of imprisonment as the condition will only be imposed on offenders who are assessed as high/very high risk of causing serious harm in their static risk assessment, or on a discretionary basis on offenders who are not assessed as high/very high risk, but the polygraph condition is necessary and proportionate in order to manage them in the community.

48. The Bill strengthens provision for electronic monitoring as a condition of a youth rehabilitation order, community sentence or suspended sentence (above at paragraph 4(h) and 4(p)); the Bill also increases curfew lengths, as described above in the Article 5 analysis. Imposition of electronic monitoring and curfews engage an offender's Article 8 rights.

49. These measures are considered to be compatible with Article 8. Firstly, the measures do not impose mandatory sentencing regimes; rather, they add to the options the judiciary has when imposing a community sentence on an offender, and approaches to sentencing remain individualistic. As always, the court will be required to consider the seriousness of the offence, the circumstances of the offender and the overall package of measures in the sentence and not impose greater restrictions on liberty than are warranted in the circumstances of the case. Before making a relevant order imposing a curfew requirement, the court must obtain and consider information about each place proposed to be specified in the order, including the attitude of persons likely to be affected by the offender's enforced presence there. The appropriateness of the sentence, and the conditions which make up the sentence, will be determined by the court who will do so based on the circumstances of each individual case and the risk posed by the individual. A court may vary or remove the requirements on application or discharge the order entirely where it is satisfied that they are no longer necessary.

50. The measure at paragraph 4(h) will provide for mandatory electronic monitoring if a judge chooses to impose a youth rehabilitation order with intensive supervision and surveillance. The interference with affected offenders' Article 8 rights in these cases is considered to be a proportionate interference, as these are the most serious and persistent offenders with demonstrable recidivism and risk of harm to the public from potential reoffending. It is therefore considered mandatory monitoring is necessary and proportionate in the context of these offenders' particular histories and circumstances and the infringement upon Article 8 is justified – see, eg, *R(Richards) v Teesside Magistrates' Court & Ors* [2015] EWCA Civ 7.

51. An offender may appeal the imposition of their sentence for review by a higher court. These safeguards will ensure the electronic monitoring and curfew provisions will at all times be operated accordance with law, in pursuit of a legitimate aim and necessary in a democratic society.

52. Prisoners who might have expected to be released earlier and automatically may suggest that the new release measure at paragraph 4(n) is a breach of their Article

8 rights. Those with impending or imminent release will be more greatly affected than those who have not had an opportunity to re-establish private and family ties outside of the prison environment. However, any interference is a result of substantiated behaviour by the prisoner leading the Secretary of State to believe on reasonable grounds that the prisoner, if released, would pose a significant risk to members of the public or serious harm occasioned by the commission of further offences (see, eg, *R(Richards) v Teesside Magistrates' Court & Ors* [2015] EWCA Civ 7 at [5]). The Secretary of State will be required, as a public authority, to take an offenders' particular circumstances and their Convention rights into account when deciding whether to utilise the power to refer. All offenders, whether those close to release at the point of imposition or further away, will still be serving the punishment part of their sentence, and as such, whilst the impact may be greater the nearer to release, the justification for the interference remains the same. The interference is also considered to be proportionate as the offenders will go to the Parole Board to assess that risk and can still be released if the Board considers safe to do so.

53. It is therefore considered that any interference, including those more significantly affected, is justified as being in the interests of national security, public safety, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, owing to the significant risk to the public potentially posed by this cohort of offenders.

54. The new positions of trust provisions at paragraph 4(y) engage Article 8 as they will prevent an adult and a young person engaging in a sexual relationship where previously such conduct would have been lawful. The Government considers this to be justifiable as being necessary to protect the rights and freedoms of others (those being vulnerable young people), and also as being a proportionate and necessary measure in a democratic society to prevent the exploitation and sexual abuse of young people in certain situations where there is very often a high level of dependency and vulnerability.

55. Roles within sports and religious context, such as sports coaching and religious leadership, are highlighted as a relationship of direct contact will very often exist

between those involved; the power dynamic in these situations is of particular concern; the relationship of trust between the activities undertaken and families often increases vulnerability and risk; and both contexts were identified as areas of significant concern so far as the potential for abusive relationships is concerned in the recent report of an inquiry by the All-Party Parliamentary Group on Safeguarding in Faith Settings.[1] Additionally, the Crown Prosecution Service have highlighted the incidence of delayed realisation where a young person's initial belief that they were in a genuinely consensual relationship is later replaced by a realisation they had been the victim of abuse. The Government therefore considers it essential to act to protect young people in such situations.

56. Further, Article 8 requires the state, in order to secure effective respect for a person's moral and physical integrity, to provide criminal law sanctions to deter private individuals from committing serious harm to others. For example, in *Stubbings v UK* (1996) 23 EHRR 213 the ECHR held (at [62]): "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to state protection, in the form of effective deterrence, from such grave types of interferences with essential aspects of their private lives."

57. The Government therefore considers that, in seeking to strike the appropriate balance, the rights of the individual to a private family life are outweighed by the need to protect potential vulnerable victims where such positions of trust exist. Whilst the effect of the measure may be to criminalise a genuinely consensual sexual relationship, the Government consider this is necessary to effect a 'bright line' rule to prevent the sexual abuse of young people, and so considers this to be a proportionate interference in order to further a legitimate aim.

58. In relation to the proportionality of the interference, sections 23 and 24 of the Sexual Offences Act 2003 will continue to be applicable, so that it will not be an

[1] https://thirtyoneeight.org/get-help/resources/appg-report-pot/, which accepted that between 2014 and 2018, local authorities recorded a total of 653 complaints about sexual activity by a person who was potentially in a position of trust with a 16 or 17 year old. Of the 495 cases which recorded the position concerned, the largest category (31%) was sport, followed by faith (14%). Both the total number of cases recorded and the percentage of cases relating to faith setting had increased during the relevant four year period.

offence where A and B are lawfully married or civil partners, or where, immediately before the position of trust arose, A and B were in a sexual relationship. This provision does not impact on the existing criminal law that makes it an offence for a person to engage in sexual activity with a child under the age of 16, regardless of whether consent is given; and that any non-consensual sexual activity is also an offence, whatever the age of the victim and whatever the relationship between the victim and the perpetrator. Investigative and prosecutorial discretion increase safeguards in relation to the new measures and must be exercised in accordance with section 6 HRA.

59. For all these reasons, the Government considers the measures are compatible with Article 8.

Article 10

60. Article 10 protects individual's rights to freedom of expression. The measure at paragraph 4(d) which increases sentencing scope for the offence of desecrating a war memorial engage Article 10 in the context of, for example, graffiti artists. The Government considers the broadening of the Court's sentencing options when sentencing for this offence do not breach Article 10. Article 10(2) makes the freedom of expression subject to restrictions or penalties as are prescribed by law and are necessary in a democratic society for the prevention of disorder or crime. The procedural changes introduced by this measure are therefore considered necessary in a democratic society (*Murat Vural v Turkey* ECtHR (Application no. 9540/07) as they will enable courts to sentence appropriately and proportionately where criminal damage is caused to memorials.

Article 14

61. Several of the sentencing and release measures may raise the issue of differential treatment between those persons subject to the new provision, who will be treated differently, and potentially less favourably, than those persons sentenced previously (when coupled with other Articles). Any distinction being created in this instance is a consequence of changes to sentencing going forward and offenders

are unable to compare themselves to those sentenced under a different sentencing regime (*Minter v UK* (2017) 65 EHRR SE6 and *R v Docherty* [2017] 1 WLR 181). In *Minter,* it was held that the difference in treatment was that a "…different sentencing regime applied to him as a consequence of a new legislation. As such, his Article 14 complaint is indistinguishable from that which was declared inadmissible as manifestly ill-founded…[43]". Therefore, being subject to a legislative change in sentencing regime is not an "other status" for the purposes of Article 14.

62. The measures at paragraph 4(l), (m) and (n) will change the release regimes for offenders serving certain sentences for certain offences. In the context of different release regime applying to offenders in analogous situations, the Supreme Court in *Stott v Secretary of State for Justice [2018]* UKSC 59 found that sentence length was capable of being "other status" under Article 14, upholding the decision of the ECtHR in *Clift v United Kingdom* [2010] ECHR 1106 (13 July 2010). However, although sentence length is an 'other status', the changes to release point in (l) are based on seriousness of the offence committed and are therefore justified.

63. The Grand Chamber ECtHR in *Gerger v Turkey* App 24919/94 found that offence type is not 'other status' for the purposes of Article 14. Recently *in R(Khan) v Secretary of State for Justice* [2020 EWHC 2084 (Admin) the High Court confirmed that different treatment based on type of offence is not 'other status' for the purposes of Article 14.

64. As the changes at paragraph 4(l) and (m) are based upon the gravity of offences committed (only those most serious sexual and violent offences with a maximum penalty of life imprisonment) the changes are not an 'other status' for the purposes of Article 14. In any event, it is the Government's position that the difference in treatment is justified based on public protection grounds and condemnation of offending which is serious or systemic (*R v Docherty* [2017] 1 WLR 181 at [63]).

65. For those to whom paragraph 4(n) will apply, difference in treatment is based on evidence of significant risk of harm to the public occasioned by the commission of further offences and not on the personal characteristics of the offender. The new

provisions will apply equally to all relevant standard determinate sentenced offenders, regardless of race, religion or otherwise. The power will only be used where it can be demonstrated the offender is dangerous. These offenders can be distinguished on the basis of immediate risk of significant harm substantiated with evidence. This means the particular and immediate risk of this cohort of offenders justifies a different approach (per *Khan*).

66. Accordingly, it is considered that any potential difference in treatment which resulted from the use of the power at paragraph 4(n) would be justified. The objective and reasonable justification for the different sentences and release provisions with reference to the instance case is the legitimate aim of protecting the public from dangerous offenders by ensuring they are kept in custody for a longer proportion of the penalty part of their sentence. It is a legitimate aim to protect the public, give more time for rehabilitation, and a purpose to work towards rehabilitation (to obtain discretionary release) and where a prisoner does not do so to detain them for the whole of the penalty part of the sentence. If the offender spends more time in custody as the result of a Board refusal for release than another SDS offender, this will also have the legitimate aim of providing confidence in the criminal justice system.

67. The exact period of additional detention will vary and what is proportionate and necessary will also vary depending on the prisoner's individual circumstances. A prisoner will be able to bring a High Court challenge via the provisions at 4(n), bring a judicial review or instigate writ proceedings to challenge or obtain release if the detention becomes disproportionate for the purposes of undertaking a Board referral. The measure is therefore a proportionate means of achieving a legitimate aim.

68. It is therefore the Government's position there is no unlawful interference with Article 14.

69. The positions of trust measures outlined at paragraph 4(y) engage Article 14 (read with Article 8) in that it is limited to activity in a religious or a sporting context. Such limits might be argued to amount to a difference in treatment of persons in

analogous or relevantly similar situations in relation to both religion, and employment which is an 'other status' for Article 14 purposes.

70. It is considered that any resulting difference in treatment between this category of people and others in analogous positions is objectively justified. The abovementioned APPG report illustrated that these two settings generated the most complaints about potential exploitation and abuse resulting from sexual activity between adults and young persons, making it a justifiable and proportionate response to act now to protect young people in these particular areas of activity.

71. A proposed staged approach to any further expansion of protection, enabled by the power to add or remove fields of activity by way of affirmative instrument, will allow an evaluation to be made of the effect this initial change to the law, before creating any further positions of trust to cover similar activities in other contexts where positions of trust also arise. The Government is of the view that behaviour is not to be criminalised lightly, and therefore a cautious and staged approach to the issue is preferable. It is therefore considered that this measure does not infringe Article 14 in all the circumstances.

Home Office and Department for Transport measures – analysis of particular measures

Serious violence duty

72. Chapter 1 of Part 2 of the Bill includes provisions which establish a new duty on specified authorities to collaborate to prevent and reduce serious violence in England and Wales.

