EMPLOYMENT RIGHTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

FOR THE BILL AS INTRODUCED IN THE HOUSE OF COMMONS

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Employment Rights Bill. It has been prepared by the Department for Business and Trade, Department for Education, Cabinet Office, Department for Work and Pensions, the Department for Transport and the Government Equalities Hub.

2. On introduction of the Bill the Secretary of State for Business and Trade [made] a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

3. The purpose of the Bill is to deliver key legislative reforms needed to implement manifesto commitments set out in the Government's Plan to Make Work Pay.

Summary of Bill provisions

4. The Bill includes measures to strengthen employment rights and other protections in relation to employment matters, make provision in relation to pay and conditions in particular sectors, update the law relating to trade unions and industrial action and create a new over-arching enforcement function for the Secretary of State to enforce a list of legislation related to the labour market. The measures are intended to support employers and businesses across the country, creating a fair and level playing field and modernising the employment rights framework to suit the economy of today.

5. The employment rights measures introduce new rights to guaranteed hours, reasonable notice of shifts and compensation payments for shift cancellation, movement and curtailment at short notice for those on zero and other specified contracts, which are likely to be low hours contracts. They further provide a right to request flexible working, remove the waiting period and lower earnings limit which apply in relation to statutory sick pay and strengthen protections in relation to tips and

gratuities. The Bill also provides a right to parental and paternity leave from day one of employment, a right to bereavement leave, and introduces provisions to require employers to take all reasonable steps to prevent sexual harassment at work and to prevent harassment at work by third parties. Whistleblowing protections are extended to apply to disclosures relating to sexual harassment and in relation to dismissal, the Bill makes provision to remove the qualifying period in relation to unfair dismissal, extend legal protections in relation to dismissal following pregnancy or periods of certain types of statutory family leave and for failing to agree to variation of contract. These implement reforms in relation to providing protection from unfair dismissal from day 1, strengthening protections in relation to pregnancy and maternity and situations involving "fire and rehire".

6. Regarding other protections in relation to employment, the Bill updates requirements which apply in relation to collective redundancy, and extends the existing requirements concerning collective redundancy notification to apply to ships' crew. The Bill further updates the legislative framework in relation to the duties of employers relating to equality and the transfer of workers under public contracts, and increases the time limits which apply to making claims in Employment Tribunals.

7. The measures concerning pay and conditions in particular sectors make provision for the reinstatement of the School Support Staff Negotiating Body in England and the establishment of an Adult Social Care Negotiating Body.

8. The trade union and industrial action provisions update the legislative framework in this area. The Bill removes restrictions on trade unions, giving them greater freedom to organise, represent and negotiate on behalf of their workers, repeals the Strikes (Minimum Service Levels) Act 2023, makes it easier for trade unions to gain recognition. The Bill also makes provision to regulate access to workplaces for trade union members meeting and representing their members, provision for trade union equality representatives, and for facilities to be provided to trade union officials and learning representatives. It further provides for additional powers in relation to the prohibition on blacklisting, and makes reforms in relation to industrial action ballots, the provision of information to employers regarding industrial action and picketing, protections for taking industrial action and the functions of the certification officer.

9. The Bill also makes provision for the enforcement of labour market legislation by the Secretary of State, to implement the commitment to establish a single enforcement body to be known as the Fair Work Agency.

Convention article analysis

10. The following provides analysis of the interaction of the provisions in the Bill with the various Convention rights engaged.

Article 5 ECHR

11. Article 5 provides that:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in [certain specified] cases and in accordance with a procedure prescribed by law."*

Enforcement of labour market legislation by Secretary of State (Clauses 72 to 112)

12. The Government considers that Article 5 is engaged by provisions relating to the Fair Work Agency and the enforcement of labour market legislation (listed in Part 1 of Schedule 4). Specifically, the Bill makes provision for an expanded Labour Market Enforcement ("LME") regime, with the Secretary of State having the power to seek LME undertakings ("LMEUs") and orders ("LMEOs") in relation to certain labour market offences (defined in clause 112). Breach of an LMEO is a separate offence. The offence is triable either way and may result in imprisonment, a fine, or both. For convictions on indictment, imprisonment may be for a term of up to 2 years. For summary convictions, the maximum term of imprisonment depends on whether the conviction is in England & Wales, Scotland or Northern Ireland.

13. The current regime established by the Immigration Act 2016 applies only to specified "trigger offences" relating to the national minimum wage, regulation of employment agencies and licensing of gangmasters. The Bill extends the scope of the regime and, consequently, the circumstances in which the offence of breaching an LMEO applies.

14. Part 5 also makes provision for an offence of providing false information or documents and an offence of obstruction. These are summary offences, which may result in imprisonment or a fine. The maximum term of imprisonment depends on whether the conviction is in England & Wales, Scotland or Northern Ireland.

15. The Government considers that Article 5 is engaged because of the potential for imprisonment on conviction for these offences. However, our view is that the Bill provisions are compatible with Article 5. Imprisonment is only possible following a conviction in a court of law. This corresponds to Paragraph 1(a) of Article 5, which allows for deprivation of liberty following lawful detention of a person after conviction by a competent court. In relation to the offence of breaching an LME Order, the Bill provisions largely replicate existing provisions in the Immigration Act 2016.

