

NATIONAL SECURITY BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the draft Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the National Security Bill. It has been prepared by the Home Office and Ministry of Justice. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon Priti Patel MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
2. The purposes of the Bill are to:
 - a. bring together a suite of measures to help protect national security, the safety of the public and the nation's interests from hostile activities of foreign powers;
 - b. provide security and law enforcement services with updated and new tools, powers and protections to enhance our ability to deter, detect and disrupt state actors who target the UK.
 - c. prevent the exploitation of civil legal aid and civil damages systems by convicted terrorists by preventing funds from being given to those who could use them to support terror.
3. Following the publication of the Law Commission's report of their review of the protection of official data in September 2020, the Government launched a consultation on legislation to counter hostile activities by foreign states in May 2021, which closed in July 2021. While the consultation responses were not informative on significant issues in policy development, they did address some detail in the provisions and inform handling strategies and the Government will publish a response in due course. No further scrutiny (such as PLS) has been conducted on the Bill as a whole.
4. The Bill includes the following measures:
 - a. A modernised approach to the offence of espionage in the Official Secrets Acts 1911-1939 (OSAs 1911-39) which includes an offence of obtaining or disclosing protected information for, on behalf of, or with the intention to benefit, a foreign power with a purpose prejudicial to the safety or interests of the UK (SOIOTUK).
 - b. Expands espionage to include 'trade secrets' where a person, acting for, on behalf of, or with the intention to benefit, a foreign power and without authorisation (e.g., in breach of the confidence under which the trade secret is held), obtains or discloses a trade secret.
 - c. Introduces new offences of assisting a foreign intelligence service, where a person provides material assistance to a foreign intelligence service (FIS) in carrying out UK-related activity.
 - d. Updates the offence of entering and inspecting places which are used for the purposes of defence or for other purposes where access should be restricted in order to protect national security ('prohibited places'), including additional police powers and an accompanying compliance offence to support the enforcement of the two new prohibited places offences.
 - e. Creates a new police cordon power to impose a cordon around military aircraft crash sites to temporarily protect the site against trespass/harmful activity, and a supporting offence of failing to comply with a lawful order.
 - f. Introduces the new offence of sabotage where a person, with a purpose prejudicial to the SOIOTUK conducts activity for, on behalf of, or with the intention to benefit a foreign power, which they intend will, and which does, cause damage to an asset.
 - g. Introduces the new 'foreign interference' offence, where a person engages in illegitimate conduct for, on behalf of, or intending to benefit, a foreign power and the intended effect of the activity is to interfere with the exercise of Convention rights, to affect public functions,

to manipulate whether or how a person uses public services or participates in political or legal processes, or to prejudice the safety or interests of the United Kingdom.

- h. Increases the penalty for electoral offences when committed for, or on behalf of, or with the intention to benefit a foreign power.
 - i. Replaces the offence of acts preparatory to espionage under section 7 of the OSA 1920, with a new offence to include harmful preparatory conduct that is undertaken with the intention that the acts amounting to the principal offences in the Bill will be committed, or foreign power threat activity.
 - j. Introduces a new aggravating factor in sentencing where the offence is linked to a foreign power.
 - k. Introduces new police powers to support the investigation of foreign power threat activity, including new search power and arrest powers, a new pre-charge detention regime and power to obtain and retain biometric material.
 - l. Amends the definition of protected material within Schedule 3 to the Counter-Terrorism and Border Security Act 2019 to remove confidential business material from the scope of that definition.
 - m. Disapplies the extra-territorial provisions of the offences of encouraging or assisting crime at schedule 4 of the Serious Crime Act 2007 when activity is carried out for the functions of the intelligence services or armed forces.
 - n. Introduces a new Prevention and Investigation Measures regime, which gives the power to impose a suite of restrictive measures on an individual where the Secretary of State reasonably believes that the individual is involved in foreign power threats activity, with an accompanying criminal offence for failure to comply with or for contravening a measure.
 - o. Makes provision to ensure damages awards against the Crown reflect misconduct of the claimant of a terrorist nature.
 - p. Makes provision to ensure damages are not used to fund terrorism.
 - q. Makes civil legal aid available to those subject to prevention and investigation measures.
 - r. Narrows the range of circumstances in which individuals convicted of specified terrorism offences are eligible to receive civil legal aid.
 - s. Ensures that the new data sharing and data processing powers are available to enforce the restriction on access to civil legal aid for those convicted of specified terrorism offences.
 - t. Clarifies how civil legal aid is available for Terrorism Prevention and Investigation Measures (TPIMs) proceedings heard on judicial review principles.
5. The Government considers that clauses or Schedules of the Bill which are not mentioned in this memorandum do not give rise to any human rights issues.

Foreign power condition and prejudice to the safety or interests of the UK

6. The new offences in clauses 1, 2, 12, 13 and 15 only apply where the foreign power condition is met. This is defined in clause 24. It requires that either the conduct in question, or a course of conduct in respect of which their conduct forms a part, is carried out for or on behalf of a foreign power and the person knows, or ought reasonably to know, that to be the case, or the conduct is intended to benefit a foreign power. This condition limits the ambit of these offences. It is the Government's view that for the most part conduct carried out on behalf of a foreign power will not involve the exercise of rights under the Convention. Similarly, clauses 1, 4 and 12 only apply to conduct that is prejudicial to the SOIOTUK (this concept also applies partially to clause 3 and 13). The concept of prejudice to SOIOTUK comes from section 1 of the Official Secrets Act 1911, which uses the phrase "safety of interests of the state" and was considered by the Courts in *Chandler v DPP* [1964] AC 763 HL. Whilst this has been updated to refer specifically to the UK for clarity, the intention is to retain the meaning and extent. This element also limits the ambit of those offences and is a way that assists in restricting their application to circumstances where, if there is any potential interference with qualified Convention rights, it will be justified. Together, these limitations are ways the offences seek to focus on the hostile acts of foreign powers and

other conduct prejudicial to the UK, without criminalising legitimate behaviour. Further detail is given below.

Obtaining or disclosing protected information (clause 1)

7. The offence in clause 1 deals with obtaining and disclosing protected information, access to which is restricted, or where it is reasonable to expect it is restricted, for the purpose of protecting the safety of interests of the UK. The offence is only committed if the person's conduct is for a purpose that they know or ought reasonably to know is prejudicial to the SOIOTUK and where the foreign power condition is met. The foreign power condition (see clause 24) is that the conduct must be either carried out for, or on behalf of, a foreign power, or be intended to benefit a foreign power.
8. Criminal offences that prevent the disclosure of information could be seen as restricting rights under Article 10 ECHR (freedom of expression). However, the Government considers that for the most part hostile activities by foreign states such as disclosing protected information to a foreign power with a purpose that the person knows (or should know) will harm the UK are not within the ambit of Article 10 at all, as they are not an exercise of the right to freedom of expression. Conversely, the offence does not cover disclosures of information with no foreign power link and so should not cover the types of activity to which Article 10 gives most protection to such as legitimate journalism, political expression or genuine whistleblowing activity (though other criminal offences may apply).
9. However, to the extent that the offence might engage Article 10, the Government considers any interference is justified under Article 10(2) in the interests of national security. This is first because the offence only applies to information restricted for the purpose of protecting the SOIOTUK and second because the person committing the offence must know or ought to know that their conduct is prejudicial to the SOIOTUK.

Prohibited Places (clauses 4 to 8)

10. The purpose of the prohibited places offences is to provide protection to sites, particularly defence establishments, vulnerable to espionage or sabotage. In this way, they must be considered in the context of those activities. Consequently, these offences do not seek to interfere with freedom of assembly and, as a general principle, in particular do not seek to restrict legitimate protest.
11. Protest activity at a prohibited place could potentially constitute a prohibited places offence. For example, a protest that sought to blockade a military airbase. However, the Government considers that any interference with Article 11 (freedom of assembly) would be justified in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime. The clause 4 offence requires that the protesters know, or reasonably ought to know, that their protest activity is for a purpose that is prejudicial to the SOIOTUK, so being rationally connected to those public interests.
12. Noting the particular sensitivity of the prohibited places sites, the Government considers that the measures are proportionate, even if there is some risk that otherwise lawful protests could be prevented. The supporting police powers can only be used to restrict protest activity if specific conditions are satisfied – in particular, where the restriction is reasonably suspected to be necessary to protect the SOIOTUK.
13. The Government therefore considers that these clauses are compatible with Article 11.

Sabotage (clause 12)

14. The new sabotage offence covers activities that result in damage to any asset; this would include loss of or reduction in access or availability to land and buildings. On the face of it, therefore, the

offence might also interfere with Article 11 (freedom of assembly) by capturing a peaceful protest that restricted access to a military base. However, the offence requires the foreign power condition to be met, which means that either the activity is carried out by or on behalf of a foreign power or the person intends to benefit a foreign power. Second, the purpose of the conduct must be prejudicial to the SOIOTUK. In those circumstances, an individual involved in a protest for a common cause would not be caught by the offence.

15. As any contravention of the offence requires that the foreign power condition be met and be for a purpose prejudicial, the Government considers that any interference with Article 11 would be justified in the interests of national security, territorial integrity or public safety or for the prevention of disorder or crime. Accordingly, the Government considers the sabotage offence to be compatible with Article 11.
16. The offence of sabotage includes circumstances in which damage is caused to one's own property. The Government considers that 'peaceful' enjoyment of possessions does not extend to freedom to damage a person's own property where the other elements of the offence are met. Therefore, the offence does not engage Article 1 protocol 1 as the criminal offence only manifests at the point at which the property is used for 'non-peaceful' means; the offence does not prevent that person otherwise dealing freely with their property. Even if the offence did engage Article 1 Protocol 1, the Government considers that the offence meets the legitimate aim of criminalising damage that prejudices the SOIOTUK where there is a foreign power link.

Foreign Interference (clauses 13-14 and Schedule 1)

17. Article 10 arguably does not protect expression that amounts to a criminal offence or that involves coercion. That being so, the risk of interference with freedom of expression arises in the limited sense that the offence seeks to criminalise conduct that involves deception of some kind. However, in order for such conduct to be caught by the criminal offence, as well as being classed as "illegitimate", two further conditions must be met: first the foreign power condition must be satisfied; secondly, the person must intend that their conduct, or a course of conduct in which they are participating, will have one or more of the following effects: interfering with the exercise of fundamental rights or affecting public functions, manipulating whether or how a person makes use of public services or participates in political or legal processes, or prejudicing the safety and interests of the United Kingdom.
18. The Government considers that any expression forming part of that conduct is not expression that is entitled to the protection of Article 10, in that the Article does not protect expression by or on behalf of a foreign power that is intended to affect the public functions of another State, or to manipulate whether or how the public in another State makes use of public services there. And nor does Article 10 protect expression by or on behalf of a foreign power that is intended to manipulate whether or how a person participates in a political or legal process in another State. Of particular relevance in that regard are Article 16 and Article 17.
19. Should any such interference be established, this will be in pursuit of the legitimate aims: principally the interests of national security but also the protection of the rights of others. Some might ask whether there is any risk that the general Foreign Interference offence might cause people to engage in pre-emptive self-censorship in order to avoid the risk of prosecution, particularly in respect of political speech or journalism. However, the Government considers that the need for the foreign power condition to be satisfied will mean that any interference in political speech will be justified under Article 16. As to journalism, the Government considers that the offence is such that a professional person acting on advice will be able to understand what is and what is not permissible, and that the offence is therefore sufficiently foreseeable so as to avoid inhibiting public interest journalism.