Directions

73. Article 6 is engaged as the Bill provides the Secretary of State with the power to give directions to certain authorities for the purpose of securing compliance with a duty under Chapter 1 of Part 2 where the Secretary of State is satisfied that authority has failed to discharge it. The exercise of the direction power would be inherently susceptible to judicial review which means that an authority in respect of which the power is exercised has a legal avenue of challenge available. The

Secretary of State will be able to seek enforcement of a direction by a mandatory order. This would be made on application to a court on behalf of the Secretary of State. Accordingly, the Government considers the provision to be compliant with Article 6.

Information sharing

74. Chapter 1 of Part 2 provides information-sharing gateways to enable the disclosure of information (including personal data) for the purpose of functions conferred by the Bill, primarily preventing and reducing serious violence. It imposes three powers to disclose information (clauses 9, 14 and 15) the last of which includes a duty to disclose information.

75. Government considers the disclosure provisions in relation to the serious violence duty are compliant with the requirements of Article 8, and Article 14, to the extent it may be engaged, if authorities share information which relates or impacts on a protected group, for the following reasons. The information-sharing gateways are subject to important statutory restrictions on disclosure of information. The Bill does not authorise or require the disclosure of personal data which contravenes the data protection legislation (as defined by section 3 of the Data Protection Act 2018), or a disclosure which is prohibited by the Investigatory Powers Act 2016 (Parts 1 to 7 or Chapter 1 of Part 9 thereof). If regulations made under clause 10(2) provide that a disclosure under the regulations does not breach an obligation or confidence or other restriction on disclosure, then the regulations must provide that they do not authorise a disclosure of information that would contravene the data protection legislation or a disclosure which is prohibited by the Investigatory Powers Act 2016 (Parts 1 to 7 or Chapter 1 of Part 9 thereof).

76. The disclosure of information is only authorised for the limited purposes specified in the Bill. Where that information includes personal data, it must only be made if the disclosure is in accordance with the relevant provisions set out in the data protection legislation. In addition to the safeguards set out in the data protection legislation, the Human Rights Act 1998 will apply to the conduct of the authorities exercising the powers, although not expressly referred to in the Bill. The Government considers that the balancing of interests between the exercise of

individuals rights to a private and family life on the one hand and the prevention and reduction of serious violence, on the other should be satisfied by compliance with data protection and Human Rights Act 1998 by the public authorities making disclosures of information.

Homicide reviews

77. Chapter 2 of Part 2 of the Bill establishes a new requirement for certain homicides involving offensive weapons in England and Wales to be subject to review in order to learn lessons and prevent future deaths.

Information Sharing

Article 6

78. In order to enforce any request for information under clause 28(5) a review partner can apply to the High Court or the county court for an injunction. In such a situation the court would consider the reasons for such a request and any refusal to comply. In addition, the exercise of the power would be susceptible to judicial review which means that a person or body in respect of which the power is exercised has an avenue of legal challenge available. In the context of any judicial scrutiny of the exercise of the power, the court as a public authority must not act in a way that is incompatible with Article 6. The Government therefore considers that the Article 6(1) right to a fair hearing is adequately protected.

Article 8

79. Clause 26 requires review partners to notify the Secretary of State of particular issues, including as to whether or not they consider that they must arrange for a homicide review in respect of a death (or whether they have not been able to so decide), and any changes to such decisions. Clause 27(4) requires that relevant review partners prepare a report on a review and send it to the Secretary of State and clause 27(7) and (8) provide for publication of the report, or so much of the contents of the report as the Secretary of State considers appropriate to be published. Clause 28(1) provides review partners with the power to request information from a person or body for the purpose of enabling or assisting the performance of functions conferred by clauses 23 to 27, which must be complied

with. Clause 28(7) provides a power for review partners to disclose information they hold to other review partners for the purpose of enabling or assisting the performance of functions conferred by clauses 23 to 27.

80. The Government considers the disclosure provisions are compliant with the requirements of Article 8, and Article 14, to the extent it may be engaged, if information which relates or impacts on a protected group is requested, for the following reasons. The information-sharing gateways are subject to important statutory restrictions on disclosure of information. The Bill does not authorise or require the disclosure of personal data which contravenes the data protection legislation (as defined by section 3 of the Data Protection Act 2018), or a disclosure which is prohibited by the Investigatory Powers Act 2016 (Parts 1 to 7 or Chapter 1 of Part 9 thereof). The Bill also does not require information subject to legal professional privilege, being information that a person could not be compelled to disclose in proceedings before the High Court, to be disclosed by virtue of the requirement to comply with a request under clause 28. A disclosure of information by virtue of clause 28 is only authorised for the limited purposes of the enabling or assisting with the performance of functions conferred by the statutory provisions, and disclosures under clauses 26 and 27 are limited by the provisions. Any disclosure under clause 26 must be to notify the Secretary of State as set out by the provisions. Any disclosure by a review partner in a report under clause 27 must by virtue of clause 27(6) omit any material that might jeopardise the safety of any person, or might prejudice the investigation or prosecution of an offence. In addition, the Secretary of State may only publish so much of the contents of the report as considered appropriate to be published, providing a further safeguard against publication of inappropriate information, for example personal data.

81. Where that information disclosed includes personal data, it must only be made if the disclosure is in accordance with the relevant provisions set out in the data protection legislation. In addition to the safeguards set out in the data protection legislation, the Human Rights Act 1998 will apply to the conduct of the review partners and the Secretary of State, although not expressly referred to in the Bill. The Government consider that the balancing of interests between the exercise of individuals' rights to a private and family life on the one hand and learning lessons

from a homicide in order to prevent homicide and serious violence occurring again in future, on the other should be satisfied by compliance with the data protection legislation and Human Rights Act 1998 by the public authorities making requests for information, and making disclosures of information.

Information extraction from digital devices

82. Clause 36 provides a power for police constables and other authorised persons to extract information from digital devices, with the agreement of the device user, for the purposes of (i) the prevention, detection, investigation or prosecution of crime, (ii) helping to locate a missing person, or (iii) protecting a vulnerable person from neglect or physical, mental or emotional harm. Clause 39 provides a power for police constables and other authorised persons to extract information from digital devices of a deceased person for the purposes of an investigation or inquest into their death.

Article 8

83. To the extent that these provisions may give rise to an interference with Article 8, the Government considers that any interference is justified. Any interference will be in accordance with the law, the powers being set out in primary legislation. The provisions are in pursuance of legitimate aims, including the prevention of crime and public safety, as is clear from the purposes for which the powers may be exercised (set out above).

84. Moreover, the provisions contain various safeguards. Only those persons listed in Schedule 3 ('authorised persons') – who all have investigative functions, and some of whom have safeguarding functions or a role relating to the investigation of deaths – will be able to rely on the powers. Although the Secretary of State will be able to add a reference to a person to Schedule 3 by way of regulations, such regulations will be subject to the affirmative procedure.

85. An authorised person will only be able to exercise one of the powers if he or she reasonably believes that information relevant to a specified purpose is stored on

the device, and that exercise of the power is necessary and proportionate to achieve that purpose. In cases where the authorised person thinks there is a risk of obtaining excess information, he or she will have to be satisfied that there are no other means of obtaining the information sought which avoid that risk or, if there are, that it is not reasonably practicable to rely on them.

86. Except in limited cases (e.g. where a device user is deceased), the clause 36 power will only be exercisable where a device user voluntarily provides the device to an authorised person and agrees to the extraction of information from it. No adverse inferences should be drawn if a user chooses not to provide his or her device and agree to extraction.

87. Authorised persons, when exercising or considering whether to exercise either power, will have to have regard to the code of practice which the Secretary of State must prepare (and lay before Parliament and publish) further to clause 39. The code will be admissible in evidence in criminal or civil proceedings and a court may take into account a failure to act in accordance with it in determining a question in such proceedings. By virtue of clause 41, the Secretary of State will also be under a duty to make regulations containing provision about the exercise of the powers in relation to confidential information (e.g. material subject to legal privilege).

88. In addition, information extracted will have to be processed in accordance with other relevant provisions of law (e.g. the Data Protection Act 2018).

89. Accordingly, the Government is of the view that any interference with Article 8 will be proportionate to the aim pursued.

Pre-charge bail

90. Clause 43 and Schedule 4 contain several reforms to the statutory framework governing pre-charge bail as provided for in Parts 3 and 4 of the Police and Criminal Evidence Act 1984 (“PACE”).

91. Part 1 of Schedule 4 removes the perceived ‘presumption against bail’, by amending the provisions introduced by the Policing and Crime Act 2017, to remove

the suggestion that the default position is to release a person before charge without bail, and to encourage its use in appropriate cases.

92. Part 2 of Schedule 4 creates a set of risk factors to which constables (in the case of “street bail” under section 30A of PACE) and custody officers (under Part 4 of PACE) must have regard in determining whether releasing a person on bail is necessary and proportionate in all the circumstances. This set of factors aims to streamline and introduce some more consistency into the “necessary and proportionate” test, helping to ensure that suspects are released on bail where appropriate. These provisions include, amongst other factors, the need to safeguards victims of crime and witnesses, as well as the need to prevent offending.

93. Part 3 of Schedule 4 aims to provide further protection to alleged victims of an offence by conferring a duty on persons in charge of the investigation of an offence to seek an alleged victim’s views where reasonably practicable to do so regarding the imposition or variation of a suspect’s bail conditions and the nature of those conditions. When such conditions have been imposed or varied, a separate duty is conferred on those persons to notify the alleged victim of those conditions/that variation.

94. Part 4 of Schedule 4 extends the initial period for which a person may be released on bail before charge (the “applicable bail period”) and the subsequent extensions of that period. Currently, all cases other than Serious Fraud Office (“SFO”) cases (known as “standard cases”) are afforded an initial bail period of 28 days whilst SFO cases are afforded a longer applicable bail period – three months - owing to the complex nature of these cases. The new provisions extend the initial bail period for “standard cases” from 28 days to three months, and for non-standard cases from three months to six months. These provisions are intended to reflect more accurately the time periods required to investigate different types of cases, and to ensure that bail periods are consistent with the operational realities of conducting an investigation.

95. Consultation responses indicated that cases involving other agencies, namely Her Majesty's Revenue and Customs ("HMRC"), the Financial Conduct Authority ("FCA") and National Crime Agency ("NCA"), also tend to be complex in nature and tend to take considerably longer to investigate than more "standard cases", in the same manner as SFO cases. Part 4 of Schedule 4 therefore provides for a longer initial bail period to be granted for these additional categories of cases ('the agency cases').

96. In addition, the new provisions mean that standard cases, with a new initial bail period of three months, can be subject to two further extensions (the first extension being from three months to six months from the bail start date and the second extension being from six months to nine months from the bail start date) by the police before coming before a magistrates' court. Standard cases which are designated as exceptionally complex (which necessarily will have already been subject to the second extension above), or the above agency cases can be extended to up to 12 months from the bail start date before coming before a magistrates' court.

97. Section 41 of PACE provides that a person shall not be kept in police detention for more than 24 hours without being charged (a period commonly referred to as the "detention clock"). The release of a person on bail suspends this "detention clock". However, the arrest of a person for breach of bail conditions re-starts this clock. Part 5 of Schedule 4 provides that the "detention clock" shall be suspended for three hours from a suspect's arrival at a police station where they are arrested for failure to attend a police station or breach of their bail conditions under section 46A of PACE. This is designed to ensure that the detention clock is not run down as a result of an individual repeatedly breaching bail conditions.

98. Part 6 of Schedule 4 confers a power on the College of Policing, with the approval of the Secretary of State, to issue guidance to persons exercising functions relating to pre-charge bail, with a carve-out for members/officers at the above-named agencies, to ensure that the guidance does not apply to those persons.

Article 5

99. Imposition of bail conditions, and the extension of the applicable bail period, may engage a person's right to liberty under Article 5(1). However, there are limits on the conditions that can be imposed on bail before charge; sections 3 to 3AC of the Bail Act 1976 set out restrictions that can be imposed on electronic monitoring requirements and prevent any requirement to reside in a bail hostel. Further, provided relevant conditions are met, suspects can request that custody officers vary their bail conditions or may apply to court for reconsideration of their pre-charge bail terms.

100. The suspension of the detention clock for three hours upon a suspect's arrival at a police station following arrest for breach of bail conditions or for failure to attend a police station (to "answer" bail) may be considered to interfere with a person's right to liberty under Article 5(1). However, the period of three hours will facilitate the conduct of the various custodial activities associated with the re-arrest whilst ensuring that further time will be available later in the case for questioning of the suspect and gathering of evidence, amongst other activities, relating to the substantive offence. This will help to ensure comprehensive investigation of a case.

101. It is therefore the Government's view that, insofar as the above pre-charge bail measures interfere with Article 5(1), any interference with this right is "in accordance with a procedure prescribed by law" and is a proportionate measure, justified under Article 5(1)(c) – for the purpose of bringing a person before a competent legal authority on reasonable suspicion of having committed an offence or fleeing after having done so.

102. Part 4 of Schedule 4, which amends the applicable bail period, may also engage Article 5(3) – that everyone arrested or detained shall be brought promptly before a judge and shall be entitled to trial within a reasonable time. However, the Government considers nine months and twelve months, for standard and non-standard cases respectively, given the operational position in respect of investigation times, to be proportionate and to strike the right balance between the rights of victims and those released on bail. To the extent that this provision interferes with Article 5(3), the Government considers this is in accordance with the

law (and is sufficiently precise to be foreseeable), is in pursuit of the legitimate aims of preventing crime and protecting the public and the rights of others and is necessary in a democratic society. The pre-conditions for bail, including the requirement to release a person on bail before charge only where it is necessary and proportionate to do so and the addition of risk factors to these pre-conditions act as an important safeguard to mitigate that interference. Additionally, the ability of a suspect to apply to court for reconsideration of their police bail, including an ability to vary their conditions of bail, also helps to ensure these amendments are proportionate, and comply with Article 5(3).

Article 6

103. Whilst the views of victims will be sought where reasonably practicable to do so in respect of the imposition or variation of bail conditions and the nature of those conditions, the custody officer (or constable, where applicable) will still be required to apply and meet the various tests in relation to pre-charge bail, including the pre-conditions for bail under sections 30A and 50A of PACE and the tests for imposing bail conditions under section 30A(3B) of PACE and section 3A(5) of the Bail Act 1976. This ensures compliance with the Article 6(1) rights of the suspect – that everyone is entitled to a fair and public hearing - and their Article 6(2) rights– that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law. The rights of suspects to make representations before authorisation of release on bail, under sections 30A and 50A of PACE, as well as their rights to apply to vary conditions and to apply to court for re-consideration of their bail also ensure that this duty complies with Article 6(3)

Article 8

104. The extension of the period for which a person can be released on bail and suspension of the detention clock interfere with a person's right to a private and family life, as do, in a very broad sense, the provisions reversing the presumption against bail, which may result in more people being placed on bail. However, the Government considers that interference with this right is justified in accordance with Article 8(2). The release of a person on bail before charge and suspension of the detention clock is in accordance with the law, in pursuit of the legitimate aims

of preventing crime and protecting the public and the rights of others and is necessary in a democratic society. On balance the Government considers these measures to be proportionate.

105. These reforms are also aimed at addressing feedback received from victims or their support groups that they feel inadequately protected under the existing regime, concerns echoed by HM Inspectorate of Constabulary and Fire & Rescue Services. Their Article 8 rights, and the need to balance these against that of a suspect, are an important consideration in the determination that these changes are justified.

Overseas Production Orders

106. Clause 47 and Schedule 5 amend the Crime (Overseas Production Orders) Act 2019 ("COPO Act") to facilitate the implementation and operation of the overseas production orders scheme and to correct a small drafting defect in the Act.

107. The COPO Act allows for law enforcement agencies and prosecutors in the UK to apply for stored content data (i.e. messages, text of emails, files, pictures) directly from communications service providers based outside the UK where a relevant international co-operation agreement is in place. An Overseas Production Order ("OPO") can be made for the purposes of supporting criminal investigations or prosecutions. The first international co-operation agreement designated under the COPO Act by the UK is the UK-US Bilateral Data Access Agreement2 ("Agreement"). This method of direct access to content data by UK law enforcement agencies and prosecution authorities will be quicker and more efficient than is currently the case under State-to-State Mutual Legal Assistance ("MLA") channels by which such data is currently obtained. Where OPOs are used with the Agreement, a UK designated authority can serve an order directly on a US company, rather than relying on a MLA request made to US authorities. Paragraph 2 of Schedule 5 amends section 3 of the COPO Act to add a new subsection (4A) which provides that communications data which is "comprised in, included as part

[2]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf

of, attached to or logically associated with electronic data" may be sought by means of an OPO.

108. As currently drafted, the COPO Act forbids the seeking of any communications data (i.e. the who, where, when and how of a communication) and only allows for content data to be included in a request made through an OPO. During preparations for implementation it became apparent that this was not practicably workable as communications data and content data are often inextricably linked and in many circumstances the content data will have little or no evidential value with this communications data removed. For example, the text of an email required as evidence in a criminal trial would need to have the details of the sender, the recipient and the time of sending of the email included to provide necessary context. This amendment allows that information to be included in a request for data using an OPO.

Article 8

109. The obtaining of electronic data from communications service providers will engage Article 8 because such data may include personal correspondence sent by digital means. However, such data may already be obtained by law enforcement personnel and prosecutors by means of existing channels, including use of an MLA request or a request made pursuant to the provisions of the Investigatory Powers Act 2016. OPOs are designed to be a quicker and more efficient method of obtaining such data and do not provide for any greater interference with Article 8 rights than is currently the case under existing legislation.

110. There are many safeguards and tests built into the COPO Act to ensure that OPOs are only used appropriately and where necessary. The OPOs themselves are made by a judge in the UK who must consider that all of the requirements in section 4 of the Act are satisfied. These include that "there are reasonable grounds for believing that all or part of the electronic data specified or described in the application for the order is likely to be of substantial value (whether or not by itself) to the proceedings or investigation" and "is likely to be of relevant evidence" in relation to an indictable offence or, as the case may be, to a terrorist investigation.

The judge must also be satisfied that "there are reasonable grounds for believing that it is in the public interest for all or part of the electronic data specified or described in the application for the order to be produced or, as the case may be, accessed."

111. The more efficient and swifter obtaining of electronic data held or controlled by communications service providers, outside the UK, will allow for a shortening of investigation and prosecution times as well as allowing for a quicker removing of persons as suspects from an enquiry if such data rules out their involvement in the crime under investigation.

Taking of fingerprints etc

Power to photograph certain persons at a police station

112. The provisions in clause 48 confer on a constable a power to direct an individual who has been arrested, charged or convicted of a recordable offence, but is not detained, to attend a police station to have their photograph taken at a specific date and time or between specified times on a specified date. A photograph of an individual directed to attend a police station under this power may be taken without the individual's consent.

113. Reliance on the existing power in section 64A(1) of PACE, to take photographs of an individual detained at a police station, poses practical difficulties. An increasing proportion of people investigated are not arrested but attend for a voluntary interview. In this case the police cannot exercise their power under section 64A(1), since it only applies where an individual is detained at a police station. The new provisions will apply where an individual is not detained. The reasons for the increase in voluntary attendance are partly a reduction in the number of custody suites and partly changes to PACE Code G in 2012 requiring the police to take account of more factors before deciding it is necessary to arrest someone.

114. It is necessary to maintain an up-to-date database of images of individuals who have been arrested, charged, informed they will be reported, convicted or

cautioned for a recordable offence, so that matches can be made against past and future convictions. The ability to match offenders against their past and future convictions is necessary in a democratic society for the prevention of disorder or crime.

115. The collection and disclosure of personal information, such as fingerprints, non-intimate samples and photographs, could amount to an interference with a person's right to private life. Any interference by a public authority of an individual's Article 8 right to respect for private life must be in accordance with law and necessary in a democratic society for it to be justified.

116. *Bridges v. Chief Constable of South Wales Police* [2020] EWCA Civ 1058 sets out that there must be a sufficient legal framework governing the use of a measure for an interference of Article 8 to be in accordance with the law. Therefore, the taking of photographs under the new power in clause 48 must be based in law which must be accessible and foreseeable. The scope of discretion afforded to the competent authority must be sufficiently clear and there must be adequate legal protection against arbitrary use of the power.

117. The power conferred on a constable in clause 48 to take photographs is based in primary legislation which clearly sets out the scope in which it applies. This power will be subject to time limits, which ensures that any exercise of power to take or retake photographs of offenders is proportionate. The legal basis will be accessible and foreseeable since primary legislation is published online and, as such, is widely available to the public.

118. As clause 48 will confer on a constable the power to obtain a facial image of the person, the processing of that image will be regulated by Part 3 of the Data Protection Act 2018, because a facial image will fall within the definition of 'personal data' as information relating to an identified or identifiable living individual. This is a key safeguard providing adequate legal protection against arbitrary use of this power, since Part 3 stipulates that processing (in this case, the taking and retention of a photograph of an individual) may only carried out if it is necessary for law enforcement purposes.

119. Although the taking of a photograph of an individual without their consent could be an interference with that individual's Article 8 right to respect for their private life, an equivalent power can be found in the existing section 64A of PACE, so this approach is not considered novel or controversial.

120. The Government therefore considers that the extent to which the provisions in clause 54 interfere with Article 8 is justified in that they are in accordance with law and necessary to reduce the likelihood of opportunities to collect photographs being missed.

Use of photographs taken under the power in clause 48 in live facial recognition software

121. Photographs of arrested, charged and convicted people taken under the provisions in clause 48 will be added to force and national 'custody image databases', as they are at present. Clause 48 does not propose to make provision as to the use of the photographs after they have been taken. Such photographs may be subject to 'retrospective facial recognition', in which a still image of an unknown person (perhaps caught on CCTV committing an offence) is compared with the records on the database to see if they can be identified. Images from the custody image database may also be used to make up a watchlist of suspects which a live facial recognition system will be deployed in a public setting and compare those on the watchlist with passers-by. However, this is a much less frequent use than the retrospective one.

122. It was held in *Bridges* that the police's common law powers were a sufficient legal basis for the use of live facial recognition technology. Since automated facial recognition is similar to live facial recognition, but without the 'live' aspect to it, it follows that the police's common law powers are also a sufficient legal basis for the use of automated facial recognition technology. Any processing of such images will be carried out under Part 3 of the Data Protection Act 2018 by the police, who are a competent authority (Schedule 7 to the Data Protection Act 2018) for the primary purpose of law enforcement, and will be necessary for the performance of a law enforcement task.

123. The processing of facial images is sensitive processing under section 35(8) of the Data Protection Act 2018. As held in Bridges, the processing of facial images via live facial recognition by the police is strictly necessary for the prevention and detection of crime. and is necessary for the rule of law, specifically the common law duty to prevent and detect crime.

124. As confirmed in the *Bridges* judgment (at paragraph 64 of the judgment), local published police policies can be relevant to satisfy the requirement that any processing is done 'in accordance with law', but it may be prudent for there to be consistency in the content of local policies (at paragraph 118 of the judgment). The Home Office has been working with NPCC and College of Policing to refresh England and Wales guidance on the police's use of live facial recognition, in particular to provide for when and where the police can use it, and who they can look for. When producing local policy documents, forces should take into account this guidance. Additionally, the use of facial recognition technology is already governed by the Surveillance Camera Code.

125. The processing will therefore be compliant with the requirement set out in section 35(5) of the Data Protection Act 2018.

126. Facial images will be collected under the new power for the purpose of prevention or detection of crime and can therefore be used by the police in facial recognition software for the same purpose.

127. Facial images collected under the new power, and used in live or automated facial recognition technology, will continue to be subject to the retention regime set out in the existing Code of Practice on the Management of Police Information (and associated Authorised Professional Practice), which governs the use, retention and disposal of police information, including custody photographs. The new power to retake photos will ensure that photos are as accurate and up to date as possible.

128. The Government therefore considers that the use of live or automated facial recognition, against images collected under the provisions in clause 48, is compliant with the Data Protection Act 2018 and Article 8 ECHR.

Power to direct a person to attend to have their fingerprints and non-intimate samples taken

129. The provisions in clause 49 confers on a constable the power to direct an individual to attend the police station at a specified time and date to have their fingerprints and non-intimate samples taken. This amends the existing power conferred on a constable in paragraph 16 of Schedule 2A to PACE to attend the police station at a specific time on any day within a 7-day period to have their fingerprints and non-intimate samples taken.

130. Clause 49 does not seek to amend the existing powers in sections 61 and 63 of PACE to collect fingerprints and non-intimate samples.

131. The Government therefore considers that the power to direct a person to attend to have their fingerprints and non-intimate samples taken is compliant with Article 8 ECHR.

Human remains

132. Clauses 50 to 52 and Schedule 6 introduce new powers enabling the police, provided certain conditions are met, to obtain a warrant to authorise the entry and search of premises in circumstances where the police reasonably believe that there are human remains or material which may relate to the location of human remains on the property. In addition, a power is introduced which enables the police to obtain an order to access certain material if the police reasonably believe that the material either consists of human remains or may relate to the location of human remains. The use of these powers will not be contingent on the information obtained being used in an eventual prosecution, which set them apart from existing powers under the Police and Criminal Evidence Act 1984 ('PACE').

Article 8

133. Where a warrant or order is issued by a justice of the peace under clauses 50 to 52 and Schedule 6, this will enable the police to search private property and access private material without requiring the consent of the relevant person. It is therefore considered that Article 8 is engaged. However, the Government's position is that where these provisions present an interference with Article 8 it is necessary and proportionate in order to further a legitimate aim (as set out in Article 8(2)) and that the safeguards which are built into the relevant clauses protect against any concerns regarding the proportionality of the powers.

134. The Government considers that the legitimate aim of the new power is to locate human remains in order to protect the Article 8 rights of the families of the deceased by providing them with closure where possible, and by enabling funerals to be held. The new power will also further the public health aim of ensuring that human remains are found and subsequently disposed of appropriately. The circumstances in which the existing police powers under PACE may be used to locate human remains are limited. The Government therefore considers that the introduction of the proposed new powers is both necessary and proportionate in order to achieve the legitimate aims outlined above. The Government also considers that the new powers will be foreseeable and clear because they are set out in a sufficiently precise form in primary legislation.

135. The new powers also have safeguards built in which require the justice of the peace dealing with the application to be satisfied that a number of conditions have been met before a warrant or an order can be issued. The Government considers that these conditions, which include a requirement that these powers are only used as a last resort, will ensure that any use of the new powers will be proportionate.

A1P1

136. As outlined above, the warrants and orders which may be issued under clauses 50 to 52 and Schedule 6 will give the police the power to enter and search a person's property and access certain material held by a person without requiring their consent, including powers to take away material. It is therefore considered

that A1P1 is engaged because of the interference with a person's right to the peaceful enjoyment of their property. However, for the reasons which are described above, the Government considers that any interference with A1P1 is necessary in order to achieve a legitimate aim and that the safeguards which have been built into the new powers will ensure that any interference with A1P1 is proportionate.

Public order

137. Clauses 54 to 56 and 60 amend the Public Order Act 1986 ("POA 1986") to:
    a. Broaden the circumstances in which conditions can be imposed on a public procession or public assembly, and allow for conditions to be imposed on a one-person protest, where the noise generated by the person(s) carrying on the procession, assembly, or one-person protest may:
        i. result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession, assembly or one-person protest, or
        ii. have a significant "relevant impact" on persons in the vicinity of the procession, assembly or one-person protest.
    b. Allow any type of condition to be imposed on a public assembly; and
    c. Amend the mens rea requirement for the offence of failing to comply with a condition imposed on a public procession or public assembly, and increase the maximum sentences for offences associated with failing to comply with conditions.

138. Clauses 57 and 58 amend the Police Reform and Social Responsibility Act 2011 ("PRSRA 2011") so that police may direct a person not to obstruct access to Parliament, which is included as a new prohibited activity for the purposes of Part 3 of that Act and to introduce a power for the Secretary of State to specify a new area in respect of which the provisions of Part 3 may apply, in the event that either House relocates from the Palace of Westminster.

139. Clause 59 creates a new offence of "intentionally or recklessly causing public nuisance" and repeals the common law offence of public nuisance.

<u>Amendments to the Public Order Act 1986</u>

Articles 10 and 11

140. These provisions are likely to be used in the context of public processions and assemblies where people are exercising their Article 10 right to freedom of expression and their Article 11 right to freedom of assembly. Someone carrying on a one-person protest will very likely be exercising their Article 10 right. These are qualified rights meaning that they can be interfered with lawfully provided that:

a. the interference is in accordance with the law,
b. it pursues a legitimate aim (which are listed in paragraph 2 of each Article), and
c. the interference is necessary in a democratic society.

141. The threshold for imposing conditions currently requires that a senior officer reasonably believes that:

a. the public procession or public assembly may result in:
    i. serious public disorder,
    ii. serious damage to property, or
    iii. serious disruption to the life of the community; or
b. the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

142. Clauses 54 and 55 will expand these criteria to include where the noise generated by persons taking part in such a procession or assembly may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the protest, or have a significant "relevant impact" on persons in the vicinity of the procession or assembly. The latter will be subject to a two-stage test:

143. New subsections (2A) in sections 12 and 14 of POA 1986 provide an exhaustive list of what amounts to a "relevant impact". These are:

a. it may result in the intimidation or harassment of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity, or
b. it may cause such persons to suffer serious unease, alarm or distress."

c. The need to consider the impact on persons of reasonable firmness incorporates an objective element into the assessment of impact.

144. New subsections (2B) then go on to provide matters to which the senior police officer must have regard when considering whether the impact is "significant". These are:

a. the likely number of such persons who may experience such an impact,
b. the likely duration of that impact on such persons, and
c. the likely intensity of that impact on such persons.

145. Clause 60 amends the POA 1986 to include a new section 14ZA, which provides the police with a power to impose conditions on one-person protests in the same two situations as above, namely where noise generated by the person carrying on the one-person protest may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the protest, or have a significant "relevant impact" on persons in the vicinity of the one-person protest.

146. The provisions will be set out in primary legislation and are sufficiently precise to be foreseeable.

147. The threshold for imposing conditions requires that a senior officer *reasonably* believes that the particular criterion exists, meaning that this belief must be based on objective grounds. The imposition of conditions can be challenged in court by way of judicial review. The Government therefore considers that the provisions will be in accordance with the law.

148. The imposition of conditions may pursue various legitimate aims, including the prevention of disorder and crime, and protecting the rights of others. The actual legitimate aim pursued will depend on the factual context of the procession, assembly, or one-person protest.

149. The Government considers that the provisions are proportionate as conditions can only be imposed to the extent that they appear to the senior police officer to be necessary to prevent the disruption etc. When imposing conditions, it is also

unlawful for the police, as a public authority, to act in a way which is incompatible with a Convention right (subject to section 6(2) Human Rights Act 1998).

150. Accordingly, the Government considers the provisions to be compliant with Articles 10 and 11.

Article 6

151. Article 6 is also engaged given that failure to comply with a condition is a criminal offence. Clause 56 provides for a lowered *mens rea* that is objective ("ought to have known") and the same *mens rea* will apply to the offences of breaching of conditions imposed on one-person protests. The burden will still be on the prosecution to prove this element of the offences. The offences already provide a defence where the defendant can prove that the failure arose from circumstances beyond their control. The normal safeguards provided for in the criminal justice system will apply to the amended criminal offence. The Government therefore considers that the provisions are Article 6 compliant.

Amendments to the PRSRA 2011

Articles 10 and 11

152. These provisions may be used in the context of protests outside Parliament where people are exercising their Article 10 right to freedom of expression and potentially their Article 11 right to freedom of assembly. As set out above, these are qualified rights.

153. The provisions will be set out in primary legislation and will be sufficiently precise to be foreseeable. The Government therefore considers that the provisions will be in accordance with the law. The threshold for giving a direction will require that a constable has reasonable grounds for believing that a person is doing, or about to do, a prohibited activity – namely blocking or impeding vehicular access to Parliament.

154. The giving of a direction may pursue various legitimate aims, including the prevention of disorder and crime, and protecting the rights of others.

155. The Government considers this provision to be proportionate as the prohibited activity is limited to activity blocking or impeding vehicular access to Parliament and thus posing a threat to the safety of Parliamentarians – any protest or other activity which does not block access can continue. The power to give a direction is not a power to ban the activity outright.

Article 6

156. Article 6 is also engaged as a person who fails to comply with a direction commits an offence. The offence is only committed where a person fails without reasonable excuse to comply with the direction, and the usual safeguards provided for in the criminal justice system will apply. Accordingly, the Government considers the provisions to be compliant with Article 6.

Public Nuisance

157. Clause 59 creates a new offence of "intentionally or recklessly causing public nuisance" and repeals and restates the common law offence of public nuisance. This follows the recommendation in the Law Commission's 2015 report "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency". In doing so, it imposes a higher *mens rea* requirement of recklessness or intention, and reduces the maximum term of imprisonment from life to 10 years' imprisonment.

Articles 6 and 7

158. Article 6 will be engaged by the investigation and prosecution of the offence; however, the normal safeguards provided for in the criminal justice system will apply to this offence.

159. The clause provides that it is a defence for a person to prove that they had a reasonable excuse for the act or omission it is alleged resulted in the public nuisance. The burden of proof is placed on the defendant given the general nature of the defence and the facts as to whether the defendant has a reasonable excuse will be within their knowledge. The prosecution must still prove all the elements of

the offence to the criminal standard of proof, including the serious harm or obstruction that arises as a result of the act or omission, and that the defendant intended or was reckless as to serious harm or obstruction.

160. The Government considers that the new statutory offence will comply with Article 6.

161. The Government considers that the offence will be sufficiently certain and predictable to meet the requirements of Article 7.

Article 10 and 11

162. The offence could potentially be used against people who are exercising their Articles 10 and 11 rights to freedom of expression and freedom of assembly. The offence will be more accessible than the common law offence, given its substance and scope will be set out in legislation. The Government considers that the offence is sufficiently precise to be foreseeable and that the provision is in accordance with the law.

163. The police and the Crown Prosecution Service must comply with the Human Rights Act 1998 when making decisions around arrest, charge and prosecution and therefore must do so in a way that is compatible with an individual's human rights. The court must do the same when carrying out its functions.

164. Accordingly, the Government considers the offence to comply with Articles 10 and 11.

Unauthorised encampments

<u>Offence relating to residing on land without consent in or with a vehicle</u>

165. New section 60C of the Criminal Justice and Public Order Act 1994 (the "1994 Act"), inserted by clause 61, creates a criminal offence in relation to individuals

residing or intending to reside with vehicles on land who have caused or are likely to cause significant damage, disruption or distress and:

a. who fail to leave the land or remove their property without reasonable excuse when asked to do so by an occupier of the land, their representative or a constable; or
b. who enter or, having left, re-enter the land with an intention to reside there without the consent of the occupier of the land, without reasonable excuse, and who have, or intend to have, at least one vehicle with them on the land within 12 months of the request.

166. The offence can take place on land which is private or public (subject to the exclusions in the definition of "land" in new section 60C(5) of the 1994 Act).

167. If the conditions of the offence are met, the provision confers a power of arrest (by way of section 24 of the Police and Criminal Evidence Act 1984) and seizure of the person's vehicle/other property on a constable.

168. New section 60D of the 1994 Act enables the chief officer of the police force for the area in which the property was seized to retain this for:

a. Up to three months from the date of the seizure; or
b. If criminal proceedings are commenced, until the conclusion of those proceedings.

169. New section 60D of the 1994 Act confers a duty on the chief officer of the police force to, subject to any order of forfeiture by the court, return the property to the person believed to be the owner once they are no longer entitled to retain it. This includes if written notice is given to the person within the period of three months from seizure that they will not be prosecuted for the offence.

170. New section 60E of the 1994 Act confers power on a court which convicts a person of the offence to order anything seized to be forfeited and handled in a manner specified in the order. It also provides that before making an order of forfeiture, a court must:

a. Permit anyone who claims to be its owner or to have an interest in it to make representations; and
b. Consider its value and the likely consequences.

171. Clause 62 broadens the list of harms caught by the power to direct under section 61(1)(a) of the 1994 Act, providing the police with powers to direct trespassers in a wider range of circumstances than under the current legislation. These harms will reconcile with the harms set out under the new offence (they will include damage to the environment as well as to the land) (clause 61 above) but will be of a lower threshold – the harms will not be "significant".

172. Clause 62(5) increases the period under section 61 of the 1994 Act in which trespassers who have received a direction to leave and remove their vehicles/other property in England and Wales must not return to the land from three months to twelve months. Clause 62(8) makes equivalent provision to the return period in relation to the power of seizure under section 62 of the Act. Clause 62(9) and (10) make amendments in relation to trespassers directed to leave the land under section 62A of the 1994 Act; they increase the period in which the trespasser must not return to the land following a direction from three months to twelve months.

173. Clause 62(6) amends the definition of "land" in section 61 of the 1994 Act to enable the police to direct trespassers away from land that forms part of a highway.

Article 8

174. The criminalisation of persons residing in vehicles on land and police powers to seize their property, as well as the extension of the police powers of direction under the 1994 Act, engage the first limb of Article 8 which protects an individual's "right to respect for his private and family life, his home and his correspondence". In particular, the offence, seizure power and amendments to the 1994 Act will interfere with the rights of anyone who lives in a caravan or movable vehicle, most notably the Gypsy Roma Traveller ("GRT") community. This community's nomadic existence is afforded special consideration by the domestic and European courts, see *Chapman v United Kingdom* (2001) 33 EHRR 18. The Court of Appeal

reiterated this in *The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown* [2020] EWCA Civ 12 when considering the legality of a de facto borough wide injunction and confirmed that measures which affect this community's ability to place their caravans on land not only interfere with the right to respect for their home but also their ability to maintain their identity and to lead their private and family life in accordance with their nomadic tradition. Such interference will always have to be assessed as proportionate and necessary.

175. Article 8 is a qualified right and can be interfered with lawfully, provided that:
    a. The interference is in accordance with the law;
    b. It pursues a legitimate aim; and
    c. The interference is necessary in a democratic society.

176. The offence and amendments to the 1994 Act will be set out in primary legislation and will be sufficiently precise to be foreseeable. The Government therefore considers that these provisions will be in accordance with the law.

177. The offence, seizure power and amendments to the 1994 Act pursue legitimate aims, including the prevention of disorder and crime and protection of the rights of others (being landowners and the local community).

178. The Government considers these provisions to be necessary to tackle the harms caused by unauthorised encampments which can cause significant distress to landowners and the neighbouring community. These harms include rubbish and litter resulting in significant clean-up costs, deprivation of use of the land for its intended purpose and anti-social behaviour.

179. With the below safeguards, the Government considers that the offence and seizure power are compatible with Article 8:
    a. Damage, disruption or distress caused or likely to be caused must be significant for a person to be caught by the offence.
    b. A person will not be caught by the offence if they can show that they have a reasonable excuse for failing to leave the land or remove their property or for entering or re-entering the land within the prohibited period. This will

enable the constable to take into account any welfare considerations, such as children residing in the vehicle, and will allow sufficient time for the person and their family to move to a new location and remove their property.

c. Permanent seizure or disposal of property will only take place upon judicial oversight, taking into account any representations from the owner of the vehicle and the likely consequences.

180. The Government also considers that the amendments to the 1994 Act comply with Article 8. The widening of the definition of "damage" is considered necessary to tackle the wide range of harms suffered by landowners/those in the immediate vicinity of the land. The amendment to the length of time from three months to 12 months before legal return to the land is also considered a proportionate interference with Article 8; it helps to ensure that those affected by the return/the presence of the vehicle on the land can be alleviated of the harms suffered whilst not criminalising return after a disproportionately long time has passed.

181. Constables must comply with the Human Rights Act 1998 when directing or arresting a person and seizing their vehicle, and they must do so in a way that is compatible with an individual's human rights. The constable will conduct a balancing exercise between the rights of the person residing in their vehicle against the rights of the landowner and/or the local community. Powers of arrest, direction and seizure will therefore only be exercised where it is necessary and proportionate to do so and once welfare considerations have been taken into account.

Articles 6 and 7

182. The criminal limbs of Article 6 – Article 6(2) and (3) that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law and has the minimum rights set out in Article 6(3) - are engaged as a person who meets the criteria in clause 61 commits a criminal offence. There is a "reasonable excuse" defence incorporated into the offence and the usual safeguards provided for in the criminal justice system will apply. Accordingly, the Government considers the provisions to be compliant with Article 6(2) and (3).

183. Article 6(1) – that in the determination of a person's civil rights and obligations or any criminal charge against them, they are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal – will also be engaged in relation to the seizure of a person's vehicle/any other property, with the possibility for this to be disposed of by order of the court. The incorporation of judicial oversight into the legislation, ensuring that permanent seizure/disposal of a vehicle will be subject to an order of a court, following representations from the owner of the vehicle, ensures that the seizure power is compatible with Article 6. In addition, the police will have to assess ECHR considerations when determining whether to retain the vehicle/other property up until to the conclusion of the criminal proceedings (if such proceedings are commenced).

184. The Government considers that the measures will be sufficiently certain and predictable to meet the requirements of Article 7.

Article 1, Protocol 1

185. The seizure of a person's vehicle represents a deprivation of property and interferes with an individual's right to peaceful enjoyment of their possessions under Article 1, Protocol 1. To be deemed compatible with Article 1, Protocol 1, any interference must comply with the principle of lawfulness, pursue a legitimate aim and be proportionate (*Beyeler v. Italy* [GC], §§ 108-114).

186. The seizure power will be in accordance with the law because it is contained in primary legislation and formulated with sufficient precision to enable a person to know in what circumstances it can be exercised. It is the view of the Government that interference can be justified by the public interest in the prevention of disorder and crime and the protection of the rights of others; the seizure will bring the above harm/harmful behaviour to an end and ensure the land is cleared at the earliest opportunity.

187. The incorporation of judicial oversight into the legislation, ensuring that permanent seizure/disposal of property will be subject to an order of the court, coupled with the duty on a constable to comply with the Human Rights Act 1998

and to only exercise these powers where it is necessary and proportionate to do so, means the Government considers that these powers are compliant with Article 1, Protocol 1.

Article 14

188. Article 14 – the right to protection from discrimination - is engaged (parasitic on the rights identified above) as the measures may disproportionately affect members of the GRT community, who are protected as minorities under the Equality Act 2010 and who, as above, are afforded special consideration by the courts.

189. The Government considers there is objective and reasonable justification for any interference with Article 14 rights. These measures seek to protect the rights of landowners and those in the immediate vicinity from the harms caused by trespassers residing with vehicles on land. The offence and seizure power include the above safeguards to help ensure compliance with Convention rights. There will also be safeguards in place to make clear that the exercise of the powers should not be based on race or ethnicity (or any other protected characteristic), by way of guidance to officers and the legal duties on the individual officers to act in compliance with Convention rights.

Fixed-Penalty Notices: Scotland

190. Clause 75 of the Bill extends to the police in Scotland the power to issue Fixed Penalty Notices (FPNs) on-the-spot to road traffic offenders. This power already exists in England and Wales. Clause 75 engages A1P1 as it potentially requires an offender to pay a penalty.

191. The Government considers that any interference with A1P1 rights is justified. The fixed penalty provisions will be set out in law and will be sufficiently accessible, clear and foreseeable. The penalties imposed are in the general interest of the community as they are intended to prevent motoring offences which could endanger other road users. The Government further considers that the financial

liability arising out of the fixed penalty notice does not place an excessive burden on the individual and there is adequate opportunity to put a case in front of a court by requesting a hearing within the period stipulated on the notice.

Serious Violence Reduction Orders

192. Chapter 1 of Part 10 makes provision for serious violence reduction orders ("SVROs") as a new court order in England and Wales.

Article 6

Grant of an SVRO

193. The Government is satisfied that proceedings from making an SVRO do not involve the determination of a criminal charge[3] The domestic classification of SVRO proceedings is civil. The clear intention of an SVRO is the prevention of, and deterrence from, individuals committing further knife and offensive weapons offences, and an SVRO will only be granted where the court considers it "necessary" for protective purposes. Proceedings by which these orders are obtained are therefore, civil proceedings[4] and will engage the civil limb of Article 6. The Government considers that these proceedings satisfy any requirements arising under Article 6(1). In relation to the application of civil (as opposed to the criminal) standard of proof, the Government is satisfied that the use of the civil standard does not violate article 6 and adequate safeguards are provided to ensure procedural fairness[5]. The rules which govern the application process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order provide sufficient safeguards.

Criminal proceedings for breach of the Order

194. There will be a criminal trial with the relevant Article 6 rights applied for a decision about criminal conduct. If a person subject to an SVRO is searched and found to be in possession of a bladed article or offensive weapon they will be

[3] See *Engel v Netherlands (A/22) (1979-80) 6 EHRR 409*
[4] See *McCann v Manchester Crown Court [2002] UKHL 39*; *Chief Constable of Lancashire v Wilson [2015] EWHC* 2763
[5] See *Jones v Birmingham City Council [2018] EWCA Civ 1189*

subject to standard criminal procedures in respect of the investigation and prosecution of any offences (for example, the offence under section 1(1) of the Prevention of Crime Act 1953 of carrying of offensive weapons without lawful authority or reasonable excuse).

195. If a person commits a criminal offence under the new provisions (for example by failing, without reasonable excuse, to comply with the notification requirements or by obstructing a constable exercising the stop and search power) the normal safeguards provided for in the criminal justice system will apply. The Government considers that the new statutory offence will comply with Article 6.

SVROs – the measures

196. The requirements of an SVRO will be requirements on the offender to notify the police as to their name and address(s), within three days of the day the order takes effect. The individual will also be required to notify within three days any use of a new name, any change to their home address or if they decide to live at any address which has not been notified to the police for one month or more, any such new address. These requirements are intended to assist the police in the exercise of the stop and search power against an individual who has been granted an SVRO.

Notification requirements

197. The measures imposed by an SVRO engage Article 8(1). Article 8(2) permits interference with those rights for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. The Government considers the interference is in accordance with the law and is proportionate to achieve a legitimate aim. The interference will be in accordance with the law: there is clear provision governing the basis on which the court may make an order and setting out the notification requirements. The notification requirements will also be explained to the offender in plain English and will be on the face of the Order. The requirements will last for the duration of the SVRO, which the court will set, subject to a minimum of six months and a maximum of two years, as set out in the Bill. The Bill provides a process for appeal against an order, and for variation and discharge of an order. The law will therefore be clear, foreseeable and adequately

accessible. Any interference will be in pursuit of the legitimate aims of public safety, preventing crime and disorder and for the protection of the rights and freedoms of others, reducing the risk of violence, serious injury and death from the use of knives and offensive weapons.

198. In relation to proportionality, the court has a discretion whether to grant an SVRO, and under section 6 of the Human Rights Act 1998 must exercise their discretion in a way that is compatible with ECHR rights, including Article 8. Article 8 imposes positive requirements on the state to ensure an individual's private and family life, home and correspondence are respected. This obligation extends to protecting individuals from each other (see *X and Y v Netherlands* [1985] ECHR 4). The purpose of an SVRO is protect the public from the risk of harm involving a bladed article or offensive weapon, protecting their physical and psychological integrity. The offender's rights may, therefore, be outweighed (in the individual case) by the state's positive obligations to protect the Article 8 rights (to physical and psychological integrity) of specified individuals and/or the public at large and to prevent crime and disorder. In addition, the notification requirements will only last for the duration of the Order, which is to be determined by the court (within a maximum period of two years and a minimum period of six months), the court may also vary or discharge an order. The Government is therefore satisfied that these provisions are compatible with Article 8, and are a proportionate measure to achieve the aims of public safety, preventing crime and disorder and for the protection of the rights and freedoms of others, reducing the risk of violence, serious injury and death from the use of knives and offensive weapons.

Stop and search power

199. A power is conferred on police constables to stop and search persons who are subject to a SVRO, in a public place for the purposes of ascertaining whether the person has a bladed article or offensive weapon with them. There are also associated powers of seizure and retention of anything found in such search which the constable reasonably suspects to be a bladed article or offensive weapon.

200. Under Article 5(1)(b) an individual may be deprived of his liberty for non-compliance with the lawful order of a court or in order to secure the fulfilment of

any obligation prescribed by law. If the exercise of the stop and search power by the police were to engage Article 5, the purpose of detention would be consistent with Article 5(1)(b). Any detention to undertake the search would only be for the minimum length of time necessary in order to conduct the search, and the safeguards in place in relation to its operation as set out below in respect of Article 8 below would apply.

201. The conferral of a power on the police to stop and search a person who is subject to an SVRO interferes with the Article 8 rights of those subject to an SVRO.

202. Article 8(2) permits interference with those rights for the prevention of disorder or crime or for the protection of the rights and freedoms of others. The legitimate aim of SVROs is to prevent harm to the public, particular members of the public (including the offender), and to prevent reoffending in those who have been convicted of a relevant offence related to knives, or offensive weapons. This aim is to prevent crime, and also to protect the potential victims of knife/offensive weapon crimes by providing a power for the police to target those known to have previously been involved in such activity, in order to deter them from reoffending. The Government considers that the provisions are in accordance with the law and are a proportionate means to achieve that legitimate aim.

203. *Beghal v UK (Application no. 4755/16)* held that domestic law must "afford a measure of legal protection against arbitrary interferences [with Convention rights] by public authorities". In relation to the power to stop and search those entering the UK under Schedule 7 to the Terrorism Act 2000 the European Court of Human Rights in that case considered the geographic and temporal scope of the powers; the discretion afforded to the authorities in exercising the powers; any curtailment on the interference; the possibility of judicially reviewing the exercise of the powers; and any independent oversight of the use of the powers.

204. The Government considers that the SVRO stop and search power contains sufficient safeguards against abuse, such that they are in accordance with the law. In particular, the court will have discretion to determine whether to grant an SVRO in cases where it considers the order to be necessary to protect the public, or particular members of the public, from the risk of harm involving a knife or offensive

weapon, or to prevent the offender from committing an offence involving a knife or offensive weapon. In exercising this discretion, the court will be required to act in accordance with section 6 of the Human Rights Act 1998, and thus will be required to assess the necessity and proportionality of granting an order in each individual case. In addition, there is a requirement that the prosecution apply for the Order to be granted. The prosecution must also act in accordance with section 6 of the Human Rights Act 1998 in considering whether to make the application in each case.

205. The length of an SVRO will be limited to a minimum length of six months and a maximum length of two years, and the court will have discretion to decide (within those limits) what an appropriate duration for an SVRO should be in each case which is an important safeguard. There will also be the ability for applications to be made to vary or discharge the order so further consideration can be given to duration if appropriate.

206. In order to provide the deterrent effect of the Order the stop and search power can be exercised across England and Wales. Whilst an individual could, therefore, be stopped anywhere within England and Wales, the power can only be exercised against an individual who is subject to an SVRO. The notification requirements are intended to support the police in ensuring they can identify those with an SVRO.

207. Statutory guidance about the exercise of the power, along with monitoring and reporting requirements, will provide further safeguards to ensure appropriate use of the power by the police. In any case where a person not subject to an SVRO were stopped they would have existing public law remedies available to challenge any action by the police. The officer would be acting unlawfully if they exercise the stop and search power against an individual who does not have an SVRO, and there will be an ability to challenge any search on that basis.

208. The Supreme Court in the R (on the application of Roberts) v Metropolitan Police Commissioner [2015] UKSC 79 considered safeguards in terms of the police exercising the stop and search power in section 60 of the Criminal Justice and Public Order Act 1994. The officer exercising the SVRO power will, as in Roberts,

be required to act compatibly with the convention rights, by virtue of section 6 of the Human Rights Act 1998, and with the Equality Act 2010 when doing so. They will also be limited to searching the individual for the purposes of ascertaining whether the individual is in possession of a bladed article or offensive weapon. Provisions which apply to existing stop and search powers will apply to this power (see for example sections 2 and 3 of the Police and Criminal Evidence Act 1984, and the relevant Code of Practice under section 66 of that Act). In addition, further guidance will be issued by the Secretary of State in relation to the operation of the Orders.

209. Existing mechanisms for challenging police actions both nationally and locally will also be available. By way of example, powers possessed by the Home Secretary to appoint Her Majesty's Inspectors of Constabulary and to direct them to carry out inspections and report to her, under section 54 of the Police Act 1996. At a local level, police and crime commissioners are responsible for holding the chief constable of their area to account for the way in which he or she, and the people under his or her direction and control, exercise their functions. In relation to the Metropolitan Police, the equivalent function is performed by the Mayor's Office for Policing and Crime. The Government further intends that reporting/monitoring use of the power will form an additional oversight mechanism.

210. In relation to proportionality, the court will have discretion to determine whether to grant an SVRO in cases where it considers the order to be necessary to protect the public, or particular members of the public, from the risk of harm involving a knife or offensive weapon, or to prevent the offender from committing an offence involving a knife or offensive weapon. In exercising this discretion, the court will be required to act in accordance with section 6 of the Human Rights Act 1998, and thus will be required to assess the necessity and proportionality of granting an order in each individual case. In addition, there is a requirement that the prosecution apply for the Order to be granted. The prosecution must also act in accordance with section 6 of the Human Rights Act 1998 in considering whether to make the application in each case.

211. The impact and effectiveness of SVROs will be assessed by a pilot. This pilot will be used to improve the evidence base regarding the impact of such orders and inform a decision on rolling out the policy nationally. A report on the pilot would be required to be laid before Parliament prior to any full roll out.

212. The Government accordingly considers that such interference is in accordance with the law, is justified and is a proportionate means of achieving the intended legitimate aim of public safety, preventing crime and disorder and for the protection of the rights and freedoms of others, reducing the risk of violence, serious injury and death from the use of knives and offensive weapons.

A1P1

213. A1P1 will be engaged by the power for the police to seize and retain items which they find in the course of a search and which they reasonably believe may be a bladed article. The Government considers that any interference with the right to peaceful enjoyment of property is compatible with A1P1.

214. The powers of seizure are in accordance with the law because they are set out in the Bill and are formulated with sufficient precision to enable a person to know in what circumstances they can be exercised. Any interference is justified by the public interest in protecting public safety and the prevention of disorder or crime. Property will only be seized and retained if there is a reason to believe that they may be a bladed article or offensive weapon, and in accordance with the primary legislation. The powers are proportionate because the articles seized could otherwise be used for the purposes of violent crime and could result in evidence (that would otherwise be missed or subsequently destroyed) being available for use in a criminal prosecution. The Bill includes a power for the Secretary of State to make regulations as to the retention of items seized, which will allow for the Secretary of State to provide for the retention of property, including its destruction or return to the owner.

Article 14

215. SVROs will be available in respect of all individuals. The threshold test for the making of an SVRO is predicated on objective factors unrelated to any protected characteristic, namely the facts of the risk posed by the individual. SVROs seek to protect the communities most at risk from serious violence through the more targeted powers, and given the safeguards that will be in place to make clear that exercise of the power should not be based on race or ethnicity (or any other protected characteristic), and the legal duties on the individual officers to act in compliance with Convention rights and the Equality Act.

216. The Government is satisfied that in the event that the rights of a particular group, may indirectly be disproportionately affected in comparison to other members of society, that there is reasonable and objective justification (namely, the threat posed to public safety by knife and offensive weapon crime).

Management of sex offenders

217. Chapter 2 of Part 9 makes provision for the management of sex offenders in a number of respects. However, it is considered that only the following provisions engage ECHR rights which will be considered in turn:

a. Clause 142 amends the Sexual Offences Act 2003 ("SOA") to remove the requirement for Notification Orders and introduce a system where the police will inform those convicted of a relevant sexual offence outside the UK that they must comply with notification requirements where they are resident in the country for more than a total of seven days within a 12-month period;
b. Amendments are made to the framework governing Sexual Harm Prevention Orders ("SHPOs") and Sexual Risk Orders ("SROs") in the SOA to:
    i. enable certain positive obligations to be attached to SHPOs and SROs (clauses 148 to 150);
    ii. enable electronic monitoring requirements to be attached to SHPOs and SROs (clause 151);
    iii. requiring courts and applicants to have regard to a list of high-risk countries when considering SHPOs and SROs (clause 146);

iv. provide for the civil standard of proof to apply to the making of a SHPO on application or SRO (clause 147).

Amending notification requirements (clause 142)

218. Clause 142 removes the requirement for a chief officer of police to apply to a magistrates' court for a notification order in respect of a person who has been convicted of a relevant sexual offence under the law in force in a country outside the United Kingdom. The clause requires the foreign offender (being a person who meets certain specified conditions) to comply with the notification requirements under Part 2 of the SOA once informed by the police that they are required to do so. Removing the requirement for a chief officer to apply to the court for a notification order for an offender with a foreign conviction reflects the current position of offenders who are tried or cautioned in England and Wales and become subject to notification requirement without further consideration of the court. The new provision puts a person who has been convicted abroad of an equivalent offence in the same position.

219. Where an offender is under 18 the police will serve a notice on both the offender and their parent, the parent will then become responsible for the offender notifying and subject to criminal penalty for failure to do so. The police will have discretion over whether to serve a parental notice and will make the relevant enquiries to identify the most appropriate individual with parental responsibility prior to doing so.

Article 6

220. The previous system of notification orders did not engage Article 6(1). In Raimondo v Italy A 281A [1994] 18 E.H.R.R 237, the European Court of Human Rights held that the imposition of a special supervision order in conjunction with criminal proceedings did not amount to a criminal sanction, since it was designed to prevent rather than to punish the commission of offences. The Commission adopted a similar approach in Ibbotson v United Kingdom (1999) 27 E.H.R.R CD322, where the registration requirements of the Sex Offenders Act 1997 were

found not to constitute a criminal penalty since they were preventative rather than punitive in nature. The magistrates' court was not determining civil rights, as the duty to make the notification order depended on three statutory conditions being fulfilled unless the application by the police or by the person with the foreign conviction indicated that there would be a breach of Article 8 rights if the order were made. This would engage the civil limb of Article 6. The police had limited information to provide to the court and the purpose of the notification requirements was to risk assess the offender and so protect members of the public. However, in almost all cases the court was bound to make the notification order.

221. Where an offender breaches the notification requirements without reasonable excuse, the offender (or their parent where applicable) is liable to a fine or on summary conviction to imprisonment for a term not exceeding six months or on indictment to a term not exceeding five years. There will be a court hearing to determine whether the offender is guilty of the offence at which the offender will be represented and can challenge the requirement to notify. The court is required to act compatibly with Convention rights in determining whether an offence has been committed. An offender can also appeal a notice on wide statutory grounds of appeal to the Court and where a parental notice has been served the individual served and the offender can make representations to the police where they feel there is a more appropriate individual with parental responsibility. These processes ensure the offender's Article 6 rights have been protected. We do not consider that Article 6 is engaged with the amended notification requirements except to the extent that the offender breaches these requirements.

Article 8

222. Article 8 is engaged because the notification requirements request information about an individual's private life. The interference will be in accordance with the law because there is clear provision in primary legislation stating the requirement to notify. The Government considers that any interference is necessary and furthers a legitimate aim (as set out in Article 8(2)). The legitimate aim is to protect members of the public from sex offenders, wherever the relevant conduct has occurred. The notification requirements are necessary since the offender poses an

equivalent threat as a person convicted within the UK. The requirement for the offender who has been convicted of a relevant offence abroad to be required to notify when informed by the police is proportionate as notification enables the police to gather sufficient information to carry out a risk assessment of the sex offender. An offender can appeal to a magistrates' court if they can provide evidence that the statutory conditions in new section 96ZA of the SOA have not been met or provide evidence that the investigation or the proceeding prior to the conviction were not carried out in compliance with Convention rights. The offender could also challenge by way of judicial review.

Amending SHPOs and SROs (Clauses 144 to 152)

223. Clauses 144 to 152 contain several reforms to SHPOs and SROs in Part 2 of the SOA. The purpose of an SHPO, as set out in sections 103A to 103K, is to protect the public, and children and vulnerable adults from sexual harm from the defendant. It is also to prohibit the defendant from doing anything described in the order. The purpose of an SRO, as set out in sections 122A to 122K, is similar to the purpose of an SHPO. However, in the case of an SRO the order is made where the person has done an act of a sexual nature as a result of which there is reasonable cause to believe it is necessary for SRO to be made. Both the SHPO and SRO may contain prohibitions which prevent the defendant from doing anything described in the order. An offender who is subject to a SHPO needs to comply with the notification requirements in Part 2 of the SOA if they are not already required to. Whereas a person subject to SRO needs only to give their name and address and keep these details up to date.

224. The overarching aims of the reforms are to increase the effectiveness of the management of sex offenders and so the protection of members of the public by:

a. introducing the option of including positive obligations, as described below, in the orders;
b. expressly allowing for electronic monitoring of a defendant's compliance with the prohibitions or positive obligations included in an order where appropriate;

c. requiring applicants and courts to have regard to a list of countries where children are considered to be at high risk of child sexual abuse and exploitation by UK nationals and residents in deciding whether it is necessary to apply for or make, as the case may be, an SHPO or SRO for the purpose of protecting children outside the UK from the risk of sexual harm from the respondent, and whether the inclusion of a foreign travel prohibition in such an order is necessary for that purpose; and
d. requiring the behaviour condition of SROs and SHPOs when made on application be assessed "on the balance of probabilities", the civil burden of proof.

225. In respect of the provisions in (a) and (b), where an individual fails to comply with a positive obligation or electronic monitoring without having a reasonable excuse this is considered a breach of the SHPO or SRO and is a criminal offence. That person may be liable on summary conviction to imprisonment for a term not exceeding six months or on indictment to a term not exceeding five years. However, the breach of these new conditions simply makes them subject to the existing penalty for breach of a condition in a SHPO or SRO.

Article 8- Positive Obligations (Clauses 148-150 and Schedule 17)

226. Positive obligations will enable applications for SHPOs or SROs to include for instance a requirement for the offender to attend rehabilitation courses, polygraph interviews or require them to update the police on specific changes for instance new online aliases or new electronic devices in their possession. Allowing the courts to impose positive obligations on defendants (the breach of which would be a criminal offence in line with the current provisions on breaching negative obligations) is consistent with various other existing civil order schemes under which positive obligations may be imposed, such as Criminal Behaviour Orders in section 22(9) of the Anti-social Behaviour, Crime and Policing Act 2014 or Stalking Protection Orders in section 2(2) of the Stalking Protection Act 2019.

227. The power for the court to include positive obligations in SHPOs or SROs engages Article 8. The interference will be in accordance with the law as there is

clear provision in primary legislation. The requirement for a positive obligation will be proportionate as the only obligations which can be imposed are those which are necessary for protecting the public or members of the public or protecting children or vulnerable adults generally or particular children or vulnerable adults outside the UK. The obligations also need to be compatible with the defendant's religious beliefs, work and educational commitments so far as this is practicable. The court is also required by section 6 of the Human Rights Act 1998 to act compatibly with Convention rights.

228. A court in Scotland is able to vary or renew an SHPO or SRO made by a court in England and Wales and a Sexual Offences Prevention Order (SOPO) made by a court in Northern Ireland to include positive obligations (Schedule 17 Part 2). A court in England and Wales is able to vary or renew an SHPO or SRO made by a court in Scotland or a SOPO made by a court in Northern Ireland to include positive obligations (Schedule 17 Part 3).

Article 8-Electronic Monitoring (Clause 151)

229. The electronic monitoring of compliance with prohibitions or requirements of a SHPO or SRO where appropriate engages Article 8(1). The interference will be in accordance with the law because there is clear provision in primary legislation governing the basis on which the court can make an order and setting out the necessary considerations.

230. Electronic monitoring is not an end in itself; it is a tool to monitor compliance with another requirement or prohibition imposed by an order with the aim to support the management of risk of harm. It is a way of remotely monitoring and recording information on an offender's compliance with restrictions on or conditions of their behaviour e.g. a curfew or exclusion zone. This is normally done by way of an electronic tag which is fitted to a subject's ankle. The tag worn by the subject (offender) transmits their location data to a monitoring centre where it is processed and recorded. The monitoring centre, operated by the 'responsible person', reviews this information to see whether the perpetrator is complying with the conditions being electronically monitored. Where an offender has failed to comply, the

responsible person provides information to the police for the enforcement of the order.

231. The Government considers that any Article 8 interference in requiring electronic monitoring is necessary and proportionate to further a legitimate aim (as set out in Article 8(2)). The legitimate aim is to protect the Article 8 rights of the members of the public and/or particular members of the public.

232. In *R. (on the application of Richards) v Teeside Magistrates' Court* [2015] EWCA Civ 7, the offender challenged electronic monitoring as a condition of the now superseded post-conviction Sexual Offences Prevention Order on the basis that the SOA did not expressly permit electronic monitoring as a condition. The Court of Appeal held that there was no need for the SOA to contain express wording to enable electronic monitoring and that the interference with the appellant's Article 8 rights was in accordance with the law. It was held that the only test for a condition in the SOA was whether it was "necessary to protect the public or particular people from sexual harm". However, the Court also held that it was significant that the SOA did not expressly authorise electronic monitoring when other statutes did and that it was desirable to have an express statutory authority to remove any uncertainty in the law. This provision addresses that concern.

233. Electronic monitoring is proportionate as it must be attached to a requirement or prohibition, which can only be imposed if they are necessary for protecting the public or members of the public or protecting children or vulnerable adults generally or particular children or vulnerable adults outside the UK. An electronic monitoring requirement can only be imposed for a maximum period of 12 months, thereafter the necessity of the requirement would have to be reassessed. The court also is required by section 6 of the Human Rights Act 1998 to act compatibly with a Convention and so the court will consider whether the requirement for electronic monitoring in an order will comply with Article 8.

234. A court in England and Wales is able to vary or renew an SHPO or SRO made by a court in Scotland or a SOPO made by a court in Northern Ireland to include a

requirement for electronic monitoring of a requirement or prohibition (Schedule 18 Part 3).

Article 8- High Risk Countries (Clause 145 and 146)

235. The Secretary of State will prepare, or direct another body to prepare, a list of countries where the Secretary of State, or body, consider children to be at high risk of child sexual exploitation and abuse from UK nationals and residents. The Secretary of State will lay the list before Parliament and the body compiling the list will arrange for it to be published. The intention is that applicants (including the police and National Crime Agency) and the courts will be required to have regard to the list when deciding whether to apply for or make, as the case may be, an SHPO, interim SHPO, SRO or an interim SRO and also to consider whether to apply for a travel prohibition in respect of one of those countries in the SHPO or SRO. There is already a power for an applicant to request a travel prohibition and for the court to include this in an SHPO or an SRO. This statutory provision is implementing one of the recommendations of the Independent Inquiry into Child Sexual Abuse. The intention is to provide more evidence for the court to consider whether an SHPO or SRO should be made and if so, whether a travel prohibition should be included

236. A court in England and Wales which is varying or renewing an SHPO or SRO made by a court in Scotland or a Foreign Travel Order (FTO) made by a court in Northern Ireland will be required to have regard to the list in deciding whether to include a travel prohibition in an SHPO or SRO or to vary a FTO to include a further prohibition or renew it (Schedule 17 Part 3).

237. Where a court has regard to the list of high-risk countries and includes a travel prohibition to one of those countries in the order, this will engage Article 8(1) rights of the person in respect of whom the order is made as the restriction may interfere with family life in restricting contact with members who live abroad. It may also restrict private life by preventing travel to countries for a holiday.

238. The legitimate aim of the proposal is to protect the Article 8 rights of members of the public or particular members of the public in that third country. The interference will be in accordance with the law as there is clear provision in primary legislation requiring the police or other applicant for an order and the court to have regard to the list. The requirement to have regard will be proportionate as the travel prohibition may only be included in the order when it is necessary for protecting the public or members of the public or protecting children or vulnerable adults generally or particular children or vulnerable adults outside the UK from sexual harm from the defendant. The court also is required by section 6 of the Human Rights Act 1998 to act compatibly with a Convention right.

Article 6- Civil Standard of Proof (Clause 147)

239. The civil standard of proof will be applied by the court to the behaviour condition required for SHPOs on application and SROs. The current legal test is that the offender 'has since the appropriate date acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made'. This provision will make this a two-stage inquiry and apply the civil standard to the question of whether the behaviour has occurred.

240. This provision engages Article 6 ECHR because it concerns the decisive determination of the respondent's civil rights. Such an order can potentially restrict the respondent's rights under Articles 8, 10 and 11 (where necessary for the protection of the public). *McCann v Manchester Crown Court* [2002] UKHL 39 held that orders can be civil but where they are quasi-criminal in nature a higher standard of the civil proof should be used which is indistinguishable to the criminal standard. These orders however are unlikely to be classified as definitively criminal as they are not punitive in nature.

241. Lowering the standard of proof for the only limb of the legal tests open to any standard of proof arguably affects the fairness of the process, particularly where there are significant consequences for breach. Where the offender fails to comply with a requirement or prohibition in an SHPO or SRO without having a reasonable

excuse, the breach of the SHPO or SRO is a criminal offence and that person may be liable to a fine and/or on summary conviction to imprisonment for a term not exceeding six months or on indictment to a term not exceeding five years.

242. Both orders are however subject to other checks by the Court, before they can be imposed. The Court must also assess the tests of fact and necessity. When assessing SHPO and SRO applications the Court must determine if the order is necessary for the protection of the public or specific members of the public, or vulnerable adults or children outside the UK whether specified or generally. The case of *McCann* (noted above) states that where there is a test of necessity this is a matter of judgement and evaluation for the Court which is not subject to a standard of proof.

243. Further, the Court must always have regard to the offender's convention rights under section 6 of the Human Rights Act 1998. The new provisions regarding positive obligations and electronic monitoring include further safeguards as discussed above.

244. The Government's assessment is that although lowering the standard may affect the fairness of the hearing in light of the above this will be to a very limited degree and therefore will be insufficient to breach the offender's Article 6 rights.

Management of terrorist offenders

Power of arrest

245. Clause 157 confers a new power for the police to arrest terrorist prisoners who have been released on licence, if it appears that they have breached a condition of their licence and accordingly may be recalled to prison. The clause was developed following a recommendation made by Jonathan Hall QC's independent review into the arrangements and powers for the management of the risks posed by terrorist offenders released from prison.

246. At present the police are unable to detain a prisoner in connection with a breach of a licence condition until a decision has been made by the Secretary of State's officials to recall that prisoner to prison; which may take a period of time. In some circumstances this might lead to the police being unable to protect the public from the risk posed by that prisoner; for example, where the police observe a prisoner entering a train station in breach of his or her licence conditions, and boarding a train in order to abscond, before a decision can be made to recall them.

247. Under the new power a constable may arrest the terrorist prisoner if there are reasonable grounds to suspect that prisoner has breached a condition of their licence, and the constable reasonably considers that it is necessary to detain the prisoner for purposes connected with protecting the public from a risk of terrorism, while a decision is made on recall. Detention is permitted for a maximum of six hours in England and Wales (12 hours in Scotland or Northern Ireland), and the prisoner must be released as soon as practicable if a decision is made not to recall them.

Article 5

248. Article 5 is engaged only where an act of detention constitutes a deprivation of liberty rather than a restriction of movement. Detention for this relatively short period, of up to either six or twelve hours, may not be sufficient to constitute a deprivation of liberty for the purposes of Article 5, and the Government considers that any deprivation is compatible with Article 5. However, as this clause involves a power of arrest, the Government has analysed the compatibility of the power with Article 5 on the basis that it may involve a deprivation of liberty.

249. The Government considers that there is a lawful basis for the deprivation of liberty. This power is provided for by primary legislation, and is exercisable only in relation to prisoners serving their sentence while released on licence, in connection with the anticipated recall of the prisoner. Accordingly, the power falls under a combination of Article 5(1)(a), the lawful detention of a person after conviction by a competent court and Article 5(1)(b) the lawful arrest or detention… to secure the fulfilment of any obligation prescribed by law.

250. The Government also considers that the new power contains sufficient safeguards against arbitrary use such that it is meets the necessary requirements as to be “prescribed by law” for the purposes of Article 5(1). In particular:

a. The power is available only in respect of a specified group of prisoners (terrorist prisoners) who pose a higher terrorism risk than other prisoners or members of the public in general;
b. The power may be exercised only where the constable has reasonable grounds to suspect that the prisoner is in breach of a licence condition;
c. In addition, the constable must also have reasonable grounds to consider that the arrest is necessary for purposes connected with protecting members of the public from a risk of terrorism; and
d. The detention cannot exceed six hours in England & Wales, or twelve hours in Scotland and Northern Ireland, and the prisoner must be released as soon as practicable if the decision is made not to recall them.

251. Furthermore, the Government considers that this new power is a proportionate deprivation of liberty. The safeguards outlined above are intended to ensure that it will be used only for the limited cases where the police consider that a breach has taken place, that a recall may occur as a result, and that it is necessary to arrest the prisoner in order to avoid a risk to the public.

252. The power has been developed following the recommendation of an independent review that identified the need for this power because situations have arisen in the past where the police lacked the necessary powers to detain a terrorist prisoner while a recall decision was made, with an associated risk to the public. In some circumstances it may take some time for a recall decision to be made, and it is proportionate for a prisoner to be detained for up to six or twelve hours while that decision is made.

<u>Power to search a terrorist prisoner released on licence</u>

253. Clause 158 permits the police to carry out a personal search of certain terrorist offenders who have been released from prison on licence, for purposes connected with protecting the public from a risk of terrorism.

254. The clause permits the search of a prisoner if:

a. It is a condition of the prisoner's licence that he or she submit to such a search; and

b. The constable considers that it is necessary to carry out the search for purposes connected with protecting members of the public from a risk of terrorism (there is no requirement that the constable reasonably consider that it is necessary).

Article 8

255. The search provided for by this clause will constitute an interference with the Article 8 rights of prisoners. However, the Government considers that such interference is in accordance with the law, is justified and is a proportionate means of achieving the justified aim.

256. The power created by this clause may be exercised without the need for reasonable grounds; and is therefore a so-called "suspicionless stop-and-search" power. Such powers may be in accordance with the law for the purposes of Article 8, provided that, considered in all the relevant circumstances, they provide adequate safeguards against arbitrary use.

257. In *Gillan v UK* ("Gillan")[6] Strasbourg considered provisions of the Terrorism Act 2000 ("TACT 2000") that permitted a senior officer to designate an area within which persons could be stopped and searched without suspicion, if the senior officer considered that such designation was expedient in order to prevent acts of terrorism. Strasbourg found that this power was disproportionate and was not in accordance with the law because the power did not contain sufficient safeguards to prevent abuse. The Court reached this conclusion because the test of "expediency" was a low threshold, and that in practice it had led to wide areas

[6] 50 EHRR 1105

being designated on a continuous basis rather than in response to a specific need. The Court also noted that because the power was exercisable in relation to any person anywhere within the relevant area, this had led to persons being subjected to searches despite there being nothing to suggest that they posed a terrorism risk.

258. In *Beghal v DPP* ("Beghal")[7] the Supreme Court considered whether the powers under Schedule 7 to TACT 2000 that allow for persons to be detained, searched and questioned while passing through the UK Border, without the need for a basis of suspicion, were in accordance with the law for the purposes of Article 8. The Court found that the powers were compatible with Article 8 and that this power differed to that which had been considered by Strasbourg in *Gillan*:

> *"84 We do not read the decision in the Gillan case as ruling that any random stop and search system… cannot be "in accordance with the law" This view is supported by the Third Section's decision in Colon v The Netherlands (2012) 55 EHRR SE45, which upheld a universal right of stop and search in a particular area, albeit for a limited, but not inconsiderable, period. While the court in Colon relied in paras 73 and 76–78 on certain factors which distinguished it from the Gillan case, its decision emphasises how the determination of lawfulness is very sensitive to the facts of the particular case…"*

259. In finding that the Schedule 7 power was in accordance with the law, the Court noted various factors, including: the powers could be exercised only against an identifiable group; the powers could be used only to determine whether the person concerned "appears to be" a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism; and it was not extraordinary for persons passing through airports to be subjected to stop, search and questioning."[8]

260. The power being created by this clause contains sufficient safeguards against abuse. In particular, the following aspects of the power distinguish it from that considered in *Gillan*:

a. The power may be exercised only in relation to terrorist prisoners out on licence; and only those in respect of whom the Parole Board or the Secretary of State has concluded that it is necessary and proportionate to

[7] [2015] UKSC 79
[8] Paras 88 and 89.

include this as a licence condition.[9] The power is therefore directed at individuals who pose a substantially greater terrorism risk to the public.

b. In order to exercise the power, the constable carrying out the search must consider that the search is necessary for purposes connected with protecting the public from a risk of terrorism. While the constable does not have to have reasonable grounds for the view, he or she must honestly hold it; and if necessary be able to set out the reasons why he or she formed that belief. Furthermore, the officer must consider that the search is necessary rather than merely useful or expedient.

c. The intention is that additional guidance for officers as to the circumstances in which it is appropriate to conduct a search under this power will be issued when these powers are commenced.

261. The Government also considers that this new power is both justified and proportionate. Recent attacks have demonstrated the risk posed to the public from terrorist prisoners who are recently released from prison on licence; and it is justified in order to protect the public from such risks that the police be granted additional search powers. In relation to the requirement of proportionality, the Government considers that the factors listed above are sufficient to ensure that the measure is proportionate. This power has been developed following the recommendation of an independent review that identified that there was a need for this power in order to address a gap in the power of the police to protect the public, which became apparent following the Streatham attack in February 2020.

Power to search premises

262. Clause 159 creates a new power for the police to obtain a warrant from a justice of the peace or a sheriff to search the premises of a prisoner who is released on licence, if the search is necessary for purposes connected with protecting members of the public from a risk of terrorism. A warrant may be obtained in relation to the premises of any prisoner released on licence. This clause was also developed following one of the recommendations of Jonathan Hall QC's independent review.

[9] This may also be applied on a temporary basis, for example if the individual has been given permission to attend a particular event and the risk posed by the individual at that event was higher than it is in their everyday life.

Article 8

263. The search authorised under this power will constitute an interference with the Article 8 rights of those whose premises are searched. However, the Government considers that such interference is justified by the need to protect the public from the risk of terrorism; and is both proportionate and in accordance with the law.

264. The power permits a justice to authorise the warrant if he or she is satisfied that the search is necessary for purposes connected with protecting members of the public from a risk of terrorism. While this is a wide test, the Government considers that the legislation provides sufficient safeguard against abuse as to be in accordance with the law.

265. The search may only be conducted under the authority of a judicial warrant. While this of itself is not sufficient to satisfy the requirement of "in accordance with the law", taken with other features of the search power, it provides an effective safeguard against arbitrary use.

266. In order to be satisfied that such a search is necessary, the justice will have to be shown sufficient evidence to demonstrate that: a) that there is a terrorism risk associated with that person; b) that it is necessary to conduct a search of their premises in order to ascertain the nature and extent of that risk; and c) the occupier of the premises is unlikely to consent to the search. The inclusion of the word "necessary" in the clauses is significant, because it requires that the justice be satisfied that the justification for the search goes beyond what is merely useful or expedient.

267. In addition, this clause applies only to prisoners who are serving their sentence while released on licence. While this is a relatively large group, it is a limited group in terms of the population as a whole; and members of this group are already subject to restrictions on their Article 8 rights as compared to the population as a whole.

268. The Government considers that this power is justified by the need to protect the public from a risk of terrorism. The power has been developed following a recommendation of Jonathan Hall QC's independent review, who noted that there was a gap in the powers of the police to manage the risks posed by offenders who are released from prison on licence, and who present a risk to the public; this gap having been identified following two recent terrorist attacks.

269. The Government also considers that this power is a proportionate means of achieving the justified aim. While all prisoners serving sentences while on licence are within scope, the requirement that any search be necessary limits the application to those who have the potential to pose some terrorism risk to the public; as does the judicial scrutiny.

The UN Conventions on the Rights of the Child

270. The UK is signatory to the UN Convention on the Rights of the Child 1990 ("UNCRC") which it ratified in 1991. The Convention has not been implemented directly into legislation, but the UK is bound by it and must under international law perform its obligations in good faith.[10] As such, regard is to be given to the UNCRC when developing any new legislation or policy.

271. Article 3 of the UNCRC requires the best interests of the child to be a primary consideration in all actions concerning children. As public authorities, the specified authorities, education authorities and local policing bodies, must have regard to the child's best interests in performance of their duties and functions under the Bill (i.e. in collaborating to prevent and reduce criminality).

272. The provisions of Chapter 3 of Part 9, relating to the management of terrorist offenders, are exercisable against those under the age of 18. It is considered necessary to include those under 18 as a result of the growing prevalence of minors in both Pursue casework and as a proportion of overall terrorist offenders, and the powers in these provisions would be of utility in managing all terrorist offenders,

[10] The Vienna Convention on the law of Treaties (concluded at Vienna on 23 May 1969).

regardless of age. The exercise of these powers against those under the age of 18 is expected to be infrequent, and supplemented by policy and operational guidance to support their careful use. The exercise of these powers against those under the age of 18 may be sufficient to support disengagement from terrorism-related activity, and could therefore intervene before an individual engages in more serious criminal activity and better support the individual's rehabilitation, avoiding the need for more robust interventions or criminal proceedings and potential harm to the individual.

273. In relation to the sentencing measures, Article 37 of the UNCRC requires that no child shall be deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The youth justice system is distinct from the criminal justice system applicable to adults, focusing on the statutory aim of preventing offending by children and the welfare of the child. The measures in the Bill will not affect these fundamental principles.

274. The Bill includes measures to strengthen community sentences for under 18 year olds and provide courts with robust alternatives to custody and measures to ensure that children are not subject to custodial remand unnecessarily. The Bill also includes measures to make custodial sentences clearer and more flexible for sentencing courts so that they are appropriate for the small number of children for whom custody remains necessary while reflecting the severity of the offence. For children who are sentenced to detention, the Bill will confer statutory powers of temporary release to make sure that children detained in secure children's homes can fully access plans for their effective re-integration into the community upon release. There are also measures to support the establishment of secure schools which will be a new form of custodial provision for children operated by providers with experience of working with children enabling them to take an education, rehabilitative and trauma-informed approach to youth custody.