16. The Bill provisions provide a sufficient degree of legal certainty, such that a person may reasonably foresee that imprisonment is a potential consequence of breaching an LMEO. There are also safeguards against arbitrariness, in that prison sentences are subject to clear maximum terms, thereby preventing deprivation of liberty for an unreasonable length of time.

17. The Bill amends section 114B of the Police and Criminal Evidence Act 1984 ("PACE") regarding the application of PACE to enforcement officers in respect of labour market offences (see Part 2 of Schedule 6).

18. To the extent that PACE powers (including powers of arrest or detention) are to be applied to enforcement officers, the Bill does not amend any of the powers as set out in PACE, including any relevant safeguards. For example, the power of arrest without warrant provided by section 24 PACE is subject to the requirement that the officer has reasonable grounds for suspecting that an offence has been committed and reasonable grounds to believe the arrest is necessary. The powers related to detention under sections 44 and 43 PACE are subject to time limits as well as the requirement for a warrant approved by the court and other limitations. As such the Government considers that these provisions are compatible with Article 5.

Article 6 ECHR

19. Article 6 provides that:

> *"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

Civil rights and obligations

20. Broadly, the Government considers the civil rights at issue to be the rights (whether statutory or contractual) of employees and workers, the determination of which may engage article 6, and the correlative rights of an undertaking to carry on a business, as it sees fit, without undue state interference. The right to carry on a business involves freedom of contract, the free exercise of property rights and the right to protect confidentiality and trade secrets. Provisions aimed at determining any of these rights would engage article 6, and therefore need to comply with the substantive and procedural obligations article 6 requires.

Criminal charges

21. The ECHR concept of a criminal charge is broader than just those charges which are tried in domestic criminal courts. If the measure is not classified as "criminal" under domestic law, this is not decisive. The court will look behind the national classification and examine the substantive reality of the procedure in question. A decision is unlikely to constitute the determination of a criminal charge where the decision cannot lead directly to the imposition of a penalty, but may lead to other obligations being imposed, breach of which may be punished with a penalty.

22. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6:

    (i) Shifts: rights to reasonable notice;
    (ii) Right to payment for cancelled, moved and curtailed shifts;
    (iii) Dismissal for failing to agree to variation of contract, etc.;
    (iv) Collective redundancy: extended application of requirements;
    (v) Right of trade unions to access workplaces;
    (vi) Facilities provided to trade union officials and learning representatives;
    (vii) Facilities for equality representatives;
    (viii) Enforcement of labour market legislation by Secretary of State.

23. The Bill establishes (or revises) a number of civil rights which can be enforced in the Employment Tribunal (e.g. unfair dismissal rights for dismissals for failing to agree to variation of contract, etc, and amended rights in relation to collective redundancy consultation). The Government considers that the framework provided by the Employment Tribunal ("ET") and Employment Appeal Tribunal and appellate courts for effective redress in relation to disputes that may arise from the provisions of this Bill meets the relevant procedural safeguards required by Article 6(1). In particular, ET decisions on the rights addressed by the Bill will be directly decisive for the rights in question (*Ulyanov v. Ukraine (dec.)*, 2010 and *Alminovich v. Russia (dec.)*, 2019, §§ 31-32); the tribunal process is fair and public (*Stanev v. Bulgaria* [GC], *2012*, § 231; *Airey v. Ireland*, 1979, § 24); independent and impartial (which is indispensable for a fair hearing) (*Grzęda v. Poland* [GC], 2022, § 301), and established by law (*Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020, § 211). The ET is itself a public authority and as such is required to act in a manner which is compatible with section 6 of the Human Rights Act 1998.

    <u>Shifts: rights to reasonable notice; and Right to payment for cancelled, moved and curtailed shifts) (Clauses 2 and 3)</u>

24. Clauses 2 and 3 make provision to require employers to provide reasonable notice of shifts and changes to shifts to workers on zero-hours contracts and arrangements, and to workers on other specified (likely low hour) contracts, and to pay them where they cancel, move or curtail their shifts at short notice (unless an exception applies).

25. Where an employer wishes to rely on an exception from the requirement to pay for short notice cancellation, movement or curtailment, they must notify the worker.

26. The provisions on notice of shifts establish new civil rights that can be brought before an employment tribunal for determination. Accordingly, they engage the Article 6 rights of both workers and employers.

27. Under usual rules in civil cases, the burden of proof would be on the claimant to establish their claim. There are two provisions that reverse the usual rules on the burden of proof as follows:

(i) a rebuttable presumption that notice of a shift given in less than a time to be specified in regulations is presumed to be unreasonable; and
(ii) where a worker alleges that the information provided to them on an applicable exception is incorrect, it is for the employer to establish that the information is correct.

28. Employers will be given sufficient opportunity to state their case and contest any evidence. The presumption of unreasonable notice will be rebuttable and therefore it is open to the employer to rebut this where notice was reasonable. Further, the standard of assessment will still be "on the balance of probabilities" meaning that the employer just needs to establish that it is more likely than not that notice was reasonable or that the notice was correct. The Government considers the provisions to be compliant with Article 6.

29. The court-based process for enforcement of the rights established under this Bill will be delivered through decisions of the Employment Tribunal system, which is an independent and impartial court for the purposes of Article 6. The Government considers that the enforcement regime for the rights established under this Bill is compliant with Article 6.