Power of Search (clause 20 and Schedule 2)

20. The Bill includes powers of entry, search and seizure, which replace the power currently in section 9 Official Secrets Act 1911 so as to apply to certain offences within the Bill.

21. The powers include:

- a. the power to issue a warrant to authorise entry to relevant premises and search of those premises and any person found there, seizing any material – but for “excepted material” - that is likely to be evidence that a relevant offence has been, or will be, committed;
- b. the power for a judge to make an order requiring the production of excluded and special procedure material where specified conditions are satisfied;
- c. the power for a judge to make a warrant authorising entry to relevant premises and search of those premises and any person found there for excluded and special procedure material that is likely to be evidence that a relevant offence has been, or is about to be, committed, where specified conditions are satisfied; and
- d. the power for a police officer of the rank of superintendent or above to give authority equivalent to the warrant in urgent cases.

Article 8

22. It is accepted that these powers of entry, search and seizure will prima facie interfere with an individual’s rights under Article 8 ECHR when exercised. However, that interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society.

23. These powers require that there be a reasonable suspicion that an offence under the Bill or foreign power threat activity is being, or is about to be, undertaken. Accordingly, the powers have a clear and rational connection to the pursuit of a legitimate aim in protecting national security and public safety as well as preventing crime or disorder.

24. The safeguards in place for the exercise of these powers, including judicial scrutiny, will ensure that the powers are exercised proportionately, going no further than is necessary to achieve their legitimate ends. Accordingly, the Government considers that these provisions are compatible with Article 8 ECHR.

Article 10

25. The powers will enable the police, on application for a production order or warrant, to obtain excluded and special procedure material. (Paragraph 2 onwards, Schedule 2). This will include journalistic material and as such Article 10 is engaged. However, the safeguards in place for the exercise of these powers, namely prior judicial approval, will ensure that the powers are exercised proportionately, going no further than is necessary to achieve their legitimate ends. In cases of great emergency where immediate action is necessary, a superintendent of police will be able to give like authority to a warrant (paragraph 10). In such cases paragraph 11 of Schedule 2 requires that the police must apply as soon as reasonably practicable to the Court for a warrant authorising the retention of any material seized. The Government considers this a sufficient safeguard such that the urgent procedure in particular is compatible with Article 10 in light of *R(Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6.I.

Power of Arrest and Detention (clause 21 and Schedule 3)

Article 5

26. In order to effectively investigate and disrupt hostile activities of foreign powers against the UK, the Bill introduces powers to assist investigating authorities in disrupting and investigating foreign power threat activity. The Government considers that the power of arrest and subsequent detention is lawful; it falls under Article 5(1)(c), to bring a person before a competent legal authority on reasonable suspicion of committing an offence. In addition, the Bill provides for the ability to keep an individual in detention for the purposes of determining a deportation order, which falls within the power under Article 5(1)(f). Whilst the power provides for a longer period of detention than that provided for in the Police and Criminal Evidence Act 1984 ('PACE'), the Government considers that the ability to detain up to 48 hours initially and subsequent judicial approval for a period up to a maximum of 14 days is justified and a proportionate deprivation of liberty given the likely complexity of investigations involving foreign power threats. The nature of this threat means that offending behaviour is likely to be complex and sophisticated, using methods to evade detection and involving specially trained individuals. Investigating agencies need sufficient tools to be able to understand and disrupt that threat.
27. The Government considers that the power of arrest and subsequent detention contains sufficient safeguards against arbitrary use such that it meets the necessary requirements as to be "prescribed by law" for the purposes of Article 5(1). In particular:
- a. The power may be exercised only where the constable has reasonable grounds to suspect that an individual is involved in the commission of offences with a foreign power link (Clause 21(1)). 'Reasonable suspicion' is a concept used in Article 5, is widely understood and applied by police authorities;
 - b. A judicial authority must approve detention beyond 48 hours (Schedule 3, Part 6). This meets the requirement at Article 5(3) as set out in subsequent case law for there to be prompt, independent judicial consideration which reviews the merits of detention and provides the power to release;
 - c. Regular reviews of detention are conducted and the reviewer, who is independent of the investigation, must consider that the investigation is being conducted diligently and expeditiously (Schedule 3, part 5).
28. The Bill also includes emergency powers to extend the 14-day detention period to 28 days whilst Parliament is dissolved subject to subsequent affirmative approval. This provision is needed in circumstances where the threat is so extreme that additional detention periods may be required, and Parliament is not available to approve emergency primary legislation. The Government consider such circumstances are possible but the need for such extended detention powers and its compatibility with Article 5 would require consideration at the time. Even were the maximum detention period extended, application for extended detention in individual cases would require consent of the DPP or Lord Advocate and approval by a senior judge.

Article 6

29. Article 6 applies to circumstances in which a person is questioned about their suspected involvement in an offence and therefore is engaged in respect of the police powers of detention. The following provisions interfere with Article 6 rights:
- a. Delaying the right of the detainee to have someone informed of their detention and/or to consult a solicitor (schedule 3, parts 2 and 3);
 - b. Providing that the detainee cannot consult the legal representative of their choosing (schedule 3, parts 2 and 3);
 - c. The exclusion of the suspect and/or their legal representative from the hearing of an application for extension of detention (schedule 3, part 6);

- d. Withholding information in relation to an application for extended detention from the suspect or their representative (schedule 3, part 6).
30. In exceptional circumstances, limiting access to legal advice is justified. Such restriction must be set out in law, assessed on the particular circumstances of the case and be of temporary nature¹. The Government considers that the application of the reasons set out in the Bill for delaying the right provide sufficient certainty as to the circumstances in which the interference with Article 6 may be justified. This analysis also applies to the power to restrict access to a particular legal representative, with schedule 3 paragraph 8(1)(b) making it clear that this provision does not prevent a detainee from accessing legal advice.
31. Article 6(3) also protects the right to effectively participate in proceedings. Caselaw has indicated that there may be circumstances in which interference with this right is justified, for example for national security reasons, protecting investigative techniques or preventing the alerting of other suspects. Given the sensitive nature of investigations into hostile activities by foreign powers, it is considered that there may be circumstances in which it is not appropriate to disclose to a detainee or their legal representative the information on which an application for a warrant for extended detention is made. The likely complexity and evolving nature of investigations into hostile activities by foreign powers, including identification of other individuals, links to a foreign power and the reliance on sensitive intelligence, mean that the Government considers interference with Article 6 will be justified in the circumstances of a particular case and in accordance with the reasons set out in the Bill.

Retention of Biometric Material (clause 21 and Schedule 3 Part 4)

32. The collection and retention of biometric data was addressed in the Protection of Freedoms Act 2012 in response to the ECtHR decision in *S and Marper v the UK*². In that ruling, the court held that it was necessary to have clear and detailed rules governing scope and application of measures as well as procedures to ensure sufficient guarantees against arbitrariness and that blanket and indiscriminate retention of persons suspected but not convicted of offences represented a disproportionate interference into Article 8 rights.
33. Clause 21 and Schedule 3 set out clearly the circumstances in which biometric data may be collected, used and retained. Further, there are a number of safeguards included in the provisions which help protect against the powers being arbitrarily exercised and ensure the principle of legality is satisfied.
34. The Government considers that the Article 8 intrusions can be justified as a proportionate means to achieving the legitimate ends of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others. Investigations into hostile activities by foreign powers are complex and it will often be difficult to reach the evidential threshold for charging given the nature of the intelligence available; retention of biometric data allows the police to use it in future investigations or to assist with investigative leads. The gravity of the risk posed justifies the automatic retention of biometric data and the safeguards replicate those contained in PACE and the Terrorism Act 2000 (TACT), which are considered to have struck a fair balance as being no more than necessary to accomplish the objective.
35. The power to retain biometric data on national security grounds is available up to 5 years; this mirrors equivalent provisions in PACE and TACT. The Government considers that the longer retention period and therefore increased intrusion is necessary given the likely pattern of behaviour of those involved in hostile activities by foreign powers including involvement over a

¹ *Ibrahim and others v the United Kingdom*

² 30562/04; 30566/04

number of years. The Government considers it is therefore a justified intrusion into Article 8 rights.

Border Security and Confidential information (clause 22)

36. The Bill includes an amendment to Schedule 3 to the Counter-Terrorism and Border Security Act 2019, in order to change the definition of “protected material” so that confidential business material is no longer included within that definition. This has the effect that it will no longer be necessary to seek prior authorisation from the Investigatory Powers Commissioner in order to retain and examine copies of confidential business material which is seized under the hostile activity port stop powers in Schedule 3 to the Counter-Terrorism and Border Security Act 2019.
37. Whilst accessing confidential material may prima facie represent an Article 8 interference, as it is only confidential business material, which is affected by this change, and not confidential personal records acquired or created in the course of a business, it is the Government’s view that there is no Article 8 interference by this amendment.

Prevention and Investigation Measures (PIMs): Part 2 Notices (clauses 32-56 and Schedule 4)

Article 5

38. Part 2 of the Bill introduces a new Prevention and Investigation Measures regime, which gives the power to impose a suite of restrictive measures on an individual where the Secretary of State reasonably believes that the individual is involved in foreign power threats activity, with an accompanying criminal offence for failure to comply with or for contravening a measure. A Part 2 notice may include a requirement under which the individual may be required to remain in their residence for a specified number of hours. This has been reviewed extensively by the courts in the context of control orders (and since then in the context of TPIMs) and it has been found that the principle of imposing a curfew on an individual under civil preventative measures does not breach Article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty. In particular, there is a duty on the Secretary of State (under section 6 of the Human Rights Act 1998) to act compatibly with the Convention rights in determining the length of the curfew and any other measures to be imposed under a Part 2 notice. Further, the Secretary of State may not impose measures unless they are necessary, and she is obliged to keep the necessity of the Part 2 notice and each measure in it under review³.
39. Clause 55 (legal aid for foreign power threat activity prevention and investigation measures) engages Article 5 as it makes available civil legal services provided to an individual in relation to a Part 2 notice, which could include a requirement amounting to a deprivation of liberty for the purposes of Article 5. The Government is satisfied that this addition to the legal aid scheme is compatible with the requirement under Article 5(4) that the State provide legal assistance where this necessary to enable a detained person to make an effective application for release.
40. The Government therefore considers that the provisions in the Bill allowing for the imposition of a period of confinement to the residence, together with the provisions allowing for other restrictions on the individual, are compatible with Article 5.

Article 6

41. The Bill makes provision for the Secretary of State to apply to the court (on an *ex parte* basis) for permission not to disclose certain material, and the court must give permission where it considers

³ See duty of continuing review in Clause 40

that the disclosure would be contrary to the public interest but must consider requiring the Secretary of State to provide a gist of such material to the individual.

42. Closed proceedings are only used to the extent strictly necessary in the interests of national security or public order, as the information dealt with during such closed sessions is information which the court permitted the Secretary of State not to disclose because it is necessary to withhold it in the public interest. A special advocate may be appointed to act in the interests of the individual in relation to the closed proceedings.

43. Paragraph 5 of Schedule 7 to the Bill reflects the “read down” in accordance with section 3 of the Human Rights Act 1998 as required by case law⁴. The result is that although Part 2 proceedings may make use of closed evidence, where the court concludes that there is material that it is necessary to disclose in order to meet the requirements of a fair trial – even where its disclosure is contrary to the public interest – that material must (at the Secretary of State’s discretion) either be disclosed or withdrawn from the case.

44. Case law has also held that in order for control order proceedings to be fair,

*“the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations”*⁵

45. In each Part 2 notice case, the court will determine the level of disclosure required to comply with the individual’s right to a fair hearing in accordance with Article 6.

46. In light of the above, the Government considers that the provisions in the Bill relating to court review, appeals and the use of closed proceedings are compatible with Article 6.

Article 8

47. Part 2 Notices can include measures providing for restrictions on movement, communications and association and measures requiring monitoring and reporting which all engage Article 8, as well as restrictions on dealing with money or other property, and a requirement to undertake a polygraph test, which may engage Article 8.

48. Any interference with Article 8 rights caused by imposition of these measures will be in accordance with the law because there will be clear provision in primary legislation about the circumstances in which Part 2 notices may be imposed and provision about what type of measures may be imposed. The interferences with Article 8 rights caused by the measures will be in pursuit of a legitimate aim; a Part 2 notice may only be imposed where the Secretary of State reasonably considers it is necessary in connection with the protection of the UK from activity which comprises threats from foreign powers and the Secretary of State must also reasonably consider that each measure is necessary for the prevention or restriction of the individual’s involvement in foreign power threat activity. These purposes pursue the legitimate aims of national security, public safety, the prevention of crime and the protection of rights and freedoms of others.

49. The interferences with these rights will also be proportionate. There are numerous safeguards in place to ensure that Part 2 notices will only be imposed where, and to the extent, that they are

⁴ *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46, where the majority found that although the protections and special advocate procedure for using the closed material procedure in control order proceedings were highly likely to safeguard the individual from significant injustice, they could not be guaranteed to do so in every case. The majority decided that the relevant provisions of the Prevention of Terrorism Act 2005 and the Rules made under it (requiring the court to give permission for the withholding of evidence) should be “read down” in accordance with section 3 of the Human Rights Act 1998 as if the words “except where to do so would be incompatible with the right of the controlled person to a fair trial” were added (paragraph 72).

⁵ *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 (“AF (no.3)”, Paragraph 59).

necessary and proportionate and to ensure that the individual's rights are protected. The range of measures and safeguards in place are similar in breadth and scope to those in the TPIM Act and none of the types of obligations that may be imposed under a TPIM have been found to be incompatible with Convention rights.

50. It is therefore the Government's view that Schedule 4 to the Bill is compatible with Article 8.
51. Article 8(1) is prima facie engaged in cases of search and seizure under the powers for entry and search (and associated powers of seizure and retention) provided by Schedule 8 to the Bill. The Government considers, however, that any interference with that right will be justified under Article 8(2). The powers pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at ensuring that Part 2 notices (the purpose of which are related to the prevention of threats from foreign powers) are properly enforced, including uncovering evidence of any breach of a Part 2 notice would facilitate a criminal prosecution.
52. The powers are also necessary in a democratic society, that is they are proportionate to the aim pursued and meet a pressing social need. The powers in Schedule 8 may only be exercised in defined circumstances and are no more than necessary for achieving the legitimate aims mentioned above.
53. It is therefore the Government's view that Schedule 8 to the Bill is compatible with Article 8.
54. Schedule 9 to the Bill makes provision in relation to the taking of biometric material from individuals subject to a Part 2 notice. Such material may be taken with or without consent. Prints, samples or information derived from samples may be checked against specified databases and information, to check whether there is a match with the person's data on existing DNA and fingerprint databases. This may allow the police to confirm the person's identity and to determine whether the person has previously had their biometrics taken and whether those biometrics have been found at a previous crime scene.
55. Schedule 9 also makes provision in relation to the retention and destruction of such material and about the uses to which retained material may be put. The storage and retention of fingerprints and DNA samples and profiles constitutes an interference with Article 8. The ECtHR conclusions in relation to the retention of such material post-acquittal and in relation to suspected but not convicted persons are set out above.
56. Persons subject to a Part 2 notice are believed to be or have been involved in foreign power threat activity – but have not (necessarily) been convicted of a criminal offence. The Government is satisfied that the purposes of the prevention and detection of crime⁶ and the interests of national security are legitimate aims in accordance with article 8(2). The Government is also satisfied that the provisions are proportionate due to the criteria for exercise of the power and the several safeguards that are built into its exercise.
57. The Government therefore considers that the provision in Schedule 9 to the Bill is compatible with article 8 of the ECHR.

Article 10

58. Measures providing for restrictions on communications and association engage Article 10. For the reasons given above in relation to measures which engage Article 8, it is considered that these measures are compatible with Article 10.

⁶ *Marper* is authority for this.

59. The Bill makes provision for the making of an anonymity order by the court in respect of an individual who is subject to a Part 2 notice or against whom the Secretary of State proposes to impose a Part 2 notice.
60. Case law has established that the press and journalists enjoy the rights which article 10 confers⁷. An anonymity order will interfere with article 10(1) rights of the press to report the identity of the individual subject to a Part 2 notice, meaning that the press may be restricted from reporting a complete account of an important public matter.
61. Article 10 rights of the press can be subject under article 10(2) to restrictions, including the 'rights of others' under article 8 of the ECHR which are also engaged by the issue of publication of the identity of the individual. Making provision for an anonymity order may also be justified in accordance with article 10(2) in respect of Article 2 or 3 rights, which obliges states to have a structure of laws in place to help protect people from assaults or attacks on their lives.⁸ The availability of an anonymity order is a way in which the article 2 or 3 rights of an individual subject to a Part 2 notice may be protected in appropriate circumstances.
62. Case law has clarified that the availability of such orders was not incompatible with Convention rights – rather the exercise of the power involved a balancing by the court of competing rights and the court has noted that the protection of article 2, 3 and 8 rights positively demanded the availability of such an order⁹.
63. The Government therefore considers that the provision for anonymity orders in paragraph 6 of Schedule 7 to the Bill is compatible with Article 10 of the ECHR.

Article 11

64. As noted above, measures providing for restrictions on communications and association will engage Article 11. For the reasons given above in relation to measures which engage Article 8, it is considered that these measures are also compatible with Article 11.

Article 1 Protocol 1

65. Schedule 8 to the Bill confers powers of entry and search, together with associated powers of seizure and retention, in connection the enforcement of Part 2 notices. Article 1, Protocol 1 will be engaged where these powers are used to seize property.
66. Property seized under the new powers may be retained only for as long as is necessary and so the ECHR consideration relates to the control of use of property under Article 1, Protocol 1. The Government considers that the test for justification of a control of use of property is made out: the control will be in accordance with the law, it will be for the general interest and will be proportionate to the aim pursued.
67. The powers of seizure are to seize anything which (a) contravenes a Part 2 notice, (b) would assist in detecting the location of an individual who had absconded or (c) may threaten or harm any person (corresponding to the search power) or (d) which constitutes evidence of any offence. The powers are therefore (a) aimed at the prevention or detection of a crime (in particular the breach of

⁷ In Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury [2010] UKSC 1, paragraph 33.

⁸ Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury [2010] UKSC 1, paragraph 27.

⁹ There have been more recent cases focusing on anonymity orders in other contexts in which the Article 10 interest in identifying individuals was balanced against competing Convention rights of those individuals, for example, *Justyna Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB)

a Part 2 notice) (b) in the interests of national security and public safety, and (c) in association with criminal proceedings, since the material seized could be used to prosecute an offence.

68. The powers of seizure are proportionate because:
- a. The articles seized could otherwise be used for the purposes of foreign power threat activity (which the measures in the Part 2 notice are designed to prevent or restrict).
 - b. The seizure could result in evidence (that would otherwise be missed or subsequently destroyed) being available for use in a criminal prosecution for an offence.
 - c. Anything seized may only be retained for so long as is necessary in all the circumstances.
 - d. The PACE and PACE NI Codes of Practice will be amended to extend to these powers. The Codes make provision for additional safeguards, including for records to be made of any articles seized and for such records to be provided to the persons from whom the articles were seized.
 - e. The other safeguards referred to above apply.
69. It is therefore the Government's view that the provision in Schedule 8 to the Bill is compatible with Article 1, Protocol 1.

Damages Provisions (clauses 57-61 and Schedule 10)

Article 6

70. Article 6(1) provides that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
71. Clauses 57 to 60 (damages in national security proceedings) engage Article 6(1) as they introduce a procedure for raising before a court matters relevant to the determination of claims for damages against the Crown in proceedings relating to national security. The procedure requires that the Crown makes an application, and the court has discretion as to whether to admit it. Where admitted, the court will consider whether the reduction of damages to reflect the misconduct of the claimant of a terrorist nature is appropriate. The burden of proving that misconduct will lie with the Crown.
72. Those new procedures will operate together with the existing safeguards in the rules of court, including the closed material procedures under Part 82 of the Civil Procedure Rules 1998. Any further rules considered necessary will themselves have to be compatible with Article 6(1).
73. Clause 61 and Schedule 10 (freezing and forfeiture of damages) engage Article 6(1) as they create a procedure for the provisions applying to the new power to freeze or forfeit damages awards where there is a real risk those sums may be used to fund terrorism. Those provisions identify the procedural requirements before the court may make those orders. In addition, the determination of the issues will be subject to the existing safeguards in the rules of the court in which the damages claim is considered, and any new rules of court will need to be compatible with Article 6(1).
74. The Government is therefore satisfied that the provisions are compatible with Article 6(1).

Article 1 of Protocol 1

75. Article 1 of Protocol 1 ("A1P1") protects a person's right to the peaceful enjoyment of their possessions.

76. Clause 61 and Schedule 10 engage A1P1 as they apply to an entitlement to damages in civil claims, as determined by a court. Of Schedule 10, paragraph 1 applies to a first freezing order which will last for 2 years. Under paragraph 2, it may be extended for a further 2 years. Paragraph 3 applies to forfeiture. The test in each case is whether there is a real risk that the funds, if paid to the claimant, will be used for terrorism.
77. The Government accepts that the provisions reflect an interference with A1P1 rights, being the rights of claimants to damages, as will have been found by the court seized of the issue. The interference arises as, prior to payment, the court, on considering the test referred to above, may order a restriction on payment of those damages to the claimant.
78. It is arguable, particularly in relation paragraph 3 of Schedule 10 (forfeiture), whether the interference is one of control or deprivation.
79. However, there is also an argument that that issue does not need to be resolved. For example, in *Denisova and Moiseyeva*,¹⁰ the conclusion was that “*the Court considers that there is no need to resolve this issue because the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance issues that follow.*”
80. The Government recognises the interference but considers the provisions pursue a legitimate aim and do so proportionately. The aim is of course prevention of terrorism, which is legitimate.
81. As to the proportionality, the risks from terrorism are some of the most serious a society will face, including loss of possibly many lives, protecting against which may justify significant interferences with other rights, including permanent loss of property. For example, the Anti-terrorism, Crime and Security Act 2001 also adopts forfeiture with respect to terrorism.¹¹
82. With respect to sanctions which arguably involved far more sweeping restrictions on enjoyment of possessions and less culpability on the part of the sanctioned person than are proposed in this Bill¹², the European Court of Human Rights ruled that:
- “the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued.”*¹³
83. As to the test a court will be required to apply, namely that there is *real risk* that damages paid to the claimant will be used for terrorist purposes, it is very similar to that in other statutory provisions that also interfere with A1P1 rights or create criminal offences.¹⁴
84. In addition, these provisions include a number of safeguards, arguably greater than those in other similar legislative provisions. For example, two freezing orders will have to be granted before forfeiture is possible. In addition, the court will be able to consider all parts of the awards separately and only withhold damages where there is no mechanism (such as payment to solicitors or directly to care providers) to reduce the risk below the threshold, and the court can tailor the award to the personal circumstances of each claimant.

¹⁰ *Denisova and Moiseyeva v Russia* (Application no. [16903/03](#)).

¹¹ Schedule 1.

¹² *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* C-84/95, 30/7/96, [22]-[26].

¹³ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (45036/98) (2006) 42 EHRR 1, [149]

¹⁴ Sections 14 and 16 of the Terrorist Act 2000.

85. For those reasons the Government considers that these provisions are a lawful interference with the A1P1 rights of the claimant.

Legal Aid Provisions (clauses 62-64)

Article 6

86. Article 6(1) provides that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

87. Clause 55 (legal aid for foreign power threat activity prevention and investigation measures) engages Article 6(1) as it makes available civil legal services provided to an individual in relation to a Part 2 notice, subject to the relevant means and merits tests and the applicable exclusions. This adds to rather than amends existing entitlement to legal aid and the Government is satisfied that this addition to the legal aid scheme is compatible with Article 6(1) in relation to legal aid provision.

88. Clause 64 (limits on convicted terrorists' access to Civil legal aid) engages Article 6(1) because it imposes a restriction on access to Civil legal aid by individuals convicted of specified terrorism offences, so that they are ineligible for civil legal aid for general case services unless they satisfy one of the applicable conditions.

89. Article 6(1) does not guarantee the right to free legal aid in civil proceedings, and it is permissible to impose conditions on the grant of legal aid based on the financial situation of the litigation and his or her prospects of success. A grant of legal aid funding is required under Article 6(1) only where a lack of civil legal aid would deprive an individual of a fair hearing, having regard to what is at stake for the individual, the complexity of the law or procedure, and the individual's capacity to represent him or herself effectively: *Steel and Morris v. the United Kingdom* (2005) 41 EHRR 22.

90. For new legal aid cases, individuals subject to the restriction can continue to apply for Exceptional Case Funding (ECF) for any civil legal services including general case services, and the Government is satisfied that this safeguard will provide for access to civil legal aid in circumstances where it is necessary or appropriate in view of the risk that failure to do so would breach their human rights, including their rights under Article 6(1).

Article 7

91. Article 7(1) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

92. Clause 62 (limits on convicted terrorists' access to civil legal aid) will engage Article 7 because an additional administrative measure will be imposed on convicted terrorists for which the trigger is a criminal conviction, and the measure will apply retrospectively.

93. The Government takes the view that the restriction is an administrative measure and not a penalty for the purposes of Article 7(1), having regard to the relevant criteria that apply in assessing whether a measure is to be assessed as a penalty (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], nos. 1828/06 and 2 others, 28 June 2018 § 211).

94. Those criteria are:

- a. Aim: the aim of the measure is symbolic, in that the purpose of the restriction is to reflect the significance of the bonds with the State and society that are broken by the commission of terrorist offences.
- b. Nature: the measure is administrative in nature, imposing an additional condition on the grant of civil legal aid, and so can be distinguished from the punitive measures that have been considered penalties by the ECtHR.
- c. Classification: the measure is classified as a civil measure rather than a criminal sanction under domestic law.
- d. Procedure for adoption: the measure will be enacted by Parliament in primary legislation and administered on a case-by-case basis, subject to the continued availability of ECF.
- e. Severity: the restriction is not indefinite and instead time-limited, and the safeguard of ECF remains available.

95. Moreover, the validity of administrative measures implemented as a reaction to the grave implications of terrorist acts has been recognised by the ECtHR in *Ghoumid v France* (2020) ECHR 492. The ECtHR found no violation of Article 8 when France revoked the French nationality of a group of dual nationals convicted of terrorist offences, recognising that the serious threat to human rights posed by terrorist violence provided a justification. Similarly, the Government considers that restriction is a proportionate response to terrorist violence targeted at the State and the democratic institutions that provide for the availability of civil legal aid.

Article 8

96. Clause 62 (limits on convicted terrorists' access to civil legal aid) will engage Article 8 in relation to both the retrospective and prospective application of the restriction to new civil legal aid cases, in circumstances where Article 8 rights are at issue and civil legal aid could be considered a requirement for the individual to be involved to a sufficient degree in relevant decision-making processes.

97. This includes immigration cases which fall outside the scope of the civil rights and obligations protected by Article 6(1), as the Court of Appeal has found that in practice there is unlikely to be any real difference between the test for Article 6(1) compliance and Article 8 compliance in the context of immigration cases, and so whether legal aid is required in a particular immigration case will depend on the same factors: *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622.

98. Individuals subject to the restriction can continue to apply for ECF, which will provide for access to civil legal aid in circumstances where it is necessary or appropriate in view of the risk that failure to do so would breach their human rights, including their rights under Article 8. The Government is therefore confident that Article 8 procedural obligations will be satisfied on case-by-case basis through the ECF application process

99. Clause 63 (data sharing gateway for limits on convicted terrorists' access to civil legal aid) will engage Article 8 as it will provide for the disclosure of the criminal conviction data relating to convicted terrorists by law enforcement data controllers to the Director of Legal Aid Casework. The Director will be authorised to seek this data in order to determine whether individuals are eligible to receive civil legal aid.

100. The Government does not consider that the disclosure of this criminal conviction data will amount to a violation of the right to respect for the offenders' private life. The ECtHR has recognised that margin of appreciation should be left to national authorities in striking a fair balance between the relevant conflicting public and private interests (*Avilkina and others v. Russia*, application no. 1585/09, ECHR 2013). In these circumstances, the disclosure of information will occur to achieve the legitimate aim of upholding a restriction set out in law, in order to ensure that convicted terrorists do not fraudulently access civil legal aid and that public confidence in the legal aid system is maintained.

Article 14

101. Article 14 enshrines the right not to be discriminated against in the enjoyment of the rights and freedoms set out in the Convention.

102. When taken with Article 7, Clause 62 (limits on convicted terrorists' access to civil legal aid) could engage Article 14 as conviction for a terrorist offence may arguably be considered an 'other status' for purpose of Article 14. However, the Government considers that no 'other status' is established because the restriction makes a distinction not between different groups of people, but on the basis of a particular type of offending, and Parliament's view of the gravity of that offending. This follows the reasoning in *R(Khan) v. Secretary of State for Justice* [2020] EWHC 2084 (Admin), in which the Divisional Court found that regarding difference in treatment between types of prisoners subject to determinate sentences, there is no 'other status' on the basis of conviction for a terrorist offence.

103. It may also be argued that conviction as an adult for a terrorist offence committed as a minor constitutes an 'other status' for the purpose of Article 14, since there would be a difference in treatment, in terms of length of the restriction, compared to individuals who also offended as minors but were convicted while still under the age of 18. In making a distinction on this basis, it could be asserted that application of the restriction gives rise to a distinguishable status.

104. Even if 'other status' was established in either instance, it would not be a suspect ground that would require very weighty reasons to justify differences in treatment, and it is considered that any difference in treatment is in pursuit of a legitimate aim and objectively justifiable.

105. In *Ghousmid v France* (2020) ECHR 492, the ECtHR accepted that the symbolic aim of demonstrating that terrorist acts break the bond of national loyalty was a legitimate aim which could justify very serious interferences with human rights, even though it carried no concrete benefit (such as cost savings) for the public. In *R(Khan) v. Secretary of State for Justice* [2020] EWHC 2084 (Admin), the High Court found that Parliament was justified in distinguishing serious terrorist offenders for reasons including the pernicious nature of the offending, and the restriction similarly seeks to distinguish serious terrorist offenders while retaining the safeguard of ECF.

Article 1, Protocol 1

106. Article 1 Protocol 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that no person shall be deprived of their possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

107. Clause 62 (limits on convicted terrorists' access to civil legal aid) potentially engages Article 1 of Protocol 1 as it is arguable that the retrospective application of the restriction could amount to unlawful interference with an assertible right to a benefit, because of the change in the conditions for eligibility will have occurred after an individual became theoretically eligible to receive civil legal services.
108. The Government considers that, firstly, eligibility for civil legal aid should not be considered equivalent to an assertible right to a benefit, because an individual's eligibility is assessed according to the relevant conditions at the time of each legal aid application, rather than at a set point in time as in the case of a pension and is not available as of right but subject to those relevant conditions.
109. Secondly, even if equivalence was established, the interference is compatible with Article 1 of Protocol 1. Application of the restriction will be lawful once enacted; will service the public interest in the achieving its aim of preventing convicted terrorists from receiving public money; and will be proportionate interference because the safeguard provided by ECF scheme will prevent any individual burden from becoming excessive.