CRIMINAL JUSTICE BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Criminal Justice Bill. It has been prepared by the Home Office and Ministry of Justice. On introduction of the Bill in the House of Commons, the Secretary of State for the Home Department (the Rt Hon Suella Braverman KC 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 keep our communities safe by strengthening the law to protect the public from violence and intimidation; tackling violence against women and girls; enhancing the management of offenders; introducing tougher sentencing; enabling law enforcement agencies to respond to changing technology deployed by criminals; equipping them to address emerging crime types and threats; and strengthening public confidence in policing.

3. Clauses 1 to 4 create new offences, which criminalise the importing, making, modifying, supplying, offering to supply and possession of certain articles for use in serious crime and of electronic devices for use in vehicle theft.

4. Clauses 5 to 9 include measures to deal with SIM farms, specifically:
   a) make it a criminal offence to supply (sell or let on hire) or possess a device known as a "SIM farm";
   b) provide the Secretary of State with a power, by regulations, to create a summary offence of possessing or supplying an article where there is significant risk of the article being used in connection with fraud by means of an electronic communications network or service.

5. Clause 10 creates a new criminal offence of being in possession of a bladed article or offensive weapon with intent to use the weapon in unlawful violence or to cause serious unlawful damage to property (or to enable another person to do so).

6. Clauses 11 to 13:
   a) replace and expand the offence (in England and Wales) of encouraging or assisting serious self-harm[1] to cover all methods of committing the offence;
   b) make new offences relating to taking and recording of intimate images without consent. Namely, taking or recording an intimate photograph or film, and installing equipment to enable the taking or recording of intimate photographs or films.

7. Clause 14 expands the "Identification Doctrine" (which relates to the criminal liability of senior managers of bodies corporate and partnerships) to all offences

[1] A communications version of the offence was introduced in the Online Safety Act 2023.

(expanding the reforms made by the Economic Crime and Corporate Transparency Act 2022[2] to apply to all crimes, not just economic crimes).

8. Clauses 15 to 17 amend the regime for drug testing on arrest (under Part V of the Police and Criminal Evidence Act 1984 and Drugs Act 2005) to enable testing, and assessments as to drug misuse, for specified Class B or C drugs.

9. Clauses 18 to 21 provide law enforcement bodies with additional powers, specifically:
   a) a police power to seize, retain and destroy bladed articles (any article which has a blade or is sharply pointed), where they lawfully encounter them on a private property and have reasonable grounds to suspect the article is likely to be used in connection with unlawful violence;
   b) a police power to enter premises and to search for and seize stolen goods;
   c) power for investigative agencies to apply to the court for an order that a third-party entity involved in the provision of internet protocol (IP) addresses and internet domain names should prevent access to an IP address or domain name which is believed to being used for serious crime;
   d) enabling law enforcement agencies to access the Driver and Vehicles Licensing Agency ('DVLA') driver licence records.

10. Clauses 22 to 24 relate to sentencing offenders. They:
    a) give courts an express power to order offenders to attend their sentencing hearing and to punish them for contempt if they do not. This measure applies to offenders sentenced in the Crown Court for an offence punishable with a life sentence;
    b) give the Crown Court an express power to order a prison governor to produce an offender and making it clear that prison officers can use reasonable and proportionate force, if necessary to give effect to such an order;
    c) create new statutory aggravating factors for grooming behaviour including grooming gangs and for murders connected to the end of a relationship.

11. Clauses 25 to 32 relate to the transfer of prisoners to foreign prisons and the management of offenders. They:
    a) allow for the transfer and detention of prisoners detained in England & Wales to foreign rented prison space;
    b) make multi-agency public protection arrangements (MAPPA) automatic for those convicted of the offence of controlling or coercive behaviour;
    c) extend the criteria for polygraph testing to people released on licence, under probation supervision, who have been convicted of murder and are assessed as posing a risk of sexual offending; to the whole envelope of the sentence for those who are sentenced concurrently for a sexual and non-sexual offence; and to offenders sentenced for offending which is considered to be linked to terrorism.

[2] The Identification Doctrine is being amended by the Economic Crime and Corporate Transparency Act 2023 to reform corporate criminal liability laws for economic crimes to hold corporations liable in their own right for economic crime.

12. Clauses 33 and 34 seek to tackle proceeds of crime, by:
    a) Introducing measures designed to ensure that the confiscation regime can more effectively deprive criminals of the benefit of criminal conduct, whilst also ensuring that the regime is more flexible, realistic, and proportionate;
    b) creating a suspended accounts scheme - a statutory scheme, run by a "scheme administrator" on behalf of the Government, under which participating financial institutions may transfer funds which represent suspended account balances to HMG to fund initiatives in relation to economic crime.

13. Clauses 34 to 37 strengthen the operation of Serious Crime Prevention Orders ("SCPOs") under Part 1 of the Serious Crime Act 2007 by: giving courts a power to impose electronic monitoring; allowing additional agencies to apply to the High Court for an SCPO; introducing notification requirements; and allowing the Crown Court to make an order on its own motion or on an application on acquittal.

14. Clauses 38 to 64 create new offences and civil preventative orders to tackle nuisance and organised begging and nuisance rough sleeping in place of the outdated provisions in the Vagrancy Act 1824. Specifically, they make provision for:
    a) nuisance begging directions, prevention notices and orders, and new criminal offences of engaging in nuisance begging or arranging or facilitating begging for gain (organised begging);
    b) nuisance rough sleeping directions, prevention notices and orders; and
    c) a new offence of trespassing with intent to commit a criminal offence.

15. Clauses 65 to 71 of the Bill strengthens the powers of the police, local authorities and other agencies to tackle anti-social behaviour ("ASB"). They extend the court's ability to attach a police power of arrest to all breaches of an ASB injunction; expand the persons who can make Public Space Protection Orders, closure notices and issue fixed penalty notices; and modify the duration, minimum age, time periods and penalty sums of various ASB measures.

16. Clause 72 amends the Crime and Disorder Act 1998 to enhance the accountability of Community Safety Partnerships and ensure closer working with elected policing bodies.

17. Clauses 73 and 74 focus on strengthening public confidence in policing, by imposing a duty on the College of Policing to issue a Code of Practice about ethical policing (to include a duty of candour for the police) and providing the Secretary of State with powers to make provision about appeals by chief officers of police to the police appeals tribunals (enabling chief officers to appeal against disciplinary decisions concerning officers (or former officers) serving in their police force).

18. The Government considers that clauses of, or Schedules to, the Bill which are not mentioned in this memorandum do not give rise to any human rights issues. The Convention rights raised by provisions in the Bill are: prohibition on torture, inhuman or degrading treatment or punishment (Article 3); liberty and security of person (Article 5); fair trial (Article 6); no punishment without law (Article 7); private and family life (Article 8); freedom of religion (Article 9); freedom of expression

(Article 10); freedom of assembly (Article 11); prohibition of discrimination (Article 14); and Article 1 Protocol 1 (peaceful enjoyment of property).

Articles for use in serious crime and electronic devices for use in vehicle theft

19. These measures will strengthen how law enforcement agencies confront rapidly evolving tools and technologies which, whilst currently legal, have few legitimate purposes and are being exploited by serious criminals. Such articles include vehicle concealments used to conceal and transport illicit goods, templates for 3D-printed firearms components and pill presses used in the supply of illegal drugs. These measures are likely to engage Article 1 Protocol 1 ("A1P1") and Article 6 of ECHR.

20. They may have the effect of depriving an individual of ownership of their property (A1P1), if the articles are seized by the police as evidence and permanently confiscated if the offence is made out. The Government's position is that the measure is justified as it is intended to tackle individuals who produce such articles but are currently able to keep sufficient distance from crimes to avoid prosecution. It will assist law enforcement to remove from circulation articles which facilitate these crimes.

21. It is irrelevant for the purposes of the offences at clause 1 and 3 whether the person intends to use the item in connection with a relevant offence; rather, the individual's state of mind is a defence (clause 1(3) and 3(3)). Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution[3]. It is now well settled that in deciding the issue the court should focus on the particular circumstances of the case and the balance between the public interest and the protection of the rights of the individual; Lord Bingham in Sheldrake v DPP[4] set out relevant factors. Such presumptions must be within "reasonable limits" and "justified"[5].

22. The Government's position is that the imposition of a reverse burden of proof is necessary to tackle possession, manufacture and distribution of articles that are notoriously used in serious crime and have a harmful impact on society. The subject matter of the defence will be within the knowledge and ability of the accused to demonstrate and therefore it is not unfair to require them to discharge this burden.

Possession and supply of a SIM farm and articles used to facilitate fraud by electronic communications

23. Clauses 5 to 7 deal with SIM farms, which are devices which are capable of using a number of SIM cards at the same time to make telephone calls and send SMS text messages. SIM farms can be used by criminals to carry out fraud at scale, which causes significant risks to the public; they present an attractive, easy to access, low-cost option to criminals. The measures are designed to restrict the

[3] See for example *X v Germany* (1962) 5 Y.B. 193 at [199] and Lord Hope in *R v Lambert* [2001] UKHL 37.
[4] [2004] UKHL 43, [2005] 1 AC 264 at [21].
[5] See *Salabiaku v France 13 E.H.R.R. 379, R v Foye [2013] All ER (D) 248*.

availability of these devices without good reason, by creating criminal offences of possession and supply (sell or let on hire).

24. Clause 8 provides for a summary offence to be made by regulations in relation to possessing or supplying articles where there is a significant risk that the article will be used in connection with fraud through means of an electronic communications network or service.

25. These measures are likely to engage Articles 6 and 8 and A1P1 of the ECHR.

26. As with the offences at clauses 1 and 3, these provisions engage Article 6(2) of the ECHR relating to criminal proceedings, in particular regarding the "reverse burden". The same analysis applies here. The government considers it relevant, as mentioned in the factors set out in *Sheldrake v DPP* that these are summary only offences punishable by a fine only. The subject matter of the defence will be within the knowledge and ability of the accused to demonstrate, and it is accordingly not unfair to require the accused to discharge this burden of proof.

27. Schedule 1 contains search powers for constables in relation to SIM farms. It provides the circumstances in which powers can be exercised which are subject to safeguards that apply under similar statutory and (in Scotland) common law regimes. This is likely to engage Article 8.

28. In the Government's view, the new powers to search for SIM farms are necessary for the new measures to be used effectively and the powers do not currently exist. In relation to England and Wales, the search power in section 8 of the Police and Criminal Evidence Act 1984 ("PACE") is only available in respect of indictable offences; there is an equivalent provision in Northern Ireland[6]. In Scotland, powers are largely regulated by the common law and generally require an arrest or charge. These existing powers would therefore not be available for these new offences. It is an essential element of the new provisions that the police can search premises (with the approval of a court). Search and seizure powers are already available in relation to other summary offences.

29. A power to search vehicles, vessels and aircraft is also included. These powers are considered necessary as criminals using SIM farms to commit fraud have developed techniques to evade detection by driving SIM farms on the back of vehicles to evade controls in place to detect activity on networks that is not typical of single users.

30. There are a number of safeguards included in the new search powers, in particular, a search warrant must be issued by a justice of the peace, sheriff, summary sheriff or lay magistrate to enter and search premises and constables must have reasonable grounds to suspect there is relevant evidence before searching vehicles etc. The Government therefore considers that these powers are a proportionate interference with Article 8, justified in the interests of prevention of crime.

[6] Article 10 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

31. A1P1 is engaged by the criminal offences themselves, as some individuals who currently possess SIM farms will effectively no longer be able to possess them for reasons other than in accordance with the defence set out in clause 5(2). The criminal offences are intended to combat crime and protect members of the public from loss of their own property through fraud. The Government considers this control on the possession and use of property is therefore justified in the public interest.

Possession of weapon with intent to use unlawful violence etc.

32. Clause 9 creates a new offence of possession of a bladed article or offensive weapon with intent to use the weapon in unlawful violence or to cause serious unlawful damage to property (either themselves, or to enable another person to do so). This offence is likely to engage Article 8 and A1P1 and may engage Articles 9 and 14 of the ECHR. The Government considers any interference which arises justified in order to prevent crime and disorder and protect the rights and freedoms of others (from serious violence).

33. The police seizure of a weapon may impact the individual's right to private life, enjoyment of religion and peaceful enjoyment of their property. However, the provision targets possession with intent to commit 'unlawful violence' and 'unlawful damage to property'. As such, where an individual has an alternative (lawful) purpose or good reason for possessing the weapon (such as a Sikh kirpan held for religious reasons or a knife held for use in cooking without unlawful intent) the offence would not be made out.

34. In the Government's view, the new measures are necessary and proportionate to disrupt the long-term trend of an increase in serious violence and knife crime (the prevention of disorder or crime and the rights and freedoms of others). The offence ensures that the severity of having a knife with intention to cause fear or violence, and the increased likelihood of escalation resulting in harm or threat to life, is reflected in legislation. It enables police officers to act decisively before the serious violence occurs.

35. It is possible that the police may arrest and charge persons for the offence in urban areas (where there is a greater prevalence of knife crime) than in rural areas, which may impact minority ethnic communities (potentially engaging Article 14, together with Article 8 or A1P1). The Government's view is that any such impact, if it materialised, would be justified; arrest and charge will be dependent on the offence being made out – and as such, action will only be taken against persons who intend to use the item for unlawful violence or unlawful damage to property (themselves, or to enable another to do so).

Offence of encouraging or assisting serious self-harm

36. This provision makes it an offence to encourage or assist serious self-harm by any means (including by communication means). It replaces - in relation to England and Wales - section 184 of the Online Safety Act 2023, which only criminalises relevant acts including encouraging or assisting serious self-harm by means of verbal or electronic communications, publications or correspondence. The

threshold for serious self-harm is grievous bodily harm with the maximum penalty for the offence upon conviction being imprisonment for a term not exceeding 5 years (and a possible fine).

37. Article 5, which protects the rights to liberty and security, is engaged however the measure falls within the authorised circumstances prescribed by Article 5(1) where deprivation of liberty is lawful, namely detention after conviction of a competent court (Article 5(1)a)).

38. The sentences imposed by this measure are in line with those imposed by comparable offences. By way of comparison, the maximum penalty for unlawful wounding/inflicting GBH without intent (contrary to section 20 of the Offences Against the Person Act 1861) is five years' imprisonment which is the same maximum penalty imposed by this measure. This is in contrast with the maximum penalty for the offence of encouraging or assisting the suicide or attempted suicide of another person which is 14 years (section 2 of the Suicide Act 1961), reflecting the respective seriousness of both offences.

39. The Government therefore considers that the proposed penalties are proportionate to the nature and severity of the offending. Further, the courts will be able to take account of all the relevant circumstances of the offence and offender in the usual way. In relation to the requirement for the procedure to be prescribed by law, the penalty for the offence will be set out in primary legislation. As such, the relevant prescriptions set out in Article 5 are all satisfied.

40. Article 7 is engaged in so far as it requires the offence and corresponding penalty to be clearly defined in law.

41. In order to comply with the requirement of a clear definition in law, the key question to be satisfied is whether the defendant could reasonably have foreseen - with the assistance of a lawyer, if necessary - that they risked being convicted of the offence in question and being sentenced to the penalty the offence carries, at the time of the commission of the offence.

42. In relation to foreseeability and the wording of the provision, the Government considers that the terms "encouraging" and "assisting" are widely understood by the general public given their use elsewhere; for example, the inchoate offences sections 44 to 46 of the Serious Crime Act 2007, and the offence of encouraging and assisting suicide under section 2 of the Suicide Act 1961. The clause itself also makes clear that "encouraging" includes putting pressure on a person to self-harm (whether by threatening them or otherwise) thereby illustrating the types of behaviour which might lead to conviction under the offence.

43. The Government also considers that both the terms self-harm and GBH are widely understood concepts. The Government therefore considers that the test is satisfied as the penalty for the offence is clearly set out in the proposed clause, the offences will not have any retrospective effect, and the public will have sufficient familiarity with the concepts in the offence in order to identify the kinds of acts that would fall within it.

44. Article 10 provides that everyone has the right to freedom of expression which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Article 10 is therefore engaged by the proposed measure insofar as the offence is capable of being committed by means of communication. However, the offence constitutes a lawful interference with Article 10 for the following reasons:

    a) Prescribed by law: The first part of the test is plainly satisfied as the interference will be set out in primary legislation and the offences are formulated in such a way as to enable the general public to foresee the consequences of their conduct with a reasonable degree of certainty.

    b) Legitimacy of the aim pursued by the interference: The legitimate aims of interference with freedom of expression are exhaustively set out in Article 10(2) and include the protection of the health and rights of others, which underpins the creation of this offence. The offence is being introduced to protect the health and rights of those who may be exposed to content or pressures which encourage them to cause themselves serious self-harm (as well as those who may be assisted to cause themselves serious self-harm by other means.)

    c) Necessity of the interference in a democratic society: This limb of the test is also satisfied. There is established ECtHR case law on the need to balance freedom of expression with protecting the rights of others (especially in the Internet context.)

45. In assessing the proportionality of measures intended to protect health and morality, the Court has made it clear that the audience of the speech and the impact on that audience has to be taken into consideration (*Ponson v. France*, Application No. 26935/05). In that case, the Court held that content capable of inciting young people to act in unhealthy ways - in that case consuming tobacco - was a relevant and sufficient reason to justify the interference with the publisher's Article 10 right.

46. This offence is targeted at those who encourage or assist another person to cause themselves particularly serious harm (equivalent to grievous bodily harm); they also have to intend to encourage or assist that person to self-harm to that degree. The offence was set at this level, as recommended by the Law Commission, in order to avoid criminalising those who share information about self-harming for therapeutic or mental health purposes. In that sense, the offence goes no further than is necessary to protect the rights and health of others and is therefore justified.

Offences relating to intimate photographs or films and voyeurism

47. The Bill will repeal two existing voyeurism offences at sections 67(3) and 67A(2) Sexual Offences Act 2003 ('SOA') and introduce five new offences concerning taking or recording intimate photographs or films which show another person without their consent (offences A, B and C), or installing, adapting, preparing or maintaining equipment with the intention to take intimate photographs without the other person's consent (offences D and E). Offences A to C will sit in a new section

66AA of the SOA, and offences D and E will be in a new section 66AC, as inserted by the Bill.

48. Offences A, B and C all include the element of the offence that the offender must intentionally take a photograph or record a film which shows another person (B) in an intimate state and that B does not consent. Offences A and C also require that A does not reasonably believe that B consents. In addition, offence B requires A to act with the intention of causing B alarm, distress or humiliation, whereas offence C requires A to act for the purpose of A or another person obtaining sexual gratification.

49. Offence D requires an offender to install, adapt, prepare or maintain equipment with the intention of enabling A or another person to commit offence A; offence E requires an offender to install, adapt, prepare or maintain equipment with the intention of enabling A or another person to commit offence B or C.

50. Offence A is subject to a defence of reasonable excuse as well as three other exemptions, where (i) the photograph or film in question is (or A reasonably believes that it is) taken or recorded in a place to which the public (or a section of the public) have or are permitted to have access, B has no reasonable expectation of privacy from the photograph or film being taken or recorded, and B is (or A reasonably believes that B is), in the intimate state voluntarily; (ii) the photograph or film in question shows a child in an intimate state, A is a member of the child's family, or a friend of the child, and the photograph or film is of a kind ordinarily taken or recorded by friends and family; and (iii) the photograph or film in question shows a child under 16 (B) in an intimate state and is taken by a healthcare professional acting in that capacity, or otherwise in connection with the care or treatment of B by a healthcare professional. In respect of the reasonable excuse defence, the defendant bears the legal burden (on the balance of probabilities) of proving that they had a reasonable excuse; whereas in respect of the other exemptions, the defendant bears only an evidential burden.

51. The Bill also amends Schedule 2 to the SOA so that where a UK national, UK resident, or a person who meets the residency or nationality requirements, does something outside the UK which, if done in England and Wales, would have constituted an offence under new section 66A(1) or (2), they can be tried in a court in England and Wales.

52. The Bill will also amend Chapter 4 of Part 7 of the Sentencing Act 2020, to ensure that the deprivation order power under section 153 of that Act will extend to photographs and films that relate to Offence A, B or C. It will do so by inserting a new section 154A that will provide that such a photograph or film is to be regarded for the purposes of section 153 as used for the purposes of committing the relevant offence.

53. Sections 75 and 76 of the SOA (evidential and conclusive presumptions) will apply to offences A to C.

54. Additionally, following the creation of four new offences at sections 66B to 66D of the SOA, as inserted by section 188 of the Online Safety Act 2023 ("OSA"), which

relate to the sharing or threatening to share photographs or films which show, or appear to show, another person (B) in an intimate state, the Criminal Justice Bill will amend the OSA in the following limited ways:

a) It amends and extends the exemption in section 66C(1) to capture cases in which the defendant reasonably believed that the photograph or film they shared had been taken in a place to which the public or a section of the public had or were permitted to have access.

b) It amends section 66B to provide that section 76 of the Sexual Offences Act 2003 (conclusive presumptions about consent) apply to an offence under section 66B(1), (2) or (3).

c) It makes the necessary amendments to confer extraterritorial application and jurisdiction in respect of the two more serious sharing offences, and the threat offence, at new section 66B(2), (3) and (4).

55. The proposed amendments engage Articles 5, 6 and 8 and A1P1.

56. Since these measures create criminal offences punishable with imprisonment, Article 5 ECHR is engaged. The measure creates two summary only offences and three either-way offences punishable that carry a maximum of two years' imprisonment.

57. Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary. The proposed penalties for the draft clauses are proportionate to the nature and severity of the offending, any deprivation of liberty resulting from a sentence of imprisonment will not be arbitrary. The penalties are also in line with those for the comparable 'sharing' offences at new section 66B(1) to (3) SOA, as inserted by the OSA, and existing offences in section 67 and section 67A of the SOA. Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard.

58. Article 6 ECHR is engaged by the measures in particular because:

a) There is a reverse burden attaching to the reasonable excuse defence for offence A.

b) The defendant carries the evidential burden attaching to the no reasonable expectation of privacy exemption for Offences A, B and C, and the family and friends and healthcare exemptions for Offence A.

c) They will ensure that the evidential and conclusive presumptions about the absence of consent in sections 75 and 76 SOA apply to Offences A to C, and the conclusive presumptions in section 76 SOA apply to the offences at section 66B(1), (2) and (3).

59. The reverse burden attaching to the proposed clause is compatible with Article 6(2) ECHR. As in *R v Navabi*[7], the circumstances surrounding the taking of the image and the reasons for doing so (i.e. the relevant information) are within the knowledge and possession of the defendant. A defendant wishing to avail themselves of the reasonable excuse defence should therefore be able to provide the relevant information. If the defence imposed only an evidential burden on the defendant, this would require the prosecution to then prove that there was no reasonable excuse, which is disproportionate. Finally, since the maximum penalty for offence A is 6 months' imprisonment, per *Johnstone*[8], the arguments in favour of a reverse burden need not be overwhelmingly compelling.

60. Each defendant will bear the evidential burden of raising sufficient evidence concerning the existence of an exemption (where they apply) to satisfy the court that the issue should be left to the court to decide: see section 101 of the Magistrates' Court Act 1980 (summary trials) and *R v Hunt*[9] (trial on indictment). If the defendant discharges that evidential burden, the legal burden of disproving it will be on the prosecution (see, for example, *Lobell*[10]). This has been held to be compatible with Article 6 (see, for example, *DPP v Wright*[11]).

61. Sections 75 and 76 SOA set out the evidential and conclusive presumptions around the absence of consent or a reasonable belief in consent. Sections 75 and 76 will apply to Offences A, B and C, and section 76 will apply to the offences in section 66B(1), (2) and (3). Whilst evidential and conclusive presumptions engage Article 6 and the issue of presumption of innocence, the presumption of innocence is not absolute: *Falk v. the Netherlands*[12]. An interference with the presumption of innocence must be reasonably proportionate to the legitimate aim sought to be achieved (*Janosevic v Sweden*[13]). The application of evidential and conclusive presumptions to Offences A, B and C, and conclusive presumptions to section 66B(1), (2) and (3) is compatible with Article 6(2), for the following reasons:

    a) The evidential presumption in respect of offences A, B, and C will only be engaged in circumstances where it is plain to the defendant that the complainant would not have been able to give valid consent, since it must be proved both that one of an exhaustive list of circumstances existed and the defendant knew those circumstances existed.

    b) The Defendant will still be able to adduce rebuttal evidence to rebut the evidential presumption: *R v White*[14].

    c) The spirit of section 75 is already used in cases to which it does not technically apply, insofar as directions following the wording of section 75 may accurately

[7] [2005] EWCA Crim 2865
[8] [2003] UKHL 28
[9] [1987] AC 352
[10] [1957] 1 QB 547
[11] [2009] EWHC 105
[12] (66273/01)
[13] (34619/97)
[14] [2010] EWCA Crim 1929

reflect the factual dispute between the complainant's evidence and that of the defendant when it comes to the issue of consent.

d) The conclusive presumption is limited to two very specific scenarios: both require proof that the defendant intentionally deceived the complainant in respect of key issues and therefore it will be obvious that the complainant could not have provided consent to the relevant act. Requiring the Prosecution to prove otherwise would be disproportionate.

e) In distinction to the way in which sections 75 and 76 apply to offences at sections 1 – 4 SOA, it will not be the case that where a presumption is established to apply conviction is inevitable for offences B and C: the Prosecution will still have to prove that the defendant had the necessary *mens rea* when they took, recorded or shared the photo or film before they can be convicted. While this is not the case for offence A or an offence under section 66B(1), the fact that a presumption, when successfully applied, will lead to conviction in those cases mirrors the way sections. 75 and 76 apply in respect of sections 1 – 4 SOA offences, which carry far higher sentences.

62. Both presumptions are therefore confined to reasonable limits and strike the right balance between the rights of the complainant and the defendant. Applying the presumptions is a proportionate means of achieving a legitimate aim.

63. The clause engages Article 8, both in respect of the subject matter of the clause and the imposition of notification requirements in respect of Offences C and E.

64. The subject matter of the clause engages Article 8 given its relation to the privacy of Person B (the person who is shown in the photograph or film). Right to one's image and photographs is a well-recognised element of Article 8; non-consensual taking or recording of an intimate image will go against these protections. As such, we consider that Offences A to C enhance the protection of Article 8 rights. To the extent that the exemptions could be considered to infringe Article 8, our view is that they are justified within Article 8(2) in that they serve to achieve a proportionate approach to what should, and should not, be criminalised. These exemptions strike the right balance between carving out scenarios where criminalisation of behaviour would not be appropriate or legitimate, and ensuring that harmful behaviour is captured by the offences.

65. Offence C is added to Schedule 3 to the SOA, as is Offence E when committed with the intent to enable commission of Offence C, meaning that where certain criteria are met, offenders will be subject to notification requirements under Part 2 of the SOA. Any interference with an offender's Article 8 ECHR rights is justified within the meaning of Article 8(2). Paragraph 150 of the explanatory notes to the SOA refers to the offences in Schedule 3 to the SOA as being "exclusively sexual offences"; both offence C and E are sexual offences, and offence C requires the defendant to act for the purposes of obtaining sexual gratification, and to the extent offence E will be captured by Schedule 3 it requires the defendant to act with the intent that they, or another person, will commit Offence C. There is therefore a clear and rational connection between the offences themselves and the objectives of the

notification requirements so that the imposition of notification requirements in these circumstances is a proportionate means of achieving a legitimate aim.

66. New section 154A will be inserted into the Sentencing Act 2020 ('SA') and will provide that the photograph or film to which the offence A, B or C relates is to be regarded for the purposes of section 153 of the SA as used for the purpose of committing the offence. This will ensure that the court has the power under Chapter 4 of Part 7 of the SA to make an order depriving the offender of the photograph or film in question upon conviction for offence A, B or C. This is necessary to avoid causing additional harm to victims, arising from knowledge that the offender retains the photographs and films that they unlawfully took or recorded, and is therefore in the public interest.

67. The effect of the order will be that the property will be taken into the possession of the police (section 156 of the SA). If a third party has a claim to the property, they may, within 6 months of the date of the order, seek an order of a magistrates' court for return of the property. It will therefore engage A1P1.

68. The measure will mean that the court has the power to make a deprivation order under its existing powers in Chapter 4 of Part 7 of the SA. Deprivation orders under the SA are not to be made as a matter of routine and can only be made when there has been a sufficient investigation to justify a finding that the property is the product of one of the offences and where the court is satisfied that the order is proportionate and justified (*R v Wright-Hadley (Stephen)*[15]). Consequently, not only is the measure itself justified, the courts will apply it in a way which ensures that the power is exercised in a proportionate way.

69. Therefore, to the extent that the measure engages Article 1 of Protocol 1, the interference is considered to be a proportionate means of achieving the legitimate aim of the protection of the rights of others.

Testing of persons in police detention for presence of controlled drugs

70. Clause 15 amends the Police and Criminal Evidence Act 1984 (Part V, and in particular sections 63B and 63C) to confer further powers on the police to drug test persons aged 18 or over on arrest (or persons aged 14 or over after charge) for specified Class B and Class C drugs (the power currently applies to specified Class A drugs). Amendments are also made, to the Drugs Act 2005, to enable persons who test positive for a Class B or Class C drug to be required to attend an assessment (under Part 3 of that Act) as to their drug misuse. The provision is likely to engage Articles 6 and 8 and may engage Article 14 of the ECHR.

71. Article 8 is engaged as the expansion of drug testing for specified Class B and C drugs may constitute an inference with a person's Article 8 rights to bodily and physical integrity (*Peters v Netherlands*[16] and *X v Austria*[17] show that the compulsory taking of a sample, even if of minor importance/interference, engage Article 8).

[15] [2022] EWCA Crim 446.
[16] App. No. 21132/93.
[17] App. No. 8278/78.

72. Whilst the testing in these amendments is not compulsory, a refusal to provide a sample without good cause may result in a criminal offence. Following a positive result on a drug test, an individual may be required to attend an initial or follow-up assessment (under the Drugs Act 2005). Failure to attend, or stay for the duration of, such an assessment is a criminal offence.

73. The Government considers that any interference with a person's Article 8 rights will be in accordance with the law as it will be prescribed in primary legislation, with clear and detailed safeguards. It is necessary and proportionate for the prevention of disorder and crime because it aims to address a person's Class B and Class C drug use which is suspected to contribute to their offence and reduce further re-offending.

74. Article 6 is also engaged as a person who fails to provide a sample for testing without good cause commits a criminal offence; and a person who fails to attend or stay for the duration of an initial or follow up assessment following a drug test of a Class A, B or C drug also commits a criminal offence. Whilst these amendments expand the circumstances in which a person may commit a criminal offence (i.e. for Class B and C drugs), they do not alter the regime in which the criminal offences currently operate. Notably, the relevant legislative safeguards will continue to apply, such as being reminded that refusal to provide a sample is a criminal offence; not being tested more than once in the same period of police detention; not being tested before having seen a custody officer; and the procedural protections assured by the criminal justice process (such as right to legal representation). As such, the measure complies with Article 6.

75. Article 14 may, potentially, be engaged (parasitic on the Article 8 rights) on the basis that use of Class B and C drugs amongst younger people is higher, and so younger people may disproportionately have their right to private life interfered with. Additional safeguards are provided, in the existing legislation, to protect persons aged 14 to 17; such persons may only be tested for specified Class B and C drugs after charge and not on arrest and must take place in the presence of an appropriate adult (section 63B(5A) of PACE) and a person who has not attained the age of 18 cannot currently be referred for an initial or follow up assessment. The Government's position is any such interference is objectively justified as the drug testing may only take place where a person has been arrested and charged for a criminal offence, and the purpose of drug testing is to divert users into drug treatment services and so away from further criminality.

Powers to seize, retain and destroy bladed articles

76. Clause 18 provides the police with a power to seize, retain and destroy bladed articles (any article which has a blade or is sharply pointed[18]), including those lawfully held, if the police lawfully encounter such articles in private property and they have reasonable grounds to suspect that the article is likely to be used in connection with unlawful violence. The provision is likely to engage Articles 6 and 8 and may engage Articles 9 and 14 of the ECHR.

[18] See section 139 of the Criminal Justice Act 1988 in relation to the definition of a "bladed article".

77. The provision permits the seizure of bladed articles, which are otherwise lawfully held, which will interfere with individual's right to peaceful enjoyment of their property (A1P1) and may engage with their private life (Article 8). They may also interfere with individual's right to freedom of thought, religion and belief (Article 9), as some bladed articles may be held for religious reasons – such as the Sikh kirpan (an article of faith which resembles a knife or sword).

78. The Government considers the measures justified as a necessary and proportionate means of combatting and tackling the long-term trend of an increase in knife crime, by enabling items to be seized before unlawful violent acts can occur. The Government's position is that there is no existing alternative means for the police to intercede before harm is caused to take custody of items held in private which are likely to be used for such criminality; this power is therefore necessary to enable the police to prevent that wider harm occurring. Additionally, where an individual has a "good reason" for possessing the item (as for example is the defence for possession of bladed articles in public under the Criminal Justice Act 1988), such as for religious reasons, it is expected the police will take this into account in determining whether the item is likely to be used in violence (i.e. it de facto is not because its core purpose in the individual circumstances is for use in religious ceremonies).

79. Additionally, the legislation contains safeguards to ensure the power is exercised in a proportionate way: critically, the threshold test for seizure and destruction is reasonable grounds for suspecting that the article would be likely to be used in connection with unlawful violence if it were not seized (which requires evidence, which may be challenged in any prosecution, as to intended unlawful use); the police will be required to give the individual a notice stating the reason why the relevant article was seized; and appeal routes are available (both to the police through their complaints processes and to a magistrates' court) which may result in the item being returned if wrongfully seized. Where the individual has a "good reason" for possessing the item (such as for religious reasons), the police will take this into account in their determination of whether they have reasonable grounds to suspect that the item will be used to commit unlawful violence if not seized.

80. The Government therefore considers that the power is a proportionate means of achieving the legitimate aim of driving down knife crime and violence, by enabling harmful weapons to be seized before they can be used to commit serious harm and that there are safeguards in place to ensure proportionate application.

81. As to Article 14, it is possible that the police will seize bladed articles from premises in urban areas (where there is a greater prevalence of knife crime) more frequently than from rural areas, which may impact minority ethnic communities. The Government considers the legislation has sufficient safeguards to mitigate disproportionate application. Seizure can only take place where there are reasonable grounds for suspecting that the relevant article is likely to be used in connection with unlawful violence; as such, the basis for the seizure is reasonable suspicion as to use in criminality, not an individual's protected characteristics. Additionally, the police, as public authorities, are bound to act compatibly with the ECHR (by section 6 of the Human Rights Act 1998) and in a non-discriminatory way (by the Equalities Act 2010).

82. An individual's right to fair trial, including the presumption of innocence, is likely to be engaged by the measure (Article 6). The initial decision to seize an item will be made by a police officer having "reasonable grounds" to suspect the item will be used to commit unlawful violence. The Government considers there are sufficient safeguards to meet the requirements of Article 6: the officer must have reasonable grounds (which requires sufficient evidence and/or intelligence on which such grounds can be made out, including for the police to consider any evidence as to alternative lawful use the individual puts forward), and the provisions will provide a bladed article owner with routes for redress – via the police's own complaint's procedure or via an appeal to a magistrates' court. Therefore, the Government does not consider this measure to be incompatible with the presumption of innocence.

Power to enter and search premises for the purposes of seizing stolen goods

83. Clause 19 provides the police with the power to enter premises and to search for and seize stolen goods[19]. It will be exercisable in relation to domestic/private and business premises. The power is intended to assist in detecting and preventing crime and protecting the property rights of theft victims, by enabling police to act expediently within the 'golden hour' while stolen property can still be located before being further disposed of. This measure engages Articles 8 and A1P1, and in some circumstances may engage Article 10.

84. As to Article 8, the power will interfere with the right to respect for the 'home' (established to include business premises[20]) and in some circumstances private life and/ or correspondence. In some contexts exercise of the power will interfere with the rights of third parties in addition to those of criminal suspects. Article 10 rights may be engaged where journalistic material is seized, particularly that subject to source confidentiality[21]; however, this is likely to only occur in very limited circumstances (such as if a journalist is subject to an allegation that they have stolen an electronic device). Where property is seized in exercise of the power, it is likely to constitute State control of property and/ or deprivation within the scope of A1P1 and thus interfere with this right.

85. Entry and search powers with no requirement for pre-exercise judicial scrutiny[22] and those which may impact on Article 8 rights of innocent third parties[23] such as purchasers in good faith of stolen goods, have been subject to intense scrutiny by the ECtHR. The provision is clear and ensures that the circumstances and conditions required for the power's exercise, and the procedure to apply for delivery of the property, are foreseeable. To aid in ensuring proportionate application, in respect of Article 8, 10 and A1P1, the provision contains a number of safeguards:

    a) a requirement for reasonable belief on the part of the police, regarding both the nature of the property (stolen goods or theft offence evidence) and its location;

[19] Stolen goods are as defined by sections 24 and 24(A)(8) to the Theft Act 1968.
[20] E.g. *Buck v Germany (*41604/98).
[21] E.g.. *Vinks & Ribicka v Latvia (28926/10)*
[22] E.g. *Vinks & Ribicka v Latvia (28926/10)*
[23] E.g. *Ratushna v Ukraine (*17318/06)

b) limitation of the exercise of the entry and search powers to circumstances where the police reasonably believe that obtaining a warrant would frustrate the purpose of the entry and search;

c) the exercise of the power is to be authorised at police Inspector level at minimum;

d) the police constable exercising the power must be in uniform and identify themselves and the reasons for exercising the power;

e) the power must be exercised at a reasonable hour unless this would frustrate the purpose, and within 24 hours of authorisation;

f) a carve out for legally privileged material, excluded and special procedure material[24] as defined in PACE 1984, which will be subject to the seizure and sift powers in Part 2 of the Criminal Justice and Police Act 2001, which include provision for the return of such material when discovered during the sift;

g) limited scope of the search (the extent reasonably required to locate specific stolen property);

h) force used must be necessary and reasonable;

i) a written record must be made of the grounds for exercise of the power, and anything seized;

j) the seizure power is narrower than that in PACE 1984 section 19(2)-(4) (which will be excluded in relation to police exercising the entry and search power), focusing on stolen goods/ theft offences only;

k) existing provision for the rightful owner of property to apply to have property in police possession restored to them applies.

86. The power is intended to protect the public interest inherent in protecting the A1P1 rights of theft victims (to their own property) and detecting and preventing crime. The Government considers the legislative safeguards will be sufficient to protect against abuse and arbitrariness and protect legally privileged and other sensitive material (including journalistic material) from intrusion. The power will be exercised in preference to an application for a judicial warrant only when reasonably deemed necessary in all the circumstances. An individual may, after the event, challenge the exercise of the power by the police via the police complaints process and/or by way of judicial review.

Suspension of internet protocol addresses and internet domain names

87. Clause 20 and Schedule 3 deal with the power for investigative agencies to apply to the court for an order that a third-party entity involved in the provision of internet protocol (IP) addresses or internet domain names should prevent access to them.

[24] The latter two categories include journalistic material and business records held in confidence.

The power is aimed at preventing use of servers and devices that are being used to facilitate serious crime, for example a server that is being used as a command-and-control node to distribute malware. The measure may engage Articles 8, 10 and A1P1.

88. Suspension of an IP address or domain name will mean that the user of that domain name (e.g. website) or device linked to the IP address will no longer be able to access communications intended for it, therefore impacting on a person's correspondence and their ability to communicate through any device linked to that IP address or domain name. It is considered a justified interference with Article 8 rights as necessary and proportionate for the prevention and detection of crime, given the suspension would disrupt criminal activity by preventing malicious communications from reaching intended victims, infecting devices with malicious software or controlling devices already infected. A court must consider the suspension is necessary and proportionate to prevent serious crime. Proportionality considerations would include innocent users who might be affected by the suspension or other services using the domain or IP address. Persons affected by the order can apply to the court for its variation or discharge of the order. The Government has assessed this measure to be compatible with Article 8 ECHR.

89. Preventing access to the use of an IP address or domain name could stop a person being able to communicate information and ideas externally on the internet. To the extent that this power engages Article 10, it is justified as necessary and proportionate for the prevention of disorder or crime. Interference would only be justified where communications from the relevant domain or IP address were being used for criminal activity not to curtail legitimate freedom of expression.

90. A person will have paid for the exclusive right to use a domain name and a domain name is considered to be intangible personal property. Suspension of the use of the domain will therefore engage Article 1 protocol 1. Similarly, a person provided with an IP address will have paid for the provision of internet access and the IP address will enable such activity. Suspension of the IP address linked to a device will mean that such access is restricted. Interference with this right is considered necessary and justified for the public interest in protecting victims of crime by disrupting connectivity with, and infection of, devices belonging to third parties.

91. There is a limited pool of IPv4 addresses and therefore any suspension will have an impact on the number of addresses that an IP address provider has available to allocate. The provider may have to purchase replacement IP addresses to compensate for the suspension. However, interference is considered justified as failure to suspend an IP address for an adequate amount of time could impact future users of the IP address or if re-assigned to the same customer could result in its re-use in crime. Interference on the IP address provider's rights under Article 1 Protocol 1 will be limited to what is necessary to disrupt the criminal activity. The suspension period will need to be justified on application for an order and the IP address will remain with the provider which will be able to re-allocate it once the suspension period ends.

Access to driver licence records

92. Clause 21 makes changes to the existing regime of police and law enforcement access to the Driver and Vehicles Licensing Agency ('DVLA') driver register by replacing section 71 of the Criminal Justice and Court Services Act 2000 ('the 2000 Act'). This expands access for police and other law enforcement bodies to DVLA databases.

93. Article 8 is engaged as the protection of personal data is of fundamental importance to a person's enjoyment of the right to respect for private and family life. The interference will only arise at the *point of access* to specific data sets contained within the DVLA database (i.e. mere right of access doesn't in itself infringe individual's rights, as no personal data is yet being processed). The purpose of accessing the data will be to assist in the prevention and detection of crime. A number of safeguards will apply to the access:

    a) access to the driver register will be limited to policing or law enforcement purposes only;

    b) the Secretary of State may:

        i. set minimum standards, by regulations, for the handling and use of DVLA information by authorised persons in designated police forces or other bodies;

        ii. issue a Code of Practice relating to the access and use of the relevant information. All organisations will be required to have due regard to any such code of practice;

        iii. specify, by regulations, the particular purposes for which authorised persons can access the DVLA driver register;

        iv. prohibit a body from using the data for a specific purpose, or at all, in the event that there are concerns about that body's appropriate use of the data, such as following a poor inspection and a subsequent failure to improve.

94. The Government therefore considers the provision a proportionate means of achieving the legitimate aim of preventing crime and disorder, and that there are safeguards in place to ensure proportionate application.

Powers to compel attendance at sentencing hearings

95. Clause 22(1) inserts two new sections into the Sentencing Act 2020: new section 41A (*power to order offender to attend*) and new section 41B (*power to order production of offender*).

    <u>New section 41A (power to order offender to attend)</u>

96. New section 41A provides that the Crown Court may order an offender remanded in custody awaiting sentencing to attend their sentencing hearing. If the offender fails without reasonable excuse to comply with such an order, the offender commits a contempt that may be punished as if it were criminal contempt of court. This provision only applies to offenders being sentenced for an offence punishable by a life sentence. The provision applies to both adult and youth offenders but, in keeping with general penalties for contempt, a custodial penalty is not available for offenders aged under 18.

97. Ordering an offender to attend their sentencing hearing with a potential custodial penalty for non-compliance engages Article 5 and Article 6.

98. Article 5 is engaged because the measure may result in the further deprivation of an offender's liberty: as the measure is punishable as a criminal contempt, it may attract a custodial penalty of up to two years.

99. Article 6 is engaged because the offender is subject to criminal proceedings within the meaning of Article 6 in respect of the index offence and so entitled to its safeguards from the point of charge until the determination of any appeal. Further, the determination of the criminal contempt (for non-attendance) is itself a further criminal charge for the purposes of Article 6, to which the criminal safeguards apply.

100. Any additional deprivation of liberty for non-attendance will be in accordance with a procedure prescribed by law, namely the law of contempt (as amended by the measure) with its associated, well-established procedural safeguards. Any detention will fall within the authorised deprivation specified in Article 5(1)(a) because it will follow after a conviction by a competent court (in this case, a finding of criminal contempt). Further or alternatively, it will fall within the authorised deprivation specified in Article 5(1)(b) because it will be for non-compliance with a lawful order of a court (in this case, an attendance order).

101. The use of the contempt jurisdiction to punish non-attendance will make use of the advanced procedural safeguards that have been developed and which help ensure compatibility with Article 6. For this reason, the Government considers the clause to be compatible with Article 6.

<u>New section 41B (power to order production of offender)</u>

102. New section 41B provides that the Crown Court may make an order to a prison director, governor, or escort officer, to produce any offender who has refused or is likely to refuse to attend their sentencing hearing. Operational prison and escort staff may use reasonable force to produce the prisoner in these circumstances where the force is necessary and proportionate. This provision only applies to offenders aged 18 or over.

103. Article 3 (prohibition of inhuman or degrading treatment) is relevant when considering the use of force on a prisoner, which is an absolute right. Article 8 (right to bodily integrity and respect for private life), which may only be interfered with in

accordance with the law and where it is necessary under Article 8(2), is also engaged.

104. The Government considers that this provision is compatible with Article 3 and Article 8 because any use of force under this provision must be necessary, reasonable and proportionate. This is expressly stated in the clause, which also makes clear that prison authorities are only required to do all that is reasonable to secure attendance.

Child sex offences: grooming aggravating factor

105. Clause 23 makes grooming a statutory aggravating factor for specified child sex offences. When assessing the seriousness of certain specified child sex offences, the court will be required to consider grooming to be an aggravating factor. The scope of the new statutory aggravating factor is broader than existing references to grooming in Sentencing Guidelines. As a result, it is expected to result in longer sentences for relevant offenders.

106. The new aggravating factor will apply to all offenders convicted after commencement.

107. Since the measure is expected to result in longer sentences for certain offenders in respect of specified child sex offences, Article 5 is engaged. Any additional deprivation of the liberty, however, falls within Article 5(1)(a) (deprivation of liberty following conviction by a competent court) and is therefore permitted. Furthermore, the court retains ultimate discretion regarding the weighting of aggravating factors and in setting the appropriate sentence based on the individual circumstances of the case. Accordingly, this provision does not give rise to a risk of arbitrary deprivation of liberty. Sections 3 and 6 of the Human Rights Act 1998 will also always apply to discretionary sentencing exercises carried out by judges. For these reasons, the clause is considered to be compatible with Article 5.

108. This measure has retrospective effect as the changes are to apply to those persons who may have committed offences before commencement but who have not yet been charged, convicted or sentenced. Article 7 is not breached as the maximum penalty for the index offences that may be imposed before and after commencement is unaffected (in compliance with the principles in *Coeme and Others v Belgium*[25] and *R v Uttley*[26]). For these reasons, the Government considers this measure to be compatible with Article 7.

109. Article 14 is engaged as, read with Article 5, it may give rise to a situation where:

a) men are treated less favourably than women as men; and

b) those sentenced under the new provision are treated less favourably than those sentenced previously.

[25] (2000) Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96
[26] [2004] UKHL 38

110. Regarding (a): men are more likely to be impacted by the new aggravating factor because they are overrepresented among the sex offender population. Any resulting discrimination, however, is justified as a proportionate means of achieving the legitimate aim of appropriate punishment of those who commit grooming offences (*see R (A and Others) v Secretary of State for the Home Department and another*[27]).

111. Regarding (b): offenders cannot compare themselves to those sentenced under a different sentencing regime (see *Minter v UK*[28]) and in any event any resulting discrimination would be justified (see *R v Docherty*[29]).

112. For these reasons, the clause is considered to be to be compatible with Article 14.

Murder: end of relationship aggravating factor

113. Clause 24 clause makes it an aggravating factor when sentencing for murder if the murder is connected to (i) the end of the offender's relationship with the victim; (ii) the victim intending to bring about the end of that relationship; or (iii) the offender's belief as to those things. This measure will apply to both adult and youth offenders and will apply to murders committed after the commencement of the provision.

114. The court is required to consider aggravating factors when setting the minimum term of imprisonment to be served by convicted murderers prior to their consideration for release on licence by the Parole Board. Accordingly, it is expected to result in a longer minimum terms being set for certain murderers.

115. Since the measure is expected to result in longer minimum terms of imprisonment for certain offenders, Article 5 is engaged. Any additional deprivation of liberty, however, falls within Article 5(1)(a) (deprivation of liberty following conviction by a competent court) and is therefore permitted. Furthermore, the court retains ultimate discretion to determine the minimum term as it sees fit by reference to the overall seriousness of offending and the circumstances of the offender. Accordingly, this provision does not give rise to a risk of arbitrary deprivation of liberty (see *R v Offen*[30]; *R v Lichniak*[31]). Sections 3 and 6 of the Human Rights Act 1998 will also always apply to discretionary sentencing exercises carried out by judges. For these reasons, this measure is considered to be compatible with Article 5.

116. Article 14 is engaged as, read with Article 5, it may give rise to a situation where:
   a) men are treated less favourably than women as men; and

   b) those sentenced under the new provision are treated less favourably than those sentenced previously.

[27] [2020] EWCA Civ 130 at [21] to [29] and [51]
[28] (2017) 65 EHRR SE6 at [68]
[29] [2016] UKSC 62 at [63]
[30] [2001] WLR 253 at [95] to [99]
[31] [2002] UKHL 47 at [16]

117. Regarding (a): men are more likely to be impacted by the new aggravating factor. This is because men are more likely to commit murder generally, and specifically murder connected to the end of a relationship. Any resulting discrimination, however, is justified as a proportionate means of achieving the legitimate aim of appropriate punishment of those who commit murder connected to the end of a relationship (*see R (A and Others) v Secretary of State for the Home Department and another*[32]).

118. Regarding (b): offenders cannot compare themselves to those sentenced under a different sentencing regime (see *Minter v UK*[33]) and in any event any resulting discrimination would be justified (see *R v Docherty*[34]).

119. For these reasons, this measure is considered to be compatible with Article 14.

Transfer of prisoners to foreign prisons

120. Clauses 25 to 29 deal with measures to enable the transfer of UK prisoners (including those on remand) to a prison in another jurisdiction in order to serve all or part of any court-ordered detention abroad. The clauses in the Bill facilitate the transfer of prisoners in England and Wales to the overseas jurisdiction and make provision to ensure oversight of any agreement with the foreign country under which the UK prisoners will be held.

121. The clauses do not set the terms of such agreements which will be international agreements subject to parliamentary process under the Constitutional Reform and Governance Act 2010. Any agreement and operation of that agreement would need to ensure preservation of all ECHR rights of prisoners and would be looking to provide a regime comparable to that of prisons in England and Wales. The clauses themselves:

a) provide definitions and clarify the purpose of the provisions as giving effect to an arrangement for prisoners to be held in a foreign country,

b) allow for the transfer out of England and Wales, and return of prisoners, by operation of a warrant to another jurisdiction in accordance with an arrangement,

c) make provision for the Secretary of State to appoint a person to monitor and report on any arrangement with a foreign country and the transfer and return of prisoners pursuant to that arrangement, and

d) allow for the Secretary of State to make further provision in secondary legislation, including to amend existing primary legislation to facilitate the implementation of any arrangement to transfer prisoners to a prison overseas.

[32] [2020] EWCA Civ 130 at [21] to [29] and [51]
[33] (2017) 65 EHRR SE6 at [68]
[34] [2016] UKSC 62 at [63]

122. Any international agreement and the implementation of the agreement will engage Articles 2, 3, 5, 6, and 8 of the ECHR. However, the clauses in the Bill do not of themselves engage the articles (apart from Article 5 as set out below) While the provisions for transfer in the Bill do not directly engage Article 8, it is recognised that they need to operate in accordance with Article 8 and a prisoner's individual circumstances will be required to be considered in advance of transferring any prisoner to a prison overseas.

123. The actual transfer of prisoners to prisons overseas engages Article 5 because prisoners will be in custody serving their sentence throughout transfer (as well as when imprisoned overseas under the agreement). However, the measure falls within the authorised circumstances prescribed by Article 5(1) where deprivation of liberty is lawful, namely detention after conviction of a competent court, and the detention of a person remanded into custody for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence in accordance with Article 5(1)(c)). Article 5 is not breached by the proposed measure as it is solely for the purpose of the transfer of prisoners to prisons overseas, and their detention at all times will be in accordance with Article 5(1)(a) or 5(1)(c).

Extension of polygraph condition to certain offenders

124. Section 28 of the Offender Management Act 2007 ("the 2007 Act") enables the Secretary of State to impose a polygraph testing licence provision on certain offenders released on licence in England and Wales. Clause 31 extends the criteria for polygraph testing to people released on licence, under probation supervision, who have been convicted of murder and are assessed as posing a risk of sexual offending; to the whole envelope of the sentence for those who are sentenced concurrently for a sexual and non-sexual offence; and to offenders sentenced for offending which is considered to be linked to terrorism.

125. Article 5 is engaged by the polygraph provisions of the Bill because offenders being polygraph tested may be recalled to prison as a result of a failure to cooperate with a test or based on evidence adduced from information obtained from a test. However, there is no breach of Article 5, as detention will be in accordance with the sentence of imprisonment as set by the court. The entirety of a determinate sentence prisoner's sentence is decided by the sentencing court and is in accordance with a procedure prescribed by law under Article 5(1)(a), as confirmed in *R (Whiston) v Secretary of State for Justice*[35] ("Whiston") and *Brown v The Parole Board for Scotland and others*[36] ("Brown"), which includes recalls. For extended and indeterminate sentence prisoners, any further detention resulting from recall will be confirmed by the Parole Board in compliance with Article 5.4 and therefore the offender is safeguarded from any arbitrary detention.

126. As part of the right to a fair trial, Article 6 provides for a right not to incriminate oneself. The polygraph provisions in the Bill engage this right as offenders may face sanctions if they fail to cooperate with the test, and information from tests can

[35] [2014] UKSC 39
[36] [2017] UKSC 69

be shared with police where there is lawful authority to do so. Safeguards against any unlawful interference with Article 6 in relation to criminal charges are built into the existing legislation and accompanying policies, preventing unlawful interference with the Article 6 rights of offenders.

127. Article 7 is engaged by the polygraph measures, as the measures will apply retrospectively to offenders sentenced prior to commencement, including those on licence in the community. However, there is an established body of case-law to the effect that release provisions are the administration of the sentence and do not form part of the penalty for the purposes of Article 7, and both the domestic courts and the ECtHR have consistently drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'implementation' or 'enforcement' of a penalty – see Uttley v UK[37], Csoszanski v Sweden[38], and M v Germany[39], R(Uttley) v Secretary of State for the Home Department[40].

128. Polygraph conditions are a licence condition and are therefore part of the enforcement of the sentence handed down by the court and are not a new or additional penalty on the offender, and therefore Article 7 is not breached.

129. Mandatory polygraph testing engages Article 8, but it is the Government's position that any interference with an offender's rights by imposition of this condition is justified in pursuit of a legitimate aim: namely, that it is necessary in a democratic society in the interests of public safety, for the prevention of crime/disorder, and for the protection of the rights and freedoms of others. Polygraph testing has been proven to be effective in managing the risk posed by offenders convicted of sexual and terrorist offences, and it is the Government's intention that the condition will only be imposed on offenders who are assessed as high or very high risk of serious harm.

130. Information from polygraph testing may be shared with partner agencies such as the police and other listed agencies, in accordance with section 14 of the Offender Management Act 2007 or other statutory information-sharing provisions. Owing to the sensitivity of polygraph testing information, such information-sharing will be conducted in strict compliance with the legislative scheme, in compliance with the Data Protection Act 2018 to ensure it is proportionate, lawful and necessary.

131. Although Article 14 should be considered, since the polygraph measures fall within the ambit of other Convention rights, the Government does not consider that these measures breach the Article.

132. The Government does not consider that the cohorts affected by these measures have a protected "status". Offenders will be subject to the polygraph condition either due to the gravity of their offending or to the nature of their sentencing, neither of which the Government considers relevant statuses. Prisoners treated differently due to the category of offence they have committed

[37] (Application No. 3694/03)
[38] (Application No. 22318/02)
[39] (Application 19359/04)
[40] [2003] EWCA Civ 1130

are not protected by Article 14, and if a category of offence is chosen due to the gravity of offence, this cannot be an "other status" (see R (Khan) v Secretary of State for Justice[41] and Gerger v Turkey[42]). Although the domestic courts have applied a generous interpretation of the meaning of "status" (R (Stott) v SSJ[43]), and have also held that different cohorts of prisoner can have a relevant "status" (Clift v the United Kingdom[44]), the Government's position is that to confer "other status" on a group there must still be an identifiable characteristic distinguishing them from another, and that status must be independent of the treatment complained of.

133. In any event, these measures are objectively justified on the grounds of public safety, the prevention of crime and disorder, and the protection of the rights and freedoms of others (see R (C) v Ministry of Justice[45]). Testing will only be imposed on offenders where the polygraph condition is necessary and proportionate in order to manage them in the community.

Confiscation of assets

134. Clause 32 and Schedule 4 deal with the confiscation of the proceeds of crime and associated amendments to Part 2 of the Proceeds of Crime Act 2002 ("POCA"). The measures implement a number of recommendations in the Law Commission's report *Confiscation of the Proceeds of Crime After Conviction: A Final Report*[46], and are designed to ensure that the confiscation regime can more effectively deprive criminals of the benefit of criminal conduct, whilst also ensuring that the regime is more flexible, realistic and proportionate. They engage Articles 8 and A1P1 of the ECHR. Consideration is also given to Article 6.

135. These provisions affect the existing confiscation regime in POCA which engages the A1P1 right of the offender and potentially of third parties (in particular, the provisions on confiscation orders and restraint orders). The purpose of that confiscation regime is, fundamentally, to deprive offenders of the benefit of crime. They constitute an interference in the qualified right to peaceful enjoyment of possessions (*Phillips v UK*[47]) because the orders require offenders to divest themselves of interests in property (including money) so that they may pay to the State a sum equivalent in value to their benefit from crime.

136. Part 2 of POCA does not currently contain a provision which sets out an overarching objective to which the courts should have regard during confiscation proceedings. Any objectives that the court should bear in mind when exercising its powers in connection with confiscation are understood largely to derive from two sources, namely the "legislative steer" in section 69 of POCA[48] and case law. That said, section 69(1) provides, in broad terms, that the section applies to: restraint

[41] [2020] EWHC 2084 (Admin)
[42] (application no. 24919/94 1999 [GC])
[43] [2018] UKSC 59
[44] [2010] 7 WLUK 387
[45] [2009] EWHC 2671 (Admin)
[46] Confiscation of the proceeds of crime after conviction: a final report (hyperlink).
[47] *Phillips v UK* App No 41087/97.
[48] The pre-Proceeds of Crime Act "legislative steers" can be found in the Drug Trafficking Offenders Act 1986, s 13(2); Criminal Justice Act 1988, s 82(2); and Drug Trafficking Act 1994, s 31(2).

orders, search and seizure powers and the appointment of and powers that may be granted to receivers. It does not provide a steer as to the factors to consider when imposing confiscation orders under section 6 of POCA.

137. In 2020, the Court of Appeal observed in *R v Andrewes* that "the 2002 Act proffers no criteria by reference to which an assessment of disproportionality for the purposes of making a confiscation order, is to be made"[49]. On the basis that a proportionality assessment necessitates statutory objectives against which the measures can be assessed, the Government has accepted the Law Commission's recommendation that the confiscation regime in POCA should include a clear objective within legislation. Further, it accepted their recommendation that the aim of POCA 2002 is "to deprive criminals of the proceeds of their criminality"[50].

138. Paragraph 1 of Schedule 4 to the Bill thus amends POCA so as to include a "principal objective" with respect to the exercise of powers under Part 2 of that Act. That principal objective is the deprivation of the defendant's benefit of criminal conduct, so far as within the defendant's means.

139. In a few instances, the ECtHR has specifically dealt with third-party interests affected by confiscation proceedings. When third-party interests are at stake, the ECtHR assesses the lawfulness of the interference with property rights by following the general approach explained above.

140. It is evident from ECHR case law that a fundamental feature of proportionality is "procedural".[51] The ECtHR is usually satisfied that a confiscation measure is proportionate if the third party is afforded meaningful opportunities to challenge the confiscation of their property before national courts. Put simply, a procedure must exist at national level allowing third parties to challenge confiscation measures affecting assets in which they have an interest.

141. Section 10A of POCA gives the court the power to make a determination as to the defendant's (and any relevant third party's) interest in property for the purposes of determining the defendant's benefit figure and available amount. This determination is appealable by any third party to the Court of Appeal pursuant to new section 67G of POCA as inserted by paragraph 32 of Schedule 4 to the Bill.

142. It follows therefore, that the proportionality of confiscation orders as they apply to third parties is subject to appropriate scrutiny by way of the appeal and review mechanisms as they exist and as contained in the Bill.

143. Proportionality demands that the calculation of benefit and of the recoverable amount accurately reflect the defendant's benefit from crime and their ability to repay that benefit. To assist in that assessment:

a) Paragraph 5 of Schedule 4 provides that the recoverable amount must be determined taking into account property seized or otherwise disgorged to the

[49] *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [78].
[50] *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [81] (emphasis added).
[51] See, for example: *Andonoski v the former Yugoslav Republic of Macedonia*, paras 34-41; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*, paras 43-53; *Yaşar v Romania*, paras 60-66.

State. This ensures that a confiscation order is not made in respect of property for which the State has already accounted.

b) Paragraph 14 of Schedule 4 allows for subsequent downward reconsideration of the confiscation order where the value of an asset identified in the original confiscation order realises a lower amount than its original valuation. This reconsideration would reduce both the assessment of the defendant's "available amount" and their overall assessed benefit, so as to prevent a defendant from being exposed to continuing liability when they have already satisfied the confiscation order.

144. A restraint order is intended to prevent realisable property being dissipated or put beyond the reach of the court before a confiscation order is made or enforced. It works by prohibiting any person from dealing with any realisable property specified in the order[52]. In paragraph 25 of Schedule 4, the Bill places the "risk of dissipation" test on a statutory footing. This clause also provides a list of factors to which the court may have regard when determining the risk of dissipation.

145. The effect of these measures it that it will be clearer, on the face of legislation, when it will be necessary and proportionate to interfere with a defendant's A1P1 rights.

146. As to Article 6 of the ECHR, section 10 of POCA provides that a number of assumptions are to be made by the court in determining the benefit from criminal conduct. This engages Article 6(1) (right to fair trial), which applies throughout criminal proceedings including confiscation proceedings[53].

147. Section 10 of POCA provides that, if the court has determined that the defendant has a criminal lifestyle, it must make four assumptions in calculating the value of benefit (that is, the offender's benefit from crime). The criminal lifestyle assumptions require the defendant to account for the last six years of financial activity, to prove that it does not represent benefit from crime. There is no discretion to disapply these provisions under the existing law (though Schedule 4, para 2 of the Bill provides for such discretion).

148. There are currently two ways in which the defendant may seek to disapply the criminal lifestyle assumptions: by adducing evidence to demonstrate that the application of an assumption would be wrong, and by demonstrating that the application of an assumption would lead to a serious risk of injustice.

149. Section 10(6)(b) of POCA states that the court must not apply one of the assumptions if "there would be a serious risk of injustice if the assumption were made". Case law has construed this provision particularly narrowly, and it is now largely concerned with preventing double counting,[54] rather than more general considerations of justice. Further, defendants often struggle to provide sufficient

[52] Proceeds of Crime Act 2002, s 41.
[53] Phillips v UK App No 41087/97, para 39.
[54] *R v Harvey* [2015] UKSC 73, [2017] AC 105; although the courts appear to have recognised the potential for wider application of the serious risk of injustice test (see *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [25]).

documentary evidence to meet the reverse burden. Whilst the clauses in the Bill do not remove the reverse burden, they do enhance the protection of an offender's Article 6(1) rights.

150. Assumptions by way of reverse burden have long been held to be a "fair and proportionate response to the need to protect the public interest."[55]. Nonetheless, to assist courts, the Bill contains a number of clauses clarifying and refining the application of the criminal lifestyle assumptions:

a) Firstly, paragraph 2 of Schedule 4 provides that prosecutors should have discretion in requesting that the criminal lifestyle assumptions be applied. This will, in appropriate cases, avoid the need for extensive, costly and intrusive investigations at the beginning of the confiscation process.

b) Secondly, paragraph 3 of Schedule 4 further defines the "serious risk of injustice" test under section 10(6)(b) of POCA to ensure that it is not construed unduly narrowly (i.e. not limited to the issue of double counting).

151. Paragraph 30 of Schedule 4 provides that the defendant in restraint proceedings will not be entitled to an order for costs unless the prosecution has acted unreasonably in making or opposing the application in restraint proceedings or has acted improperly in the course of proceedings. This departs from the principle that costs incurred must be met by the losing party, regardless of the reasonableness of the application.

152. The Court has held that the right of access to a court is not absolute but may be subject to limitations – see *Ashingdane v UK*[56]. Such limitations are within the State's margin of appreciation.

153. The Government does not consider that restraining a person's assets under Part 2 of POCA engages Article 6(1). As noted above, the restraint procedure – which is subject to statutory conditions and judicial oversight – allows the court to prevent the dissipation of assets that could be used for the purpose of satisfying any confiscation order that has been or may be made against the defendant. The restraint procedure does not provide for any permanent deprivation of property. Additionally, where a confiscation order is made, it does not follow that restrained assets will necessarily be used to pay the order. Further, the restraint orders themselves can allow for legal and reasonable living expenses to be paid from restrained funds.

154. The Government acknowledges the importance of the general principle on costs in ensuring that the right of access to a court is practical and effective. However, in this particular context, adherence to the general principle has the potential to expose enforcement authorities seeking restraint orders to a level of potential costs risk that is likely to impede their operational effectiveness.

[55] *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [8] (Lord Steyn).
[56] (1985) 7 EHRR 528 at §5. 7

155. The ECtHR has acknowledged that public interest-related financial considerations could sometimes play a part in the State's policy to decrease State expenses and that restrictions on the recovery of costs could be justified for the proteciton of the legal order [57]. Whilst the current procedural framework governing costs already permits the court discretion to decide what costs are appropriate and to strike out vexatious litigation, case-law has shown these measures to be narrower and only applicable in exceptional circumstances. The Government therefore considers changes necessary to ensure that prosecuting and investigative agencies acting in the public interest are able to effectively exercise their powers in support of the legitimate aim pursued by the restraint regime, i.e. the deprivation of the proceeds of crime. Those who have benefitted from criminal conduct must not be beyond the reach of law enforcement because they have extensive wealth; this is counterproductive to the aims of the restraint and confiscation regimes and POCA generally.

156. Notwithstanding the Government's position that the restraint procedure does not engage Article 6(1), the Home Office considers that the safeguards around restraint orders are and will remain sufficient to ensure that the restraint regime is ECHR compliant.

157. As to Article 8 of the ECHR, there is significant overlap between the scope of A1P1 and the scope of Article 8, since the concept of "home" under the latter provision might fall within the concept of "property" under the former. The approach followed by the ECtHR to evaluate the lawfulness of the interference with article 8 is substantially similar to the approach followed when A1P1 is engaged. However, the level of discretion afforded to States is narrower regarding Article 8 than for A1P1 [58].

158. In *Aboufadda v France*,[59] the ECtHR found that the confiscation of the applicants' house was lawful, since such an interference pursued one of the legitimate aims mentioned in paragraph 2 of Article 8 (namely, the prevention of disorder and crime). In addition, the ECtHR held that the interference was not disproportionate, since national authorities had taken into account the personal circumstances of the applicants, allowing them to remain in the house until they had the possibility to find other accommodation (and in any event until the conclusion of the confiscation proceedings)[60].

159. As noted above with respect to A1P1, the clauses in the Bill are designed to ensure there is a clear relationship of proportionality between the aim of depriving the offender of the proceeds of their criminal conduct and the confiscation measures adopted. Where confiscation involves confiscation of the offender's home, the Court will closely scrutinise the confiscation to avoid unlawful interference in their Article 8 rights. There is scope within the regime for such arguments to be put to the court, which will take them into account.

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[57] See *Černius and Rinkevičius v. Lithuania* and *Stankewicz v Poland* (2007) 44 EHRR 47.

[58] See also *Gladysheva v Russia* App No 7097/10, para 93 and *Ivanova and Cherkezov v Bulgaria App No 46577/15, paras 62 and 76.*

[59] *Aboufadda v France* App No 28457/10.

[60] *Aboufadda v France* App No 28457/10 paras 38-43.

Serious Crime Prevention Orders

160. Clauses 34 to 37 strengthen the operation of Serious Crime Prevention Orders ("SCPOs") under Part 1 of the Serious Crime Act 2007. SCPOs are civil preventative orders which can impose tailored prohibitions, restrictions and requirements on a person for a period of up to five years to prevent or disrupt their involvement in serious crime. SCPOs may be imposed where a court is satisfied that a person has been involved in serious crime, and it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime. An extensive analysis of ECHR issues was undertaken when the 2007 Act was passed.

Clause 34 - New sections 5B, 5C and 5D of the 2007 Act - electronic monitoring requirements

161. Clause 34 deals with the imposition of electronic monitoring on individuals subject to an SCPO. The physical wearing of an electronic monitoring tag and the collection of data of an individual's whereabouts will interfere with an individual's Article 8 rights.

162. The Government considers that the imposition of electronic monitoring is part of its positive obligations to prevent serious crime and it is a necessary and proportionate measure. There are legislative precedents for imposing electronic monitoring in the absence of a conviction. Electronic monitoring will improve the effectiveness of SCPOs which are intended to disrupt, prevent and deter individuals' involvement in serious crime by giving law enforcement authorities the capabilities to monitor and enforce compliance with SCPOs more effectively. The benefits of electronic monitoring include:

a) the effective and low-cost monitoring of conditions of SCPOs;

b) a swifter response to breaches through the provision of real-time data;

c) helps provide early indicators of possible recidivism;

d) helps reduce the risk of offending through enabling rehabilitation;

e) helps reduce the risk of offending through the greater threat of detection; and

f) helps the police quickly eliminate or implicate suspects from their enquiries.

163. An independent court will be responsible for imposing the requirement which will consider factors including the risk the individual poses to the public, the nature of the crimes, the individual's personal circumstances (for example, medical conditions, housing, dependents, and employment), and any other relevant circumstances. Any imposition of electronic monitoring in an SCPO can be discharged or varied by the court and it would be subject to the review of the appellate courts.

164. Any data obtained through electronic monitoring will only be processed for specified explicit and legitimate purposes. Given the public interest in disrupting and preventing serious crime and the safeguards involved in imposition of an SCPO, the Government considers introducing electronic monitoring by means of an SCPO is compatible with Article 8.

Clause 36 – section 15A and 15B of the 2007 Act - notification requirements

165. The notification requirements will require the individual who is subject to a SCPO to notify the police of a number of private details, including their name and address, contact details, identifying information and financial information. These requirements are already capable of being imposed by the courts: sections 5(3) and 5(5) of the 2007 Act, provide examples of prohibitions, restrictions and reporting requirements that may be imposed on persons by a SCPO, which include this information. This measure is therefore standardising the information available to law enforcement agencies. Safeguards will be introduced to prevent duplication of notification requirements, where a person is already subject to notification requirements under another Act or as part of their licence conditions.

166. The collection and storage of the personal data is relevant and necessary because it contributes to ensuring there are records to effectively monitor and enforce the SCPOs which is directly linked to the purpose of preventing serious crime. The police need details such as names, address and identification to enable the effective monitoring of compliance with the SCPO.

167. The Government considers that the notification requirements strike a fair balance between competing public and private interests and that appropriate safeguards are in place. The Bill sets out clearly what information will be required to be notified. The subject has the right to apply to discharge an SCPO in which case the notification requirements will no longer apply. Police forces who hold the data will also be required to process the data in accordance with the Data Protection Act 2018.

168. As such, the Government considers that interference with Article 8 rights is justified in the interests of prevention of crime.

Nuisance Begging and Nuisance Rough Sleeping

169. Clauses 38 to 64 deal with nuisance rough sleeping and begging by providing for a range of civil preventative notices and orders, police direction powers and new offences. They will replace the outdated provisions of the Vagrancy Act 1824 (the repeal of which was provided for by the Police, Crime, Sentencing and Courts Act 2022). The measures seek to prevent begging and rough sleeping that causes a nuisance, where there is a negative impact on the public and businesses, including where there is distress or intimidation of the public or where it poses a health and safety risk. They do so by providing a range of tools to enforcement authorities enabling them to seek to address the negative impacts (for example by directing persons away from a locality or imposing positive or negative requirements on them through the civil preventative notice and orders regime) and, where necessary, taking enforcement action in respect of the new offences.

170. These clauses engage Articles 6 and 8, and may engage Articles 9, 10 and Article 1, Protocol 1 of the ECHR.

171. The clauses provide for:

a) An authorised person (police and local authorities) to direct a person who is nuisance begging or nuisance rough sleeping to leave a particular locality for up to 72 hours;

b) An authorised person to give a person who is nuisance begging or nuisance rough sleeping a nuisance begging prevention notice or nuisance rough sleeping prevention notice. These civil preventative notices may require a person to do, or not do, specified things for the purpose of preventing the nuisance behaviour. Breach of a notice is a criminal offence;

c) A court to issue a nuisance begging prevention order or nuisance rough sleeping prevention order. These civil preventative orders may require a person to do, or not do, specified things for the purpose of preventing the nuisance behaviour. Breach of an order is a criminal offence; and

d) Offences of engaging in nuisance begging, arranging or facilitating begging for gain, and trespassing (on a premises or enclosed area) with intent to commit a criminal offence.

<u>Nuisance begging and nuisance rough sleeping prevention directions, notices and orders</u>

172. The directions, notices and orders will affect individuals who are nuisance begging or rough-sleeping, and as such, engage Article 8 ECHR. The ECtHR has held (in *Lacatus v Switzerland*[61]) that Article 8 encompasses human dignity and individuals' way of life where it is carried on to ensure survival (i.e. to overcome an inhuman or precarious situation). Additionally, Article 8 protects the right to private and family life. In so far as the measures apply to any individual who is destitute, or using a tent for shelter, they therefore engage Article 8.

173. The notices and orders may also engage Articles 9 (right to freedom of thought, conscience and religion) and potentially Article 10 (freedom of expression) if, for example, the positive or negative requirements they impose, or direction to leave an area, impact on individual's abilities to participate in religious observance or protest. In so far as a requirement or direction compels a person to do something in relation to their property (such as to move it from location A to B), Article 1 of Protocol 1 ('A1P1') may also be engaged.

174. To be compatible with Article 8, 9, 10 or A1P1 the interference must pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. The Government consider these policies will combat crime, disorder and the social ills associated with nuisance rough sleeping and begging (the legitimate aims of

[61] Application no. 14065/15 (19 January 2021).

the prevention of disorder or crime, the protection of the rights and freedoms of others and the protection of health and morals). The provisions are intended to protect the public from the disruptions and distress, and any health or safety risks, which arise from nuisance rough sleeping and begging.

175. The measures are prescribed by law and sufficiently foreseeable (as set out in the legislation). They contain safeguards to ensure that they are applied proportionately.

a) The measures only apply to nuisance begging and nuisance rough sleeping. Nuisance rough sleeping captures conduct which causes (or is capable of causing) damage, disruption, harassment or distress or creates a health and safety or security risk. Nuisance begging captures conduct which has caused or is likely to cause harassment, alarm or distress; a person to reasonably believe they or another may be harmed or property may be damaged; disorder; or a health and safety risk; it also captures begging which occurs in localities which are likely to cause harassment, alarm or distress, public order risks or significantly infringe the rights of others, such as on public transport, at or near ATMs, or where persons are dining.

b) The measures are only available in respect of persons appearing to be aged 18 or over.

c) The direction powers can only require a person to leave a locality for a maximum period of 72 hours and a notice setting out why the person was deemed to have been nuisance begging or rough sleeping must be provided to the individual.

d) The notices can impose requirements to do or not do specified things within specified periods. The requirements must be reasonable for the purpose of preventing the person from engaging in nuisance begging or rough sleeping and, so far as practicable, avoid interference with work or education and conflict with any court orders. They can last for a maximum of three years. The individual must be provided with a notice setting out various details, including the behaviour giving rise to the notice (the nuisance rough sleeping or nuisance begging), the requirements imposed, the consequences of breaching the notice and how any appeal against the notice can be made. Provision exists for appeal, variation and discharge of the notices.

e) The orders, similarly, can only be made by the court following application from an authorised person where a person has engaged in nuisance begging or rough sleeping or failed to comply with a direction or notice. They can impose requirements to do or not do specified things within specified periods. The requirements must be reasonable for the purpose of preventing the person from engaging in nuisance begging or rough sleeping and, so far as practicable, avoid interference with work or education and conflict with any court orders. The court, in accordance with usual procedures, will explain to the individual why the order has been issued, what its terms are and the consequences of breaching the order.

176. Additionally, when issuing a direction, notice or order, the authorised persons (police and local authority) and court will be bound by their duties to act compatibly with the ECHR (under section 6 of the Human Rights Act 1998) and the Equality Act 2010. As such, in directing a person to leave a locality, or imposing requirements on them, they will have to take account of the individual's circumstances and whether the effect of that direction/requirement would interfere with their Convention rights (such as precluding them from religious observance). The requirement must be targeted at the purpose of preventing the person from engaging in nuisance begging or rough sleeping and, as such, will appropriately weigh up the balance of the interests between the individual and the public at large. These are limited and targeted mechanisms for preventing the nuisance and/or societal harms being caused by the begging and rough sleeping. An individual is freely able to choose another place to sleep, or beg, and to do so in a peaceful and orderly manner.

177. The Government therefore considers any interference with Articles 8, 9, 10 or A1P1 arising from the directions, notices or orders to be justified, and the safeguards contained in the legislation will ensure that they are applied in a proportionate way.

178. The notices and orders may also engage Article 6 ECHR, as a determination of a civil right. The provisions contain the fair trial protections required by Article 6. On issuing a notice, the individual must be served with a copy of the notice which states (amongst other things) the behaviour giving rise to the notice, the consequences of failing to comply, and containing information about appealing against the notice. The notice may be appealed against to a magistrates' court, on the grounds that the individual was not engaging in nuisance rough sleeping/nuisance begging, or that there were procedural errors in the notice served. Authorised persons may also vary or discharge a notice if there is a change in circumstances (variation or discharge can only be relaxing in nature; it cannot impose more onerous requirements or extend the specified times for positive requirements). Similarly, an order will be imposed by a magistrates' court which will assure the individual's fair trial rights. The court will consider whether the qualifying conditions are met, and whether requirements to do or not do specified things are reasonable for the purpose of preventing the nuisance begging/rough sleeping. An individual would be provided with an opportunity make representations on each of these points. As such, the Government consider the provisions comply with Article 6 ECHR.

179. Breach of a notice or order is a criminal offence. The Supreme Court has recently reaffirmed, in *Jones v Birmingham City Council*[62], that civil preventative measures which, if breached, can result in criminal convictions can be compliant with Article 6 ECHR. The usual protections available to an individual in respect of criminal investigation and prosecution (such as rights to legal representation and fair consideration of the case by the court etc.) will apply.

<u>Offence of engaging in nuisance begging</u>

[62] 2023 *UKSC 27*

180. Clause 48 creates an offence of engaging in nuisance begging. It only applies to persons aged 18 or over. It is a summary only offence, punishable by up to 1 month's imprisonment or a level 4 fine (£2,500). As set out above, the offence punishes begging which is carried out in prohibited localities (which are identified to pose greater risks of disorder, harm or nuisance) or in a way which causes a nuisance. It replaces the existing offence in England and Wales under section 3 of the Vagrancy Act 1824, which is broader in its terms (and not limited to nuisance begging).

181. As above, Article 8 of the ECHR may be engaged in so far as the offence of nuisance begging applies to persons who are truly destitute (*Lacatus)*. This will be a factual assessment in each case, and the Government notes that state and third-party support (such as financial support available through universal credit to assist with living costs and housing support from the State, or available charitable or familial support) is in many cases available in England and Wales. Systems are in place to materially alleviate any need to beg. Additionally, begging in a way which does not cause a nuisance continues to be lawful; persons can continue to beg in localities other than those prohibited provided that they do so in a way that does not cause harm, distress or nuisance to others, disorder or health and safety risks.

182. The measure pursues the legitimate aims of public order and security, the prevention of disorder or crime, the protection of the rights and freedoms of others, and the protection of health and morals. Criminalisation of nuisance begging will prevent harassment, alarm, distress and nuisance. Persons who beg often adopt a persistent attitude, or harass individuals, and position themselves close to payment stations (such as ATMs, entrances to shops, railway stations and other public buildings). Such behaviour may lead to individuals feeling intimidated or harassed and/or to prompt more or less angry reactions that may degenerate. Additionally, it enables other persons to freely participate in public life, for example in obtaining money from ATMs, attending restaurants, using retail services. It may also protect the rights and freedoms of the beggar by lowering the risk of organised begging (by preventing persons from so begging), and by acting as a disincentive to persons from begging thus assisting them in engaging with State support services. Prohibiting begging which poses a health and safety risk protects the health of others. It is also intended to help drive down wider anti-social behaviour ('ASB') and criminality, including violence and/or disorderly conduct towards persons who are nuisance begging, and incidences of violence and/or ASB between or by persons who are so begging.

183. The Government considers the offence proportionate and necessary. It is not a blanket prohibition on begging, but rather a restriction on "nuisance begging". Additionally, it is one of a suite of tools available to the police (alongside the directions, notices and orders outline above) to deal with such conduct. The police and local authorities, as public authorities, must act compatibly with the ECHR (section 6 of the HRA 1998) which would require them to consider individual's own rights. Public authorities are adept at considering individual's vulnerabilities, and what the most proportionate and appropriate response is in all the circumstances. As such, the Government considers any interference with individual's Article 8 rights arising from the offence justified.

Anti-social behaviour

184. Clauses 65 to 71 make amendments to anti-social behaviour powers. The measures engage Article 8 and A1P1 of the ECHR.

185. Clause 67 lowers the age at which an individual can be issued with a community protection notice under section 43 of the Anti-social Behaviour, Crime and Policing Act 2014 from 16 to 10. This is to ensure that where children, aged 10 or over, are engaging in conduct which is having a detrimental effect on the quality of life of those in an area (and which is persistent and continuing) a CPN can be issued to require them to do or stop doing things; it is therefore necessary and proportionate for the prevention of crime and disorder and the protection of the rights and freedoms of others. This potentially interferes with the family life of that child as the service of a CPN may result in the child committing a criminal offence if the child fails to comply with the requirements of the CPN, and so may engage Article 8 of the ECHR. There will be statutory guidance to recommend that steps to support the child and the family are taken to reduce the possibility of the child failing to comply with the CPN. The Government therefore considers the measure a justified interference with Article 8, with sufficient safeguards to prevent disproportionate application.

186. Clause 70 increases the maximum financial penalty applicable for breach of a community protection notice (CPN), public spaces protection order (PSPO) or an expedited order (EO). The purpose of increasing the penalty is to prevent the anti-social behaviour which may lead to a CPN, PSPO or EO and ensure that conduct is remedied (as required by the relevant order), by acting as a dissuasive sanction. The sum will only be payable where an individual has breached such an order. The Government therefore considers that any interference in A1P1 rights is justified in the public interest in pursuit of the legitimate aim of protecting public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others.

Appeals by chief officers of police to the Police Appeals Tribunals

187. Clause 74 provides a power for the Secretary of State to make provision by secondary legislation about appeals by chief officers of police (and local policing bodies) to the police appeals tribunals (PATs). This provision would enable chief officers to appeal against disciplinary decisions concerning officers (or former officers) serving in their police force (and for local policing bodies to appeal against disciplinary decisions concerning chief officers, or former chief officers). This will enable challenges by chief officers to decisions considered unreasonable and/or excessively lenient, and so enhance force morale and public confidence in policing. Clause 65 may engage Articles 6 and 8.

188. Police disciplinary proceedings must be compatible with Article 6(1). The provision does not substantively alter the scope of the existing powers by the Secretary of State to regulate appeals to the PATs. Secondary legislation concerning appeals to the PATs (currently in force[63]) is considered to provide

[63] See the Police Appeals Tribunals Rules 2020 (S.I. 2020/1)

appropriate safeguards to enable PATs proceedings compliant with Article 6. Existing safeguards include the composition of PATs panels, who are independent and impartial, the appellant's right to be legally represented, provisions for hearings to be held in public unless certain circumstances apply, provisions for the calling and cross-examination of witnesses. It is not anticipated that amendments made to those rules in order to implement the proposed measure would affect any of those safeguards. As such, the Government considers the provision compatible with Article 6.

189. Appeals to PATs may result in disciplinary action (including dismissal) against a constable or former constable impacting on the Article 8 rights of the individual concerned (who would lose their professional standing and no longer be able to work in a police force). However, the proposed measure does not alter the existing legal position, and PATs decisions may already result in dismissal. The Government considers that the potential interference is justified in accordance with Article 8(2). The powers already exercised by PATs are in accordance with law, in pursuit of a legitimate aim and necessary in a democratic society.

Home Office / Ministry of Justice
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