Dismissal for failing to agree to variation of contract, etc. (Clause 22)

30. Clause 22 introduces a new unfair dismissal right to limit the use of 'fire and rehire' or 'fire and replace' by employers. Unfair dismissal rights engage Article 6 because they are civil rights that can be brought before an employment tribunal for determination. The new right will form part of the existing unfair dismissal framework, which the Government considers to meet the relevant procedural safeguards required by Article 6(1).

Collective redundancy: extended application of requirements (Clause 23)

31. Clause 23 amends employers' obligations in relation to collective redundancy consultation. The current legislation requires employees to consult with appropriate representatives when proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. This removes the scope of "establishment" from the relevant legislation. This change means the collective redundancy consultation obligation will apply across the whole business, rather than being limited to individual establishments.

32. A breach of these obligations can currently be enforced by making a claim to the employment tribunal for a protective award. The Government considers that the current framework for enforcement of collective redundancy consultation rights meets the relevant procedural safeguards required by Article 6(1), as set out in paragraph 23.

33. Clause 23 also amends employers' obligations to notify the Secretary of State in relation to proposed redundancies. A breach of these obligations is a criminal offence. The Government considers that the current framework for the prosecution of this offence meets the relevant procedural safeguards required by Article 6(1)-(3).

Right of trade unions to access workplaces (Clause 46)

34. Clause 46 inserts new sections 70ZA to 70ZL into the Trade Union and Labour Relations (Consolidation) Act 1992 to make provision for access agreements. These are agreements between employers and trade unions relating to access to a workplace for specified purposes, including for the trade union officials to meet, represent, recruit or organise workers, and for the facilitation of collective bargaining. Unions will be able to formally request access. Employers will be required to respond/negotiate. In the event of a dispute the regulator is the Central Arbitration Committee ("CAC"). The CAC will be able to make determinations as to whether there should be access/terms of access. Accordingly, this clause engages the Article 6 rights of both workers and employers. The Government considers that the legislative framework for access agreements is compatible with Article 6.

35. Determinations are to be made in accordance with access principles set out in the primary legislation (see new section 70ZF(2)).

36. The Bill makes specific provision that the access agreement is only enforceable under the CAC enforcement framework and not by any other means. Where there is a breach of the CAC order the CAC can issue a penalty. Appeal is to the Employment Appeal Tribunal ("EAT") on any question of law; the penalty or the amount of the penalty can also be appealed to the EAT.

37. The access principles, in accordance with which the CAC must make determinations, are set out in the Bill and are aimed at balancing the rights of the employer with those of the trade union. The CAC is required when considering an application for a determination to be made as to whether access should be given, to as far as reasonably practicable, give any person who it considers has a proper interest in the application an opportunity to be heard. Other safeguards include that a declaration or order of the CAC must be in writing and give reasons. There are clear time limits for steps in the process, some of which are to be provided for in secondary legislation, for example the time for which the employer has to respond to an access request, and the period of time for the negotiations. However, the provisions provide on the face of the Bill that there is three month time limit to make a complaint to the CAC from the day on which the matter complained of occurred.

38. The CAC is impartial and independent. It is a public sector body so it is constrained by general public law principles to act reasonably and must not act in a way that is incompatible with Convention rights. This includes the decision it will make as to the amount of any penalty, up to a maximum set by the Secretary of State in regulations.

39. If an employer decides not to pay a penalty imposed, that can be enforced as if it were a court order – and at that point failure to pay may lead to contempt proceedings. Given that imprisonment is ultimately a possible sanction in such proceedings, they would be considered criminal for the purposes of article 6. (*Daltel (Europe) Ltd and others v Makki and another* [2006] EWCA Civ 94).

40. However, any such proceedings will be conducted in accordance with Part 81 Civil Procedure Rules 1998, which make detailed provision for contempt proceedings. In particular, although not formally 'criminal' proceedings, the burden of proof in such cases is to the criminal standard. The Bill does not alter the regular procedures of the court. The court would exercise its powers in a manner that was compatible with Article 6.

41. The provisions are compatible with Article 6, and the Government also considers that the framework meets the procedural safeguards required by Article 6(1) to (3).

Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives (Clauses 50 and 51)

42. Clauses 50 and 51 strengthen the existing rights of employees who are trade union officials or trade union learning representatives to take time off to undertake their duties, and to access facilities. Equivalent provision is made in the Bill for trade union equality representatives. Currently, the amount of time the employer is required to permit the employee to take off is what is reasonable in all the circumstances. The Bill makes provision so that in the event of a complaint made by the employee that they have not been given a reasonable amount of time off – it is for the employer to show that the amount of time off which the employee proposed to take was not reasonable. Under usual rules in civil cases, the burden of proof would be on the claimant to establish their claim. However, employers will be given sufficient opportunity to state their case and explain why the amount of time off requested was not reasonable. Further, the standard of assessment will still be what is reasonable in all the circumstances, having due regard to any relevant provisions in an ACAS Code of Practice. The Government considers that the enforcement regime for these rights is compliant with Article 6.

Enforcement of labour market legislation by Secretary of State (Clauses 72 to 112)

43. Clauses 72 to 112 make provision for the Secretary of State to become responsible for applying and enforcing a range of employment legislation. The Secretary of State's enforcement functions will be performed by a new body, the Fair Work Agency ("FWA"). As the FWA will be an Executive Agency, enforcement powers will be conferred on the Secretary of State directly and/or on enforcement officers, with a power for the Secretary of State to delegate functions to another authority. This application and enforcement of labour market legislation will involve the determination of both civil rights and obligations, such as assuming responsibility for

licencing decisions under the Gangmasters (Licensing) Act 2004, and for enforcing criminal offences, depending on the legislation being enforced.

44. The FWA's functions will involve taking over existing functions, in particular enforcement powers, currently exercised by public bodies relating to the National Minimum Wage, employment agencies, unpaid employment tribunal awards, sick pay, gangmaster licensing and offences in Parts 1 and 2 of the Modern Slavery Act 2015. Some of these powers do not require amendment in order to be exercised by the Secretary of State or enforcement officers. However, the Bill does make provision to consolidate and, in some cases, expand the following:

    (i) investigatory powers, including powers to require persons to attend the Secretary of State or enforcement officers to provide explanations or additional information (clause 78);
    (ii) Labour Market Enforcement Undertakings and Orders ("LMEU/Os") (clauses 85 and 91).

45. The Government considers that these provisions are compatible with Article 6 for the following reasons.

Investigatory powers

46. Powers to require persons to provide information engage the principle of privilege against self-incrimination. Although this principle is not specifically mentioned in Article 6, it is generally recognised as lying at the heart of the idea of a fair procedure (alongside the right to remain silent). Intentionally obstructing enforcement officers is an offence, as is failure to comply without reasonable excuse with requirements imposed by enforcement officers (clause 104). However, clause 104(5) provides that nothing in this section requires a person to answer any question or give any information if to do so might incriminate that person. Further, clause 97 makes specific provision for privilege against self-incrimination where a person provides information in response to a requirement under clause 78 ("power to obtain documents or information"). An additional safeguard is in clause 96, which makes provision about items subject to legal privilege.

LMEU/Os

47. The Bill follows the approach of the Immigration Act 2016. The key change is to expand the scope of the LME regime to apply to a wider set of "labour market offences" which are defined in clause 112. LMEUs are undertakings given voluntarily by a person to the Secretary of State, where the Secretary of State believes that the person has committed, or is committing, a labour market offence (clause 84). If a person refuses or fails to provide an undertaking, the Secretary of State may apply to a court (which is independent and impartial) for an LMEO. The court may make a LMEO where it: (i) is satisfied, on the balance of probabilities, that the person has committed, or is committing, a labour market offence, and (ii) considers that it is just and reasonable to make the order. The balance of probabilities test is considered appropriate as the decision of the court does not result in a criminal conviction or

criminal liability. A court may also make a LMEO when a person is convicted of a labour market offence. The court may vary or discharge LMEOs on application. Further, there is a right of appeal in relation to LMEOs (see paragraph 304 below). The Government is satisfied that the provisions are compatible with Article 6.

Offences of providing false information or documents, and obstruction

48. Clause 103 provides for an offence of providing false information or documents and clause 104 provides for an offence of obstruction. Persons must be convicted of the above offences by a competent court of law. Such courts are independent and impartial for the purposes of Article 6 and follow usual criminal law procedure. The Government therefore considers the framework for this offence meets the relevant procedural safeguards required by Article 6.

General

49. To the extent that the exercise of powers involves the determination of a person's civil rights, it could be said that the Secretary of State and/or enforcement officers are acting in a quasi-judicial capacity. The Government recognises that neither the Secretary of State nor enforcement officers would constitute an independent and impartial tribunal for the purposes of Article 6.

50. Several pieces of legislation with the FWA's remit already make provision for specific appeal mechanisms to ensure the compatibility of that legislation with Article 6. For example, section 19C of the National Minimum Wage Act 1998 makes provision for appeals against notices of underpayment served by officers, and provision regarding appeals against licensing decisions has been made by way of regulations under section 10 of the Gangmasters (Licensing) Act 2004. Regarding the Labour Market Enforcement order regime in clauses 88 to 94, LMEOs are imposed by courts, either on application by the Secretary of State, or on the court's own initiative. The relevant courts are a magistrates' court (in England & Wales), the sheriff or a summary sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland). Clause 94 makes specific provision for appeals in respect of LMEOs. Appeals lie to the Crown Court (in England & Wales), the Sheriff Appeal Court (in Scotland) or a county court (in Northern Ireland). All these courts are independent and impartial tribunals for Article 6 purposes.

51. Also, in carrying out their functions, the Secretary of State and enforcement officers will be required to act in accordance with Article 6 (see section 6 of the Human Rights Act 1998). Further, their actions and decisions would be subject to judicial review. Judicial review is a flexible concept, and the courts are also bound by section 6 Human Rights Act 1998 to ensure that their review of public authorities' actions is sufficient to meet the requirements of Article 6. In relation to the Labour Market Enforcement regime, decisions taken by the Secretary of State on whether to accept, vary or release LMEUs could be said to determine a person's civil rights, and

compliance with the right to a fair trial will be subject to the courts' supervisory jurisdiction of judicial review.

52. Criminal offences in the relevant labour market legislation are to be dealt with in accordance with the criminal law. Convictions would be made by competent courts, all of which are independent and impartial tribunals for the purposes of Article 6.

Article 7 ECHR

53. Article 7 provides that:

> *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

54. In addition to preventing retrospective criminal offences, this principle means that only the law can define a crime and prescribe a penalty. Further, the rule of law requires that relevant legal provisions be sufficiently precise, accessible and foreseeable.

Enforcement of labour market legislation by Secretary of State (Clauses 72 to 112)

55. Clauses 72 to 112 are described above at paragraph 43. The Government considers that the Labour Market Enforcement powers conferred on the Secretary of State are compatible with Article 7. The provisions expand the scope of the existing powers in the Immigration Act 2016, with the result that the criminal offence of breaching an LMEO could apply in a wider set of circumstances. The Bill also provides for an offence of providing false information or documents and an offence of obstruction.

56. The Government considers that the Bill provisions are compatible with Article 7, as they provide a sufficient degree of legal certainty and foreseeability. They are not intended to be retrospective. The Bill clearly sets out, in relation to each offence, the circumstances in which an offence is committed. Persons must be convicted by a competent court of law, and the potential consequences of conviction are clear.

Article 8 ECHR

57. Article 8 provides that:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

58. The following provisions are considered to engage the right to respect of private and family life under Article 8:

(i) Shifts: rights to reasonable notice;
(ii) Right to payment for cancelled, moved and curtailed shifts;
(iii) Dismissal during pregnancy;
(iv) Dismissal following period of statutory family leave;
(v) Parental leave: removal of qualifying period of employment;
(vi) Paternity leave: removal of qualifying period of employment;
(vii) Employers to take all reasonable steps to prevent sexual harassment;
(viii) Harassment by third parties;
(ix) Right of trade unions to access workplaces;
(x) Facilities provided to trade union officials and learning representatives;
(xi) Facilities for equality representatives
(xii) Blacklists: additional powers;
(xiii) Conditions for trade union recognition;
(xiv) Enforcement of labour market legislation by Secretary of State.

<u>Shifts: rights to reasonable notice; and Right to payment for cancelled, moved and curtailed shifts (Clauses 2 and 3)</u>

59. Clauses 2 and 3 are described above at paragraph 24.

60. Regulations will set out exceptions to the requirement on employers to pay workers on zero-hours contracts and arrangements or other specified (likely low hour) contracts where they cancel, move or curtail their shifts at short notice.

61. Where they wish to rely on an exception, employers must notify the worker of the exception relied on and provide further information to explain why the exception applies. Express provision is made so that this duty does not require employers to provide personal data to workers.

62. There is still a small risk though that the explanations given by employers could reveal personal information about other individuals. The disclosure of such information could constitute an interference with Article 8.

63. To the extent that such an interference would be permitted, it would have to be in line with other law on confidentiality, including the UK General Data Protection Regulation.

64. The legitimate aim served by any interference with Article 8 would be the protection of rights of others. The information provided would enable a worker to know if they are entitled to payment for short notice cancellation/curtailment/movement and to enforce their rights if they are.

65. Any interference with Article 8 would be minimal and would strike a fair balance with competing interests and ensures that the purpose of the Bill is not undermined.

66. The provisions on notice of shifts and changes to shifts also come within the scope of Article 8 because they necessarily affect the way that family life is organised. The proposed measures will ensure that workers may better predict when they are required to work. As a result, improved stability around when they will be paid will allow better planning of their home lives, and the measures will have a positive impact on family life.

Dismissal during pregnancy; and Dismissal following period of statutory family leave (Clauses 20 and 21)

67. Clauses 20 and 21 enhance the protection from dismissal of employees who are pregnant. They provide powers to extend the existing protection, for employees when on maternity leave and on their return to work, to also cover the period when they are pregnant and a period after their return to work from maternity leave. The powers will also enable protection to be extended to employees who have taken adoption or shared parental leave, for a period after their return to work. The powers will also apply to those exercising rights which are not yet in force: to neonatal care leave and the extended form of paternity leave to be made available to bereaved parents.

68. The notion of family life under Article 8 incorporates the right to respect for decisions to become a parent and dismissal of a person from employment for reasons related to exercising a family-based entitlement to leave would engage Article 8. Extending the existing protection in relation to redundancy for pregnant employees and parents returning from certain types of family-related, in order to encompass dismissal for non-redundancy reasons would have a positive impact on family life.

Parental leave: removal of qualifying period of employment; and Paternity leave: removal of qualifying period of employment (Clauses 11 and 12)

69. Clauses 11 and 12 dispense with the existing requirement for employees to meet conditions as to the duration of their employment before they become entitled to take paternity leave or parental leave. Forms of leave for parents and related allowances come within the scope of Article 8 because they necessarily affect the way that family life is organised. They will enhance existing entitlements to leave and, therefore, will have a positive impact on family life.

Employers to take all reasonable steps to prevent sexual harassment (Clause 15)

70. Clause 15 strengthens the duty on employers to take reasonable steps to prevent sexual harassment under section 40A Equality Act 2010, which comes into force on 26 October 2024.

71. This clause engages rights under Article 8, which imposes positive obligations on the state to adopt policies which are designed to secure the right to a private and family life. These positive obligations may require the state to take action to stop interferences caused by the actions of other private individuals, including the actions of a private employer (*Bărbulescu v. Romania* [GC], 2017, §§ 108-111).

72. This clause further enhances protections for employees by strengthening the positive duty on employers. Therefore, the Government does not consider that there is any interference with Article 8 rights and in fact it should enhance the rights of employees by strengthening protection from sexual harassment.

Harassment by third parties (Clause 16)

73. Clause 16 amends section 40 of the Equality Act 2010 to strengthen employees' protection from harassment by providing that employers must not permit third parties to harass their employees.

74. The Government considers that this engages Article 8 for the same reasons as stated in the section above on prevention of sexual harassment, and, as with that clause, should lead to an enhancement of employees' rights. The Government therefore considers that there is no interference with Article 8.

Right of trade unions to access workplaces (Clause 46)

75. Clause 46 is described above at paragraph 34.

76. Access to workplaces may involve interference with the Article 8 rights of employers, or those on the premises, depending on the type of workplace. Article 8 guarantees the right to a "private social life", and under certain circumstances this can include professional activities (*Fernández Martínez v. Spain* [GC], 2014, § 110; *Bărbulescu v. Romania* [GC], 2017, § 71; *Antović and Mirković v. Montenegro*, 2017, § 42.

77. The legitimate aim served by any interference with Article 8 rights is the protection of rights of others. It is important for trade union officials to be able to meet workers face to face, and also important for workers that trade union officials are able to do so. The access framework seeks to ensure that the Article 11 (freedom of association) rights of workers are strengthened. There are various safeguards (see paragraph 37 above) which are also relevant in relation to any interference with Article 8.

78. The safeguards include that the CAC must make determinations in accordance with the access principles, which are set out in the Bill, and are aimed at balancing the rights of the employer with those of the trade union, so that a proportionate outcome

in terms of access is arrived at. The access principles specifically refer to not unreasonably interfering with the employer's business; and refusing access where it is reasonable in all the circumstances to do so.

79. Secondary legislation will set out the circumstances where the CAC must or must not grant access. This enables regulations to make provision for workplaces that are to be exempt from the scope of access agreements. A non-exhaustive list of matters which those circumstances can be prescribed by reference to include the description of the workplace, the number of workers employed by the employer, the ability of the employer to facilitate access to the workplace, avoiding prejudice to the prevention or detection of offences and national security.

80. The exercise of the powers by the Secretary of State to make provision in secondary legislation for exemptions will need to be done in a manner that is compatible with Convention rights. Those regulations are subject to the affirmative procedure so will be subject to further Parliamentary scrutiny.

81. The CAC is a public body and constrained by public law principles. In addition, there will be further restrictions placed in secondary legislation. Ultimately, the court is involved in the event of disagreement if a party chooses to appeal a determination or order of the CAC to the Employment Appeal Tribunal.

82. Overall, any interference with Article 8 rights is justified and proportionate.

<u>Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives (Clauses 50 and 51)</u>

83. Clauses 50 and 51 strengthen the existing rights of trade union officials and learning representatives to take reasonable time off for carrying out their duties so that in the event of a complaint made by the employee that they have not been given a reasonable amount of time off – it is for the employer to show that the amount of time off which the employee proposed to take was not a reasonable amount of time off. The clause also makes provision for access to accommodation and other facilities requires employers to provide an employee who is also a trade union official with such accommodation and other facilities for carrying out their duties or undergoing training as is reasonable in all the circumstances.

84. These clauses arguably engage and interfere with the Article 8 rights of the employer. However, the obligations on the employer to permit time off and provide access to facilities is conditional on what is reasonable in all the circumstances, having regard to any relevant provisions of a Code of Practice. The Code of Practice will provide more detailed guidance as to what may be reasonable. It is a legitimate aim to ensure that rights to freedom of association under Article 11 are fully realised, and it is important that trade union officials are able to fulfil their duties, and they may need reasonable access to facilities such as meeting rooms in order to do that. This

approach is proportionate and is confined to what is reasonable in all the circumstances. Any interference with Article 8 would be minimal and would strike a fair balance between employers and employees who are trade union officials. The Government considers the provisions to be compatible with Article 8.

Blacklists: additional powers (Clause 53)

85. Clause 53 is intended to strengthen the Article 8 right, as it will widen the scope of blacklisting protection, preventing the misuse of trade union membership data.

Conditions for trade union recognition (Clause 47)

86. Clause 47:

    (i) removes the requirement to show at the application stage that at least 50% of workers in the bargaining unit are likely to support recognition;
    (ii) grants the Secretary of State a power to reduce the requirement to show at the application stage that at least 10% of workers in the bargaining unit are members of the union; and
    (iii) simplifies the support required for recognition in the final ballot, so that a simple majority of those voting is sufficient, with no threshold that that majority must represent at least 40% of the workers in the bargaining unit.

87. The existing provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 impose duties on the employer relating to the ballot process: in particular to cooperate with the union and the “qualified independent person”; to provide the names and addresses of its workers; and to provide reasonable access to its workers. Such duties, information and access could be considered to interfere with the rights of the employer under Article 8. However, the Bill does not change the law relating to the ballot process itself (which is well established and supported by a Code of Practice) but only makes it more likely that the process is commenced.

88. Article 8 is a qualified right. Any interference will be in accordance with the law, clearly set out in the Act, as amended by the Bill.

89. Each part of the clause has a legitimate aim, being the protection of the rights and freedoms of trade unions and their members and other workers in a bargaining unit. This is also in the general interest. Collective bargaining is in the Government's view likely to improve the terms and conditions of employment of workers, lead to a better balance between the interests of employers and workers, in the long-term interests of the economy.

90. The aims are pursued in a proportionate way. It will remain the case that statutory recognition of a trade union will only be obtained where there is clear majority

support for recognition among those workers in the bargaining unit who exercise their right to vote on the matter.

Enforcement of labour market legislation by Secretary of State (Clauses 72 to 112)

91. Clauses 72 to 112 are described above at paragraph 43.

Power to obtain documents or information

92. The Government considers that the provisions of the Bill in relation to investigatory powers engage Article 8.

93. The Bill provides for a new, consolidated suite of investigatory powers to be exercised by the Secretary of State or by enforcement officers. The powers are framed broadly to allow the Secretary of State to require "a person" to provide specified documents or information, as well as attending at a specified time and place to answer questions (clause 78).

94. Given the nature of the rights and obligations being enforced, it is highly likely that persons may be required to produce personal data and confidential material. Such information in professional or commercial activities of persons, including legal persons, is subject to protection as an element of private life under Article 8.

95. Any interference with the Article 8 right can be said to be sufficiently justified by the objective of enhancing effective investigations into potential breaches of labour market legislation. Ensuring compliance with such legislation contributes to the economic well-being of the country and protects the rights and freedoms of employees, workers and law-abiding businesses. Further, where breach of labour market legislation is an offence, any interference with Article 8 is necessary to prevent crime.

96. The powers in clause 78 are subject to certain safeguards. For instance, the powers may only be exercised by notice (subsection (1)) and a notice may only be given if certain conditions are met. Specifically, if requiring a person to attend to answer questions, the Secretary of State must have a reasonable belief that that person is able to provide information which is necessary for any enforcement purpose. If requiring a person to produce specified information or documents, the Secretary of State must have a reasonable belief that it is necessary to obtain information or documents for any enforcement purpose and that the person is able to provide the information or documents. As such, the circumstances in which questions may be asked, or information requested, and the purposes for which they may be asked or requested are limited and clearly connected to what is relevant for the investigation, thus guarding against arbitrary use of the investigation powers.

97. Personal data will also be subject to the data protection regime. This is reflected in clause 99(2)(a), which provides that disclosures of information under clause 98 are not authorised if they would contravene the data protection legislation. Additionally, the Secretary of State and delegate authorities (e.g. HMRC) are under a general duty to carry out their investigations and make decisions in a procedurally fair manner, according to the standards of administrative law, and in a manner which is compatible with the Human Rights Act 1998.

Power to enter business premises in order to obtain documents, etc

98. Clause 79 provides a power of entry for an enforcement officer, for any enforcement purpose (as defined in clause 78), to enter any business premises (being premises or any part of premises not used as a dwelling). An enforcement officer may inspect or examine any documents on the premises, require any person on the premises to produce any document which the officer has reasonable grounds to believe are on the premises and within the person's possession or control, and to have access to, and check the operation of, any computer of other equipment (including software) used in connection with the processing or storage of any information or documents.

99. Any document so produced, inspected or examined may be seized. Clause 78 defines enforcement purpose as the purpose of enabling the Secretary of State to determine whether to exercise any enforcement function, determining whether there has been non-compliance with any relevant labour market legislation, and to ascertain whether the documents produced may be required as evidence in proceedings for non-compliance. Failing to comply with any requirement imposed by a person who is acting in the exercise of an enforcement function, without reasonable excuse, is an offence under clause 105.

100. The Government considers that the provisions on powers of entry to business premises in order to obtain documents, etc, engage Article 8. However, any interference is considered to be justified under Article 8(2) in accordance with the law and necessary and proportionate in pursuit of a legitimate aim.

101. The scope of the power is clearly set out on the face of the legislation. The power serves the legitimate purpose of supporting effective enforcement of labour market legislation which protects workers, law-abiding businesses, as well as the effective functioning of the labour market and economic well-being of the country. Further, where powers of entry are used as part of an investigation into possible breaches of labour market legislation which constitute an offence, any interference with Article 8 is necessary to prevent crime.

102. The powers are subject to safeguards, as they may only be used for any enforcement purpose and to enter business premises. The power is limited in relation to the retention of documents, etc, by clause 79(2). Further, an officer may only exercise the power to enter business premises at a reasonable time, unless it appears to the officer that there are grounds for suspecting that the purpose of entering the premises may be frustrated (clause 79(3)).

103. In relation to personal data and confidential material becoming available, an enforcement officer acting under this section will only be able to access documents for enforcement purposes. The disclosure of information will be subject to the limitations set out in clause 98. Information obtained may only be used by an enforcing authority in connection with the exercise of any other enforcement function, or by the Secretary of State in connection with a function of the Secretary of State under Part 5 of the Bill. Disclosure will be restricted to the circumstances set out in subsections (4) and (5).

104. In addition, nothing in clause 98 authorises the making of a disclosure which (a) would contravene the relevant data protection legislation or (b) would be prohibited by any of Parts 1 to 7 or Chapter 1 of Part 9 of the Investigatory Powers Act 2016 (see clause 99(2)).

105. As such the Government considers that these provisions are compatible with Article 8.

Information sharing

106. The Government considers the provisions on disclosure of information set out in clauses 98 to 101 and Schedule 5 to be in accordance with the law, necessary in pursuit of a legitimate interest and proportionate, and therefore any potential interference with Article 8 will be justified.

107. Any interference can be said to be justified by the objective of enhancing effective investigations into potential breaches of labour market legislation. Ensuring compliance with such legislation contributes to the economic well-being of the country and protects the rights and freedoms of employees, workers and law-abiding businesses. Further, where information is being shared as part of an investigation into possible breaches of labour market legislation which constitute an offence, any interference with Article 8 is necessary to prevent crime. Where data is being shared with other bodies in connection with the functions of those bodies, for example to assist with investigations of those bodies into breaches of other employment law, health and safety law, discrimination issues, modern slavery offences, immigration issues etc, any interference with Article 8 is also likely to be necessary for one or more reasons related to national security, the prevention of crime, protection of public safety, health or morals or the protection of the rights of individuals.

108. The data sharing clauses are considered to be proportionate on the basis that data may only be shared with others to the extent that the sharing is for a purpose connected to the exercise of the enforcement functions of the Secretary of State. The provisions only go as far as is necessary to facilitate data being shared for the purposes of the performance of legitimate functions of either the Secretary of State or the specified bodies, in pursuance of legitimate aims. Further, any sharing of personal data must be compliant with the data protection legislation as set out in

clause 99, as well as comply with restrictions on disclosure of HMRC information (clause 100) and on disclosure of intelligence service information (clause 101).

109. The list of specified persons with whom such data can be shared is set out in Schedule 5 of the Bill, so data sharing for those purposes is limited to that extent. There is a power to add to the list of specified persons, and where the Secretary of State wishes to do so, regulations must be made in Parliament. Those regulations will be subject to the affirmative procedure, which is considered to be an appropriate level of scrutiny.

Availability of powers under the Police and Criminal Evidence Act 1984 for the investigation of labour market offences

110. Paragraph 67 in Schedule 6 to the Bill amends section 114B of the Police and Criminal Evidence Act 1984 ("PACE") to make powers under that Act available to enforcement officers (that is a person appointed by the Secretary of State to exercise enforcement functions under Part 5 of the Bill) for the purposes of labour market offences. Clause 112 defines a labour market offence as an offence under any provision of relevant labour market legislation as set out in Schedule 4 Part 1.

111. Currently, section 114B of PACE, as inserted by section12 of the Immigration Act 2016, allows the Secretary of State to apply, by regulations, any provision of PACE which relates to investigation of offences by police officers to investigations of labour market offences by labour abuse prevention officers. "Labour market offences" are currently defined in section 3(3) of the Immigration Act 2016 and include offences under the Employment Agencies Act 1973, the National Minimum Wage Act 1998, the Gangmasters (Licensing) Act 2004 and sections 1 and 2 of the Modern Slavery Act 2015. The current regulations are The Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017.

112. The amended power in section 114B PACE applies to a wider range of offences than is currently the case, such as any other offences which could be brought into scope in future by virtue of the exercise of the power at paragraph 23 of Schedule 4 to the Bill.

113. The exercise of the expanded power in this way engages Article 8.

114. The use of police-style powers under PACE, including powers of search, seizure of evidence and entry, constitutes an interference with Article 8. Where the power under section 114B PACE is exercised to confer PACE powers on FWA officers investigating labour market offences, the interference would be in accordance with the law and any such regulations would be subject to the affirmative resolution procedure. This ensures parliamentary scrutiny of the application of PACE powers to investigations of labour market offences. The conferral of PACE powers will need to be capable of justification as necessary and proportionate in pursuit of the legitimate aim of prevention of crime and enforcement of labour market legislation. The need for the specific powers to be granted will have to be considered on a case-by-case basis

in relation to each offence the powers are to be applied to, at the time such regulations were made.

115. The Government considers that there are sufficient safeguards in place to ensure that the power is exercised in an ECHR compatible manner, and section 6 Human Rights Act 1998 will require it to be exercised in such a way. Further, under section 6 Human Rights Act 1998, an enforcement officer would be required to act in a manner that was compatible with Article 8 and other ECHR rights, including when exercising the powers available to them.

Article 10 ECHR

116. Article 10 provides that:

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

Harassment by third parties (Clause 16)

117. Clause 16 provides that an employer ("A") must not permit a third party to harass one of A's employees in the course of their employment; A is liable if they fail to take all reasonable steps to prevent the third party from doing so. This clause applies to the three forms of harassment defined in section 26 of the Equality Act 2010, including sexual harassment and harassment on the basis of certain protected characteristics. The third party in question could potentially argue that their Article 10 right to freedom of expression is engaged, particularly in areas of legitimate debate which are carried out in a contentious manner. It is considered that Article 10 is much less likely to be engaged where the conduct is reprehensible and unacceptable in principle, such as sexual harassment or unwanted sexual conduct.

118. The Government considers that any interference with Article 10 is necessary for the protection of the rights of others (in this case, the employee) and is proportionate. By definition the clause is only applicable where the third party's conduct amounts to harassment within the meaning of section 26 of the Equality Act 2010, which the Government considers is a high threshold: all three forms of harassment require that the conduct has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the recipient. The clause will have no effect on legitimate debate which is uncomfortable or contentious but falls short of harassment. It is considered that this strikes a proportionate balance between the employee's Article 8 rights and the third party's potential Article 10 rights.

Protection of disclosures relating to sexual harassment (Clause 18)

119. Clause 18 adds to the whistleblowing framework which is already a function of the Employment Rights Act 1996 in order to expressly confirm the position that sexual harassment can be the subject of a protected whistleblowing disclosure. The provision slightly broadens the definition of qualifying disclosure at section 43B(1) of the Employment Rights Act 1996 to include specific reference to sexual harassment and the policy intention is that this will make it easier for workers to speak up about sexual harassment that they experience or are aware of.

120. A disclosure about sexual harassment may already have formed the subject matter of a protected disclosure as the sexual harassment could have been a criminal offence, a breach of a legal obligation or an endangerment of health and safety. This provision is aimed at making it explicit that disