ELECTIONS BILL

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED IN THE HOUSE OF COMMONS

1. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

2. Chloe Smith MP, Minister of State for the Constitution and Devolution, has made the following statement: "In my view the provisions of the Elections Bill are compatible with the Convention rights."

Summary of the Bill

3. The Elections Bill makes provision across a range of elections-related subjects, including as to how elections are administered, the franchise and registration arrangements for certain elections, the operation and oversight of the Electoral Commission, and a range of measures relating to campaigning, including regulation of digital political material. The Bill is split into 7 Parts, which are summarised below.

Part 1 - Administration and conduct of elections

4. This Part contains various provisions to tackle electoral fraud, some of which were recommendations of the Pickles Report: "Securing the Ballot[1]". It introduces a requirement for voters to show photographic identification at polling stations at UK Parliamentary elections, and tightens up various rules relating to postal and proxy voting to improve their resistance to fraud. The existing offence of 'undue influence' is clarified. This Part also makes provision intended to improve accessibility of voting for people with disabilities.

Part 2 - Overseas electors and EU citizens

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/545416/eric_pickles_report_electoral_fraud.pdf

5. This Part contains two separate policy changes. First, it expands the franchise for UK Parliamentary elections for overseas electors and makes provision about their electoral registration. Currently there is a 15-year limit on a British citizen living abroad being able to vote in Parliamentary elections. This limit is lifted so that such citizens can continue to vote in these elections, and provision is made about how they can register to vote.

6. Second, it makes changes to the voting and candidacy rights of EU citizens in local elections in England, and PCC elections in England and Wales. It also amends relevant provisions in electoral legislation covering Northern Ireland local council elections and elections to the Northern Ireland Assembly. For EU citizens coming to live in this country on or after 1st January 2021, these voting and candidacy rights will generally be available only where a treaty exists between the UK Government and the EU Member State of which they are a citizen, under which voting and candidacy rights for relevant elections are guaranteed. The position is different for citizens of those EU Member States which are also members of the Commonwealth: absent entry into a relevant treaty, rights for these individuals will track those of other Commonwealth citizens. The voting and candidacy rights of those EU citizens lawfully resident in the UK before that date will remain unchanged if they continue to be lawfully resident.

Part 3 - The Electoral Commission

7. This Part makes provision about the Electoral Commission ("the EC") and the Speaker's Committee on the Electoral Commission ("the SCEC"). This includes a power for the Secretary of State to create a Strategy and Policy Statement which the EC must have regard to in the exercise of their functions. The SCEC is given the additional function of examining the EC's compliance with that duty.

Part 4 - Regulation of expenditure

8. This Part makes changes to a number of rules about expenditure incurred by candidates, third party campaigners and others. It also makes changes to the rules in relation to the registration of political parties.

Part 5 - Disqualification of offenders for holding elective office etc.

9. This Part creates a new electoral sanction in the form of a disqualification order where certain offences are committed involving the intimidation of candidates, holders of elected office, and others involved in the electoral process. The person convicted can be disqualified from seeking or holding certain elected offices for a period of five years.

Part 6 - Information to be included with electronic material

10. This Part creates a new imprint regime for online political campaigning material. Electronic material, within the scope of the regime, will require an imprint to identify the promoter of the material or any person on behalf of whom the material is being published (and who is not the promoter). For paid-for material, this requirement will apply all year round. The regime for other electronic material is narrower in scope and in effect applies all year round in some circumstances. Provision is made to enforce this requirement, including by way of a power to require material to be taken down.

Part 7 - General

11. Part 7 contains general provisions for the Bill, including clauses on interpretation, commencement and extent.

Human rights issues

12. Some provisions of the Bill are considered to engage Article 3 Protocol 1, Article 6, Article 9, Article 10, or Article 11, along with Article 14 of the European Convention on Human Rights ("ECHR"). This Memorandum deals only with those parts of the Bill which raise ECHR issues. The remaining provisions of the Bill are considered not to engage Convention rights, or, if they do, to do so in a way in which it is clear that there is no interference.

Voter Identification - clause 1 and Schedule 1

13. Article 3 of Protocol No 1 ("A3P1") to the ECHR provides: "*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot,*

under conditions which will ensure free expression of the opinion of the people in the choice of the legislature". It is explained as an obligation on States, but the Court's case law has developed to clarify that it creates rights for individuals relating to both voting and standing as a candidate, in elections to which it applies. The latter includes elections to the House of Commons, as a legislature, and is therefore engaged by these provisions which are making changes to voting at Parliamentary elections. For completeness, A3P1 has been held not to apply to local government elections. A wide margin of appreciation is afforded as to the type of electoral arrangements a State puts in place.

14. Article 14 to the European Convention on Human Rights provides "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

15. The effect of clause 1 and Schedule 1, which make amendments to the voting rules for Parliamentary elections set out in the Representation of the People Act 1983 ("the RPA 1983"), is that any person on the register of electors for parliamentary elections in Great Britain who wishes to vote in person and applies for a ballot paper at a polling station but does not produce a specified photographic identity, or who produces such a document but where the Presiding Officer of the polling station has a reasonable doubt as to their identity, will be unable to vote. Similar requirements already exist in Northern Ireland, although some changes are being made to the relevant rules to align them to an extent with the new provisions for Great Britain. Identification is also required when voting in many European countries, including France, Germany, Austria, the Netherlands, Switzerland, Norway and Sweden.

16. It is considered that A3P1 is engaged by these provisions. However, Member States have a wide margin of appreciation in relation to the conduct of elections. The European Court of Human Rights (ECtHR) summarised the general principles of A3P1, which have been set out through its previous judgments, in *Davydov v Russia* (2018) 67 E.H.R.R. 25, paragraphs 271 to 277. In particular, at paragraph 272 the Court observed that: "*Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of [A3P1] have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to*

such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary."

17. In *Hirst v UK* (2006) 42 E.H.R.R. 41 at paragraph 60, the ECtHR also stated that in considering the question of proportionality "*any conditions imposed must not thwart the free expression of the people in the choice of the legislature—in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage."*

18. The introduction of voter identification requirements pursues a legitimate aim of reducing electoral fraud by personation at the polling station. The EC's data showed that there were 128 allegations to the police of personation in polling stations in the 5 years to 2018, and one conviction and one caution in 2019. However, the nature of the crime - assuming the identity of another in order to use their vote - is very difficult to prove and prosecute. It often only comes to light if and when the real voter tries to vote later, after the crime has been committed, and is then very difficult to investigate. It is therefore thought that those numbers do not reflect the real scale of personation. Increasing levels of confidence in the integrity of elections is also considered an important aim, which in turn is likely to encourage participation.

19. The condition of providing identification before being issued with a ballot paper, therefore, aims to maintain and improve the integrity and effectiveness of the rights under A3P1 by protecting individuals from having their vote taken by someone else impersonating them. The EC's evaluation of pilots of voter identification undertaken in local elections in 2018[2] and 2019[3] also found some evidence that the requirement to show identification improved confidence that fraud had not taken place and overall that voting systems were secure. In respect of the long-standing requirements in Northern Ireland, the Electoral Commission have said: "*Since the introduction of photo ID in Northern Ireland there have been no reported cases of personation. Voters' confidence that elections are well-run in Northern Ireland is consistently*

[2] https://www.electoralcommission.org.uk/sites/default/files/pdf_file/May-2018-voter-identification-pilots-evaluation-report.pdf, pages 14 - 18.

[3] https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-identification-pilots/may-2019-voter-identification-pilot-schemes/impact-voters-confidence

higher than in Great Britain, and there are virtually no allegations of electoral fraud at polling stations' Electoral Commission".[4]

20. The approach set out in the legislation is considered to be a proportionate way to address the legitimate aim being pursued. In order to ensure that every eligible elector should be able to cast their vote, the list of specified documents includes a variety of photographic identification in order to provide alternative documents. This includes expired identification, so long as the photograph continues to resemble the holder. If a person does not hold any of the specified documents, a free local electoral identity document (hereafter referred to as a "Voter Card") will be available. Polling cards will remind voters of the new requirement and contain information about the documents which can be used. If a person fails to bring identification, or brings identification of the wrong type, they will have further opportunities to return with correct identification.

21. Research[5] recently conducted on behalf of the Cabinet Office showed that of the 8,500 people sampled across Great Britain (all of whom were eligible to vote), 98% already held a form of photographic identification of the types which are specified in the Bill.

22. Importantly, as mentioned above, if a person does not already possess one of the documents specified, they will be able to apply free of charge for a Voter Card from their local electoral registration officer. Whilst the process for applying for this card will be set out in secondary legislation, the intention is that they would need to provide an attested photograph of themselves, and some form of documentary evidence of their identity.

23. In the pilots mentioned above, the EC's evaluation found that (depending on the model used) between 0.3% and 0.7% did not bring an acceptable form of identification and did not return with one. Overall, the EC's view was that "nearly everyone who came to their polling station and wanted to vote in each of the pilots was able to show the right identification and be issued with a ballot paper".

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[4] *Delivering and costing a proof of identity scheme for polling station voters in Great Britain*, December 2015, p.7

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/984918/Photographic_ID_research-_headline_findings_report.pdf.

24. Alternatively, voters have the option to vote by post, which does not require photographic identification, or by proxy in certain circumstances (though a person acting as proxy would need to show identification if voting on behalf of another elector at a polling station).

25. The provisions in the Bill for Great Britain introduce a system which is very similar to that which is currently in place for all elections, including UK parliamentary elections, in Northern Ireland, including the ability to apply free of charge for an electoral-specific identification card. Voter identification was first introduced in Northern Ireland by the Elections (Northern Ireland) Act 1985, and subsequently amended by the Electoral Fraud (Northern Ireland) Act 2002. We are not aware that any suggestion has been made that the system in place in Northern Ireland is disproportionate.

26. In considering the proportionality of clause 1 and Schedule 1 it is also noted that in January 2014 the Electoral Commission published a report and recommendations on Electoral Fraud in the UK. One of the recommendations in this was that "*Electors should be required to show proof of their identity before they can be issued with a ballot paper at polling stations for elections and referendums in Great Britain, as they are already in Northern Ireland and many other countries.*"[6]

27. In addition, reports of their observation of the 2005[7], 2010 and 2015 UK Parliamentary General Elections, the Organisation for Security and Co-operation in Europe's (OSCE), Office for Democratic Institutions and Human Rights (ODIHR) all recommended the introduction of more robust mechanisms for identification of voters, citing the use of voter identification in Northern Ireland as an example[8].

28. As a result, the Government considers that the provisions introducing voter identification requirements for Parliamentary elections are compatible with A3P1 of the Convention.

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[6] https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Electoral-fraud-review-final-report.pdf, Recommendation 2, page 26

[7] https://www.osce.org/files/f/documents/7/e/16204.pdf. The 2005 Report said "In order to provide additional safeguards for the integrity of polling, consideration could be given to amending the legal framework to require that a person presents a proof of identity… before being given a ballot paper" (page 14).

[8] The 2010 report stated it "reiterated its recommendation that serious consideration should be given to introducing a more robust mechanism for identification of voters. Existing national and local government-issued cards could be considered for this purpose and voters could be obligated to sign the voters' list before being issued a ballot paper. " (page 20). https://www.osce.org/odihr/elections/69072?download=true); the 2015 report stated "Authorities have addressed some previous OSCE/ODIHR recommendations....Other recommendations, such as...introduction of safeguard mechanism for voter identification...have not been addressed" (page 9 https://www.osce.org/odihr/elections/uk/147991?download=true)

29. Article 14 is not limited to cases of direct discrimination; indirect discrimination is also prohibited. The ECtHR stated in *DH v Czech Republic* (2008) 47 EHRR 3 at paragraph 184 that "*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measures which, though couched in neutral terms, discriminates against a group…*".

30. The Court in *DH* also held at paragraphs 188 - 189 that statistics which appear on critical examination to be reliable and significant will be sufficient as *prima facie* evidence of indirect discrimination, and if there is such evidence the burden of proof shifts to the State to show that the difference in treatment is not discriminatory.

31. There may be concerns raised that the requirement to show photographic identification before voting will have a discriminatory effect on certain protected groups.

32. To the extent that any such effects might engage Article 14, the Government considers that the interference is justified and proportionate. For a measure to be proportionate for the purposes of Article 14, it is not necessary to show that there was no alternative means to achieving the same aim (*R (Wilson) v Wychavon District Council* [2007] EWCA Civ. 52). The test is simply that the measure must strike a fair balance between the rights of the individual and the general interests, having regard to the requirements of a democratic society.

33. The recent Cabinet Office research discussed above contains some useful information about the possible differential impacts on certain groups. As well as the overall holding of photographic identification documents (98% of those sampled) it also looked at results based on age, ethnicity and disability. The research on age showed that younger people (aged 18 - 29) were more likely (99%) to have relevant photographic identification than everyone else (98%). In terms of ethnicity, white people were less likely than those in an ethnic minority to have relevant photographic identification (98% v 99%). For disability, people without a disability in the research were more likely (98%) to have relevant photographic identification than those with a disability (97%). For those with a severely limiting disability, the figure was 95%.

34. The research supports the view that the wide range of acceptable photographic identification means that a very high proportion of people of voting age would have at

least one form of suitable identification and this is not significantly affected by some of the characteristics that have been suggested would lead to disenfranchisement under this policy.

35. Whilst there is power to amend the list of acceptable documents by adding to it or removing it (the latter enabling the Government to ensure that obsolete documents which are no longer issued or which are no longer considered to be sufficiently good evidence of identity, can be removed), any exercise of such power would be subject to the public sector equality duty and ECHR obligations, and would also require a recommendation from the Electoral Commission. The free Voter Card is excepted from the power to remove documents from the list of suitable identification, so will remain on the list. As explained above, any identification document specified in the legislation, including the Voter Card, will continue to be acceptable beyond the document's formal validity period, so long as the Presiding Officer in the polling station is content that the photo bears sufficient likeness to the person presenting the document.

36. In addition, the availability of a free Voter Card on application to a local electoral registration officer and supply of an attested photograph ensures that every person registered on the register of electors who does not have a suitable form of identification should be able to access one to enable them to cast their vote. As a result, a lack of another form of photographic identification will not be a barrier to gaining an electoral identity document and therefore voting.

37. A requirement for privacy screens (rule 37(1AA)) will allow for private production of identification documents and conversations. The Cabinet Office will work with the Electoral Commission, local authorities and others to develop training for polling station officials, and there will also be a comprehensive and targeted communications programme to ensure that people are aware of the new requirement, and the ability to obtain a free form of identification.

38. As mentioned above, voting in person is not the only option available, and a postal vote is available to all electors, and does not require the elector to hold photographic identification. A proxy vote is also available in certain circumstances. Both types of absent vote can be used by those with long-term medical conditions or other disabilities.

39. The requirements for voter identification are intended to protect the ability of each voter to exercise their own vote by ensuring that no-one else can do so, and are proportionate for the reasons given above. It follows that the Government considers that the provision made in clause 1 and Schedule 1, though engaging A3P1, is not incompatible with the ECHR either directly or under the prohibition of discrimination under Article 14.

Proxy voting limit - clause 5 and Schedule 3

40. Clause 5 and Schedule 3 make amendments to the provisions of the Representation of the People Acts 1983, 1985 and 2000 which govern voting by proxy. The effect of these amendments is, in part, to limit the number of electors on behalf of whom a person can be appointed to act as proxy (in any UK Parliamentary election, Northern Ireland Assembly election, or local election in England and Northern Ireland) to a maximum of four, of which up to two can be electors who are not registered as overseas electors, or registered in pursuance of a service declaration (applicable to members of the armed forces and others who may be posted abroad). Electors not in these two groups are referred to as "domestic electors" hereafter. Overseas electors cannot vote in local or Assembly elections in Northern Ireland, so in those cases the limit is two, or four if no more than two are domestic electors (with the other two able to be electors registered pursuant to a service declaration).

41. This limit is enforced by way of (a) an offence committed by the elector if the elector knowingly appoints a proxy who would be placed in breach of this limit by that appointment, and (b) an offence committed by a person acting as a proxy if the proxy votes on behalf of more than two domestic electors or four electors in total. This limit represents a further restriction on proxy voting, as currently a person is able to act as proxy for two electors who are not close relatives, but an unlimited number of electors who are close relatives, and under the current law there is only an offence in relation to a proxy who votes on behalf of more electors than permitted (and no offence is committed by the appointing elector). Additionally the existing limit has been interpreted as applying per constituency (in relation to UK Parliamentary or Northern Ireland Assembly elections) or per electoral area (in relation to English or Northern Ireland local elections), such that a person could theoretically vote as proxy on behalf of two electors (and unlimited family members) in each constituency or area. The new limit applies across all constituencies or electoral areas, such that a person could only act on behalf of up to four overseas or service electors or two

domestic electors in total across the whole of a general election or Assembly election and/or up to four service electors or two domestic electors per suite of English or Northern Ireland local elections.

42. A3P1 is likely to be engaged by the provisions that reduce the number of electors for whom a person can act as proxy, and the offences relating to this limitation. There is already a limitation on the number of persons for whom a person can be proxy (see above) and, as noted above, under A3P1 there is a wide margin of appreciation afforded to States in relation to the rules relating to exercising voting rights, provided that any restrictions are not such that they "impair their very essence", the limitations are introduced in pursuit of a legitimate aim and are proportionate to that aim. The legitimate aim being pursued in this case is the protection of the integrity of elections by the reduction of electoral fraud. Where an elector is not voting personally, there is scope for the proxy to act against their wishes and use the vote to seek to obtain a different electoral outcome. The number of electors selected (namely four, and no more than two domestic electors) is considered to be a proportionate means of reducing this risk.

43. A key consideration in setting the limit has been whether in practice there is a risk that a person is deprived of their right to vote by not being able to identify a proxy to vote for them. The Government does not consider that this is likely to be the case. There are multiple means by which a person can exercise their vote, and most voters choose to exercise their vote in person (approximately 16.8% of the electorate was registered for a postal vote in 2019[9]; and only 0.6% of the electorate voted by proxy in the 2017 general election[10], the most recent election for which there are proxy figures). Further, a voter could appoint an alternative proxy or apply to vote by post; and unlike for proxy voting, a voter does not need a specific reason for choosing to vote by post. In light of these factors, we consider that the reduction in the maximum number of electors for whom a person can act as proxy is a proportionate means of achieving the legitimate aim of reducing the opportunity for electoral fraud.

44. The effect of this new proxy limit has also been considered specifically in relation to electors who are resident outside the UK but registered in UK parliamentary

[9] Figures available at: https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/analysis-electoral-registration-data

[10] Figures available at: http://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/uk-general-elections/results-and-turnout-2017-uk-general-election

constituencies in Northern Ireland ("NI overseas electors"), and whether this has a discriminatory impact on their exercise of their rights under A3P1 in conjunction with Article 14. Unlike overseas electors registered in constituencies in Great Britain, NI overseas electors are effectively unable to vote by post as sections 6(6) and 7(5) of the Representation of the People Act 1985 require a postal vote application in Northern Ireland to provide an address in the UK for ballot papers to be sent to.

45. This means that Northern Ireland overseas electors may be more likely to wish or need to vote by proxy, and the higher limit of up to 4 is intended to address this likelihood, compared with the limit of 2 domestic electors. However, the available evidence regarding current proxy use in Northern Ireland (in particular the number of people acting as proxy for multiple electors) suggests that the proposed proxy limit will result in practice in minimal additional impediment. For these reasons, the Government considers that this aspect of the Bill is compatible with A3P1 and Article 14.

Undue Influence - clause 8

46. Article 9 ECHR provides that:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

47. The revised corrupt practice of undue influence is likely to engage Article 9. This is on the basis that the revised corrupt practice will continue to prohibit activities which inflict or threaten to inflict spiritual harm (now referred to as "placing undue spiritual pressure on a person") with the intent to either induce or compel a person to vote or refrain from voting, or to otherwise impede or prevent a person's free exercise of their right to vote.

48. It is arguable that the revised corrupt practice does not interfere with the freedoms under Article 9 at all, given that it does not seek to interfere with any particular activity that represents a manifestation of religious or other belief. It does not, for example, include legitimate aspects of the enjoyment of the freedoms of thought, belief or expression, for example, a religious leader expressing their opinion on political or other matters that have implications for the principles of that religion, or the behaviour of religious groups for whom not voting is an established doctrinal position..

49. Instead, the revised corrupt practice seeks to protect the individual from the use or threat of spiritual harm which amounts to undue influence over the individual's right to vote and participate in elections. For example, the misuse of spiritual influence for political purposes resulting from religious leaders indicating that it was the religious duty of believers to vote for a particular candidate as part of their religious duty (see further paragraphs 526 to 574 of *Erlam and others v Rahman and another* [2015] EWHC 1215 (QB)).

50. Member States are afforded a margin of appreciation in matters relating to Article 9, in order to allow national authorities to balance between potentially competing interests. Therefore, to the extent that the scope of the revised corrupt practice of undue influence interferes with the rights provided by Article 9, that interference is prescribed by law and pursues the legitimate aim of ensuring the integrity of the democratic electoral process by protecting citizens from the undue influence of others in order to allow the free exercise of the franchise. Similar reasons relating to the protection of others have previously been considered to be a legitimate aim (*R (on the application of Singh and another) v Chief Constable of West Midlands Police* [2007] 2 All ER 297, Court of Appeal). It is also a positive measure taken in line with the obligation on Member States to conduct democratic elections recognised as an important part of A3P1 (*Mathieu-Mohin v Belgium* (1987) 10 EHRR 1).

51. Article 10 of the ECHR provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

52. The revised corrupt practice of undue influence engages Article 10, on the basis that it includes any activities which are designed to intimidate a person and which are carried out for the purpose of inducing or compelling a person to vote in a particular way or to refrain from voting or otherwise impeding or preventing the free exercise of the franchise, or as a consequence of a person having voted a particular way or having refrained from voting. This is a wider scope than the current corrupt practice, which only covers a number of specific activities of an intimidatory nature. It may be considered to amount to a restriction on the right to freedom of expression contained within Article 10.

53. To the extent that it interferes with the right to freedom of expression under Article 10, it is considered that the revised corrupt practice of undue influence represents a restriction which is prescribed by law and is necessary in a democratic society for the protection of the rights of others.

54. It is recognised that political expression attracts the highest form of protection under Article 10, due to its importance in the operation of a democratic society (*R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23). Further, political expression is likely to be protected by Article 10 even where it may be considered robust or even offensive (*Sanders v Kingston* [2005] EWHC 1145 (Admin)).

55. However, the revised corrupt practice is neither intended or designed to impede or curtail genuine, robust political expression or debate. Instead, it ensures the integrity of the democratic electoral process by protecting citizens from any form of *intimidatory activity* which is intended to unduly influence the voting choices of electors and in doing so prevent or restrict the freedom of expression of the political opinion of individuals as part of the free elections required by A3P1. The way in which the revised corrupt practice protects the rights of others is proportionate, in that it only covers intimidatory activities in those circumstances where the intent to unduly influence electors can be demonstrated. Additionally, "intimidation" in this context has

to be established on an objective basis rather than subjectively on the part of the individual.

56. The revised corrupt practice of undue influence engages A3P1 because where a person is named as personally guilty of the corrupt practice in the report of an election court, or is convicted of the corrupt practice by a criminal court, the person will be incapable of being elected to or holding any elective office in the UK for a period of 5 years. Section 160 and sections 173 and 173A RPA 1983 contain the main incapacities, with further provisions on incapacities set out in articles 110(3)(a) and 123 of the National Assembly for Wales (Representation of the People) Order 2007 (S.I. 2007/236) and sections 96 and 112 of the Electoral Law Act (Northern Ireland) 1962.

57. ECHR case law has established that A3P1 implicitly includes the right to stand for election, and that this right is inherent in the concept of a democratic system (*Melnychenkov v Ukraine* (2004) 42 EHRR 784). However, Member States have a wide margin of appreciation to impose conditions on the rights protected by A3P1, provided those conditions are imposed in pursuit of a legitimate aim and are not disproportionate to the aim pursued. Further, the European Court of Human Rights has recognised that this margin of appreciation is wider in respect of the 'passive' right to stand for election in comparison to the 'active' right to vote (*Yumak v Turkey* (2009) 48 EHRR 61).

58. It is considered that the electoral incapacities which will arise from the revised corrupt practice of undue influence pursue a legitimate aim. Undue influence is one of a number of existing recognised corrupt and illegal practices, and the enforcement measures against such practices ensure the integrity of the democratic electoral process by protecting citizens to allow the free exercise of the franchise. The incapacities create a deterrent against those who seek to unduly influence the proper exercise of an individual's right to vote and the wider exercise of the franchise within the democratic system.

59. It is also considered that the electoral incapacities resulting from the revised corrupt practice of undue influence are proportionate to this legitimate aim and are not arbitrary. As is currently the case, the incapacities result either from a person being named as personally guilty of the corrupt practice in the report of an election court following a petition challenging the conduct or outcome of an election or referendum,

or from a person being convicted of the corrupt practice by a criminal court. In either case it must be established to the satisfaction of the court to the criminal standard of proof that an individual is guilty of a corrupt practice, and an accused individual has the right to challenge evidence brought against them, call evidence in their own defence and appeal against the decision of the court. Finally, the 5 year period of incapacity represents a suitable and proportionate sanction to both mark the seriousness of the corrupt practice in connection with the democratic electoral process and act as a deterrent against similar future offending.

60. For these reasons the Government considers that the revised corrupt practice of undue influence is compatible with the ECHR rights discussed above.

EU citizen's voting and candidacy rights - clause 11 and Schedule 7

61. Clause 11 and Schedule 7 make changes in respect of the voting and candidacy rights of EU citizens with respect to local government elections in England and Northern Ireland, Police and Crime Commission (PCC) elections in England and Wales, and Northern Ireland Assembly elections. The United Kingdom left the EU on 31 January 2020 and the Implementation Period ran until 11pm on 31 December 2020. Voting and candidacy rights are retained for EU citizens lawfully resident before the end of the Implementation Period and who continue to have leave to enter or remain under a variety of routes. The position is changed for EU citizens who have come to live in the UK since that date. For those citizens, voting and candidacy rights will generally depend on whether there is a treaty between the UK Government and the Member State of which they are a citizen, providing entitlement to vote and stand in local elections.

62. There is an exception for citizens of Malta and Cyprus (being EU Member States which are also members of the Commonwealth). Absent a treaty between the UK Government and the relevant state, the position of these persons will follow that in relation to other members of the Commonwealth.

63. The provisions do not have any effect on the rights of Irish citizens, whose ability to vote and stand in elections in the UK predate, and are not contingent upon, the UK's EU membership.

64. A3P1 is not engaged in relation to the changes relating to local government elections in England, nor in relation to PCC elections in England and Wales. This is because rights to vote and to stand under A3P1 are expressly applicable only in relation to elections which are for the choice of a legislature. Local authorities have been held by the Court not to be 'legislatures' for this purpose (McLean ([2013] ECHR 1368). The Court has not opined on the position of PCC elections, but as PCCs have no functions akin to those of a legislature it is very difficult to see that elections of PCCs could fall within the scope of A3P1.

65. However, it might be argued that the provisions restricting the voting and candidacy rights of EU citizens in elections to the Northern Ireland Assembly engage Article 3 of Protocol 1. Whilst it is clear that A3P1 does not, on its own, entitle non-citizens to voting or candidacy rights (see *Mathieu-Mohin and Clerfayt v Belgium (Application 9267/8)*) it might be argued that the provisions engage Article 14 when read with A3P1. This is on the basis that the provisions provide differential treatment on the basis of nationality as some EU citizens are given voting and candidacy rights whilst others are not.

66. A question may arise as to whether elections to the Northern Ireland Assembly engage A3P1. However, even if the Northern Ireland Assembly were deemed to be a legislature for the purposes of A3P1, the relevant consideration would then be whether the differential treatment of different categories of EU nationals gives rise to a discrimination issue, reading Article 14 in conjunction with A3P1. The Government's position is that it would not, as Article 16 creates an exception to Article 14 where a measure imposes restrictions on the political activity of aliens.

67. Only one case (Piermont v France, Applications 15773/89, 15774/89: (1995) 20 EHRR 301, ECtHR) has reached the ECtHR under Article 16 and it did not consider whether Article 16 permitted the restriction of voting and candidacy rights of foreign nationals. Nonetheless, other authorities suggest it is intended that restrictions on the voting and candidacy rights of foreign nationals would fall within the scope of Article 16. In *Mathieu-Mohin* the ECtHR held that A3P1 contained the principle of equality of treatment of all 'citizens' (but not non-citizens). Furthermore, this 'citizens only' approach is mirrored in Article 25 of the International Convention on Civil and Political Rights (which guarantees the right to vote only to citizens) and the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live (which gives no protection to aliens' political rights).

Similarly, the commentary on Article 16 in chapter four of Lester, Pannick and Herberg: Human Rights Law and Practice indicates that a consequence of Article 16 is that "the right to vote and to stand for election may be based on nationality criteria".

68. The meaning of "alien" in Article 16 has also been construed restrictively and in Piermont the ECtHR took the view that a German citizen was not an alien in France by virtue of their EU citizenship. However, given that the UK has now exited the EU, it is likely that the EU citizens who do not have voting and candidacy rights as a result of this measure (which does not include Irish citizens) would be considered aliens for this purpose under UK law.

69. For these reasons the Government considers that clause 11 and Schedule 7 do not engage the Convention rights.

Part 4 - Regulation of expenditure: clauses 20, 22, 24 and 25

70. These provisions are designed to build on and reinforce the existing framework of spending limits for registered political parties and third party campaigners laid down in the Political Parties, Elections and Referendums Act 2000 ("PPERA").

Clause 20 - Prohibition on entities being registered political parties and recognised third parties at same time

71. Clause 20 amends PPERA so as to prohibit an entity from being a registered political party and a recognised third party[11] at the same time. This is to prevent an entity benefitting from the spending limits for both registered political parties and recognised third parties at the same time, thereby circumventing the system of spending rules in PPERA which are safeguards designed to protect the democractic process by creating a level playing field. It is considered that this clause is likely to engage Article 11 (right to freedom of peaceful assembly and association), Article 10 (freedom of expression) and A3P1 (right to free elections).

72. The first element of clause 20, the ban on a recognised third party registering as a political party, means that the third party will not be able to field candidates in

[11] The term third party is defined in s. 85(8) PPERA: it covers any person or or body other than a registered political party but also covers registered political parties where they are campaigning in support of another registered party or its candidates; there is a definition of the type of third party expenditure that is covered - "controlled expenditure" (see s. 85) and provision about the types of third party that are eligible to be a recognised third party (see s.88(2)). Spending on support for individual candidates is dealt with in the RPA 1983

elections (section 22 of PPERA). Neither will it be able to benefit from the spending limits for political parties in a regulated period[12] in the run up to an election - which are considerably higher than for recognised third parties[13].

73. The ECHR Guide on A3P1 notes that cases concerning the banning of political parties are usually dealt with under Article 11 which provides "Everyone has the right to freedom of peaceful assembly and to freedom of association with others…". Political parties are a form of association essential to the proper functioning of democracy and are the prime entities which fall within the scope of Article 11 (Application 19392/92: United Communist Party of Turkey v Turkey (1998) 26 EHRR 121, ECtHR). Interference with the right of freedom of assembly can take the form of refusal of registration. The restriction is likely to engage Article 11.

74. Article 11(2) provides:

"*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State*."

75. The ECHR Guide on Article 11 (paragraph 170) states:

"*In view of the essential role of political parties in ensuring pluralism and the proper functioning of democracy, any measure taken against them affects both freedom of association and, consequently, democracy in the State concerned (Republican Party of Russia v. Russia, § 78). Therefore, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on*

[12] For parliamentary general elections the regulated period is the year leading up to the election in question (section 94(10)(a) and para 3(3) of Schedule 10 to PPERA; for general elections to the Scottish Parliament, the Senedd Cymru and the Northern Ireland Assembly, the regulated period is generally a period of 4 months leading up to the election in question (section 94(10(a) and paras. 5(4), 6(4) and 7(4) of Schedule 10 to PPERA).

[13] The spending limits for "campaign expenditure" for political parties for a UK parliamentary general election, for example, are £30,000 x number of constituencies it is contesting in that part of UK or if that figure is less than £810,000 in England, £120,000 in Scotland or £60,000 in Wales then these figures become the financial limit (paragraph 3(2) of Schedule 9 to PPERA). There is no substitute limit for Northern Ireland; the spending limits for "controlled expenditure" for third parties for the same election is 2% of the maximum registered party campaign spending limit in that part of the UK, (paragraph 3, Schedule 10 to PPERA).

such parties' freedom of association (United Communist Party of Turkey v. Turkey, § 46)."

76. Measures safeguarding the effectiveness of, and preventing the circumvention of, the spending limits in PPERA pursue the same legitimate aim as the spending limits themselves.

77. In *Bowman v UK* 141/1996/760/961), in the context of Article 10, the ECtHR found that spending limits for third parties in relation to individual candidates (laid down in RPA 1983) contribute to securing equality between candidates and therefore pursue the legitimate aim of protecting the rights and freedoms of others, namely other candidates for election and the electorate. This analysis can be applied in relation to political parties and third parties under PPERA. The spending limits in PPERA, alongside those in the RPA 1983, help to ensure that there is fairness between political parties and candidates and reduce the risk that wealthy parties and candidates (or those with wealthy supporters) can 'buy' electoral success simply by outspending their rivals e.g on research, advertising etc.[14]

78. The second aspect of clause 20 is a ban on a registered political party registering as a recognised third party. The significance of such an entity not being able to register as a recognised third party is that it will not be permitted to incur controlled expenditure (spending as a third party) above the £700 de minimis in a regulated period running up to a general election (under the amendments to PPERA inserted by clause 22). It is possible that this aspect of clause 20 could be examined under Article 11, in which case the considerations set out above in relation to the first aspect of clause 20 would apply. While recognised third parties are not the 'prime' entities that fall within Article 11, they are important for the proper functioning of democracy (in particular, given the close link between freedom of speech and democracy). However, the second aspect of clause 20 seems more likely to be alternatively or additionally examined under Article 10 (freedom of expression) in conjunction with A3P1.

79. Article 10(1) reads:

[14] This is discussed in the Fifth Report of the Committee on Standards in Public Life on the funding of political parties in the United Kingdom, Chapter 10, especially para. 10.25.

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers….".

80. In Bowman the ECtHR found that even though it was not a direct restraint on freedom of expression, a very low (£5.00) spending limit laid down in RPA 1983 for unauthorised third parties campaigning in relation to individual candidates still amounted to a restriction on freedom of expression. A ban on registered political parties registering as recognised third parties might therefore also be regarded as a restriction on freedom of expression as they will not be able to access the recognised third party spending limits for controlled expenditure. However, as political parties will already have access to the higher spending limits for registered political parties laid down in PPERA, the Government's view is that there is no additional restriction on freedom of expression created by clause 20, beyond that imposed via the ordinary spending limits for registered political parties.

81. In Bowman (at paragraph 41), the ECtHR said the third party spending limit under the RPA 1983 was "only one of the many detailed checks and balances which make up United Kingdom electoral law." It considered that it was necessary to consider the Article 10 rights in play in that case in the light of the right to free elections protected by A3P1.

82. At paragraphs 42 and 43, the ECtHR stated:

"*Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see the Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113, p. 22, § 47, and the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41–42). The two rights are interrelated and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature" (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, p. 24, § 54). For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.*

Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place

certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature". The Court recognises that, in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, pp. 23 and 24, §§ 52 and 54)".

83. Both aspects of clause 20 (the prohibition on a recognised third party registering as a political party and the prohibition on political parties registering as a recognised third party) will form part "of the many detailed checks and balances which make up United Kingdom electoral law." Following *Bowman* the Government considers that it has a margin of appreciation in balancing the Article 11 and 10 rights in play, and the right to free elections protected by A3P1.

84. As regards the proportionality of the prohibition introduced by clause 20, it is reasonable to ask an entity to choose which category it wishes to register in. The ECHR guide (paragraph 184) notes that *"States are entitled – subject to the condition of proportionality – to require political parties to comply with reasonable legal formalities regarding their formation (The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2), § 83)*."

85. This is not a ban on all entities that wish to express opinions or highlight particular issues in the run up to an election from becoming registered political parties. A narrower class of entity is affected, namely only those that register with the EC to be recognised third parties so as to be permitted to incur "controlled expenditure" (during a regulated period in the run up to an election). So third parties that are not recognised third parties will not be covered by the ban.

86. Neither is this a case of an entity being prevented from registering as a political party at all; rather it will simply have to decide not to become a recognised third party, or allow its recognised third party status to lapse, in order to be registered as a political party. Further, the entity's freedom of expression will not be diminished by comparison with other political parties or third parties.

87. The restriction on a registered political party being a recognised third party is similarly proportionate. Although registered political parties will only be able to incur controlled

expenditure of up to £700 as a non-registered third party, they will have access to the higher spending limits for registered political parties.

88. The Government therefore considers clause 20 to be compatible with the Convention rights.

Restriction on which third parties may incur controlled expenditure - clause 22

89. At present only those entities listed in section 88(2) of PPERA are eligible to be registered as recognised third parties and therefore permitted to incur controlled expenditure above specified thresholds in a regulated period running up to an election. The entities listed in section 88(2) mirror the entities listed in section 54(2) of PPERA as "permissible donors" to registered political parties, and these exclude foreign entities[15].

90. Although foreign entities are not currently eligible to be registered as recognised third parties, they are able to incur controlled expenditure of an amount below the existing country-specific thresholds for registration. The purpose of clause 22 is to introduce a prohibition on such foreign entities incurring any controlled expenditure in a regulated period running up to an election, subject to a £700 de minimis amount (which replicates the 'de minimis' level applied in section 75(1ZA) of the RPA 1983 for candidates). This is a significant reduction from the existing thresholds (£10,000 for Scotland, Wales and Northern Ireland and £20,000 for England). Registered political parties will also be subject to this £700 limit on controlled expenditure by virtue of clause 20 (though they will of course have access to the spending limits for campaign expenditure in their capacity as a registered political party).

91. Given the approach in *Bowman* it is likely that new section 89A of PPERA inserted by clause 22 would be considered to interfere with the Article 10 rights of foreign entities that wish to campaign in support of or in opposition to registered political parties or candidates in the run up to a UK election. It is noted that Article 10 rights are secured "regardless of frontiers".

[15] Overseas electors remain on the electoral roll and therefore are covered by sections 54(2) and 88(2). This means they continue to be permissible donors and able to register as a recognised third party.

92. The basic argument as to why foreign entities should not fund or be involved in campaigning in elections in the UK was articulated in 1998 in the Fifth Report of the Committee on Standards in Public Life (at paragraph 5.9) as follows: "*what happens here is the concern of those who live and work here*". This rationale underlies the current provisions in PPERA that limit foreign donations and third party campaigning to persons and organisations who have a genuine stake in the country.

93. More recently there has been an increased recognition of the risk of malign interference in the UK's democratic processes by foreign sources, in particular (but not only) those connected to Russia. The Integrated Review recently stated that "Russia remains the most acute threat to our security". The Electoral Commission in its 2018 report 'Digital Campaigning: increasing transparency for voters' noted this risk saying "*At the time when the rules were made in 2000, the UK Government and Parliament were worried about foreign donations to political parties. They had not seen the potential for foreign sources to directly purchase campaign advertising in the UK",* and recommended a ban on foreign spending. As announced in the Queen's Speech, the Government is also bringing forward new legislation to provide the security services and law enforcement agencies with the tools they need to disrupt state threats, including foreign interference in democracy.

94. The "pressing social need" is evident from the legitimate aims referred to above. Both the The House of Commons Digital, Culture, Media and Sport Committee (the "DCMS Committee"), the House of Lords Democracy and Digital Technologies Committee and the ISC recommended that the Government should take action to address the threats which the committees had identified.

95. Paragraph 86 of the ECHR Guide to Article 10 notes:

"*In a case examining whether a ban on political advertising in the broadcast media was compatible with the Convention, the Court clarified its criteria for determining the proportionality of a general measure. The Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. It follows that the more convincing the general justifications for the general measure are, the less importance the Court*

will attach to its impact in the particular case (Animal Defenders International v the United Kingdom [GC], §§ 108-109)."

96. The Government's view is that as there are convincing justifications for the prohibition in new section 89A, a court would attach less importance to the impact on a particular foreign entity. Measures falling short of a prohibition on controlled expenditure in the run up to an election (for example, further provisions on transparency) would be insufficient on their own to deal with the issues discussed under legitimate aim. PPERA already restricts the amount of controlled expenditure foreign entities are permitted to incur in the run up to an election (through their exclusion from the list of entities that are eligible to register as a recognised third parties in section 88(2)). However, this is considered not to have been adequate to deal with the issues at hand.

97. The prohibition in new section 89A is however limited in certain respects. In particular, it is time limited to the regulated period running up to an election. And it is limited to incurring controlled expenditure: foreign entities will remain free to incur expenditure expressing their views on issues generally, provided that they are not in support of political parties or candidates (i.e. provided the expenditure is not caught by the definition of controlled expenditure).

98. Additional safeguards have also been included:

    a. The prohibition is not applied to controlled expenditure up to and including £700 and therefore allows all third parties a low level of expenditure.
    b. Provision is included to ensure that overseas entities with a legitimate interest in UK elections are not caught by the prohibition even though they are not included in the list of entities eligible to register as a recognised third party in section 88(2) of PPERA. Specifically unincorporated associations with the "requisite UK connection" (defined in new section 89A(7) as those composed solely of UK registered overseas electors) have been excluded from the section 89A prohibition.
    c. In addition, clause 24 includes a new power in section 88 to enable the amendment of the list in section 88(2) so that it is possible to add any category that has a legitimate connection to the UK . This will ensure that in the future the prohibition in new section 89A remains no broader than is necessary and justified.

99. For the reasons given above, the Government considers that this clause is compatible with the Convention rights.

Recognised third parties: changes to existing limits etc - clause 24

100. Clause 24 amends PPERA so as to lower the spending threshold for registration as a recognised third party. This clause requires all third parties that incur controlled expenditure of more than £10,000 across the UK during a regulated period to register with the EC. It also introduces a new lower level tier of recognition, with recognised third parties within that lower tier being subject to lighter-touch regulation under Part 6 of PPERA, than those required to notify the EC due to existing spending limits. The new lower tier is subject to an upper spending limit of the existing controlled expenditure country-specific thresholds for registration set out above, alongside certain other financial controls already in existence in PPERA.

101. Following the approach in *Bowman* this may be considered to encroach on the Article 10 right to freedom of expression. However it is considered that any interference with this right can be justified in accordance with Article 10(2) in conjunction with A3P1.

102. The purpose of this provision is to increase transparency about the identity of third party campaigners. This will help to inform the electorate about who is conducting third party campaigning activity - something which is often obscured, especially in the online context. It will also help to serve as a check that only those permitted to incur controlled expenditure are doing so (see clause 22). There is a specific concern about the risk that seemingly separate entities incurring controlled expenditure below the thresholds for registration as a recognised third party, may in fact be connected and be seeking to evade spending limits. The provision aligns with the House of Lords Democracy and Digital Technologies Committee's recommendation to 'look into the feasibility of a secondary registration scheme for campaigners that fall below the £20,000 threshold at which they have to register as non-party campaigners with the Electoral Commission.'

103. The lower registration threshold is intended to help address (and deter) this sort of practice.

104. In *Bowman* the ECtHR found that spending limits for third parties in relation to individual candidates (laid down in RPA 1983) contribute to securing equality between candidates and therefore pursue the legitimate aim of protecting the rights and freedoms of others, namely other candidates for election and the electorate. This analysis can be applied in relation to the spending limits in PPERA and measures designed to prevent their circumvention. Further, the new registration threshold will increase the information available to the electorate and other political parties and campaigners. The Government considers that the provisions in clause 24 pursue the legitimate aim of protecting the rights and freedoms of others, namely other political parties, candidates, and the electorate.

105. There is a pressing social need to maintain 'equality of arms' in spending by political parties and those third parties supporting them in a regulated period running up to an election, as well as to ensure the continued effectiveness/prevent the circumvention of the relevant spending limits laid down in PPERA and to ensure that only those that are permitted to incur controlled expenditure are doing so. This will help maintain trust in our democratic processes. To address the specific concerns in this area discussed above in relation to legitimate aim, the House of Lords Democracy and Digital Technologies Committee proposed (at paragraph 323):

"*the Electoral Commission should look into the feasibility of a secondary registration scheme for campaigners that fall below the £20,000 threshold at which they have to register as non-party campaigners with the Electoral Commission. This is with the aim of transparency, which here refers to an understanding of linked business interests; it is not our intention to make onerous demands on small campaigners, and hence we recommend that only the identity of a small campaign's trustees if they are incorporated or legally responsible persons if they are not, and the identity of their five largest funders. This should go some way in restoring the public's trust that democracy is protected from automated donations.*"

106. As discussed in relation to clause 20, as the new provisions in clause 24 will form one of the detailed checks and balances in electoral law, the Article 10 rights in play have been considered in the light of the right to free elections protected by A3P1. Although the provisions in clause 24 may engage to an extent Article 10 rights, they will help to secure "the conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

107. As already noted, the ECtHR has recognised that, “in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems”.

108. Clause 24 pursues a ‘light touch’ approach to ensuring transparency and compliance with spending limits. Although the spending limit of a non-recognised third party will be reduced to £10,000, if such a party wants to incur more controlled expenditure in a regulated period it can choose to register as a recognised third party, either in the lower or higher tier of registration, depending on how much it wants to spend.

109. The amount of regulation a recognised third party is subject to will be proportionate to its level of controlled expenditure. On the one hand, recognised third parties spending up to the highest spending limit will be subject to the full suite of regulation for recognised third parties, including on donations and reporting. On the other hand, recognised third parties spending up to the limit for the lower tier will only be subject to the minimum regulation necessary to ensure that they are permitted to incur controlled expenditure (see clause 22).

110. The Government considers clause 24 to be compatible with the Convention rights.

Joint campaigning by registered parties and third parties - clause 25

111. This clause amends PPERA so that where a registered political party and a third party or third parties (as the case may be) work together in pursuance of a joint plan during a regulated period running up to an election, the regulated expenditure of each party incurred in pursuance of the plan is to be treated as the regulated expenditure of all of the parties involved in the plan and counted towards their spending limits. Registered parties and recognised third parties (above the existing country specific thresholds) will be required to report any joint campaigning expenditure and the identity of the other parties working with them in pursuance of a joint plan in their spending returns.

112. As discussed, in Bowman the ECtHR found that even though it was not a direct restraint on freedom of expression, a very low (£5) spending limit laid down in the RPA 1983 for unauthorised third parties campaigning in relation to individual

candidates still amounted to a restriction on freedom of expression in breach of Article 10. The provisions inserted by clause 25 will affect the spending limits of parties to a joint plan as expenditure incurred by one party will be counted as expenditure of all the other parties. On one view this might be regarded as reducing how much the other parties have available to spend which would be likely to engage Article 10. However, the Government's view is that these provisions simply stop parties from being able to share out campaigning and effectively increase their spending limits by doing so. For example, if third party A agrees with registered political party B to pay for advertising on a subject which is part of the manifesto of B, B does not have to spend this money and is free to spend its limit on something else, effectively increasing B's spending limit. For these reasons, we do not consider that the provisions in clause 25 engage Article 10 beyond the considerations that apply in relation to the existing spending limits.

Disqualification of offenders for holding elective office – clauses 26 to 34 and Schedules 8 and 9

113. These provisions require a court to impose a 5 year disqualification order where an offender aged 18 or over is convicted of a relevant offence of an intimidatory nature that the court is satisfied was aggravated by hostility related to candidates, future candidates, substitutes, nominees, campaigners or the holders of relevant elective offices ("relevant elective office" is defined in clause 33). The court has the discretion not to impose the disqualification order where it would be unjust to do so in the circumstances. The order disqualifies a person from being nominated for election to, being elected to or holding a relevant elective office for the specified period.

114. The effect of the disqualification order is similar to the effect of the existing incapacities that arise under section 160 of the RPA 1983 from a person being named as personally guilty of a corrupt practice in the report of an election court resulting from an electoral petition which challenges the conduct or outcome of a parliamentary or local government election, and the similar incapacities under sections 173 and 173A of the same Act resulting from a person being convicted of that corrupt practice before a criminal court.

115. The effect of these provisions is that a person who is subject to a disqualification is unable to participate as a candidate in any of the relevant elective offices within the UK for the period of 5 years.

116. ECHR case law has established that A3P1 implicitly includes the right to stand for election, and therefore it is considered that A3P1 is engaged by these provisions.

117. However, Member States have a wide margin of appreciation to impose conditions on the rights provided by A3P1, provided those conditions are imposed in pursuit of a legitimate aim and are not disproportionate to the aim pursued. In order to be compatible with the ECHR, the rejection of a candidature must be prescribed by law (*Dicle and Sadak v Turkey, 2015 case no. 48621/07*).

118. It is considered that these clauses on intimidation pursue a legitimate aim, namely to reduce the intimidation faced by those key participants in elections and political debate by creating a deterrent for those who seek to carry out that intimidation, thereby encouraging more people to contribute to public life. The conclusion of the Committee on Standards in Public Life's 2017 review[16] emphasised that intimidation, both online and offline, is "*affecting the way in which MPs are relating to their constituents, has put off candidates who want to serve their communities from standing for public offices, and threatens to damage the vibrancy and diversity of our public life."* Based on 88 written submissions and 34 meetings with, amongst others, candidates, MPs, local councillors and the police, the CSPL highlighted that *"intimidation is disproportionately likely to be directed towards women, those from ethnic and religious minorities, and LGBT candidates*".

119. The measures introduced by these clauses on intimidation are proportionate to this legitimate aim and are not arbitrary. Firstly, a disqualification order can only be imposed upon a person whose act of intimidation amounts to the commission of one or more existing relevant criminal offences; no new criminal offence relating to intimidation is created or existing offence expanded. Secondly, a disqualification order can only be imposed where a person has been convicted by a criminal court (or by Court Martial) of a relevant offence and the court is satisfied to the criminal standard (i.e. beyond reasonable doubt) that the offender was motivated by hostility towards another person based upon that person's status as a candidate etc.

16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666927/6.3637_CO_v6_061217_Web3.1__2_.pdf

120. Thirdly, although there is a presumption that where the court is so satisfied a disqualification order should be imposed, the court will retain a discretion not to impose a disqualification order where the court considers it unjust to do so based upon any particular circumstances regarding the offence or the offender. That could be the case, for example, where the nature of the offence is so minor that the court considers it is disproportionate to impose a 5-year disqualification. It is not automatically imposed upon conviction and this element of judicial discretion represents a significant safeguard against arbitrary disqualification.

121. Finally, the 5 year period of disqualification represents a suitable and proportionate sanction to mark the seriousness of the underlying criminal offence and deter against similar future offending. It is also consistent with the current period of incapacity arising from a conviction for a corrupt practice under the Representation of the People Act 1983 which is described above.

122. For these reasons the Government considers that the new electoral sanction, though engaging A3P1, is compatible with the ECHR.

Digital imprints - Clauses 35 to 52 and Schedules 10 & 11

123. Part 6 of the Bill places requirements on those disseminating campaigning material in electronic form to include a digital imprint which states the name and address of the person promoting the material and (if different) of the person on whose behalf it is being published. An imprint regime has long been in place for printed electoral material. To the extent that the rules introduced by these clauses interfere with freedom of expression under Article 10, the requirements represent a restriction which is prescribed by law and is necessary in a democratic society for the protection of the rights of others.

124. It is recognised that political expression attracts the highest form of protection under Article 10, due to its importance in the operation of a democratic society (R (on the application of ProLife Alliance) v BBC [2003] UKHL 23). Further, political expression is likely to be protected by Article 10 even where it may be considered robust or even offensive (Sanders v Kingston [2005] EWHC 1145 (Admin)).

125. However, the digital imprints requirements are neither intended or designed to impede or curtail genuine, robust political expression or debate. Instead, the aim of

this regime is to strengthen the integrity of the democratic electoral process by ensuring that citizens are better informed as to the source of the campaigning material they are viewing. The rules do not prevent or restrict the freedom of expression of the political opinion of individuals as part of the free elections required by A3P1.

126. The policy distinguishes between paid-for and other electronic material with the former always requiring an imprint and the latter only doing so where two conditions are met. The first is that the material can reasonably be regarded as intended to achieve one of the purposes in clause 40 (e.g. promoting or procuring success at a particular relevant election) or wholly or mainly relates to a referendum. The second condition is that material is promoted by or on behalf of a registered party, a recognised third party, a candidate or future candidate, an elected officeholder, a referendum campaigner or a recall petition campaigner. Those individuals or organisations are recognised as significant political actors and are already monitored by the EC. This measure is intended to provide access to free and fair elections for voters by identifying the source of electronic campaigning material so they can make an informed choice. It also supports the rights of those promoting campaigning material insofar as it does not place such restrictions on them as to impede their freedom of expression and ability to campaign.

127. An imprint requires the publishing of the name and address of the promoter or the person on whose behalf the material is being promoted (if not the promoter). This is likely to engage Article 8 of the ECHR (the right to a private life), however the regime allows for the use of a postal address that is not a home address as a safeguard against any unjustified interference with an individual's private life.

128. The rules are proportionate. Although they cover a wider category of material for both the paid-for and other electronic material, the requirements are not onerous and do not restrict freedom of expression, or the sharing of information and opinions. Accordingly, we consider that they support, and do not impede access to free and fair elections. The Government therefore considers that they are compatible with the ECHR.

Cabinet Office
July 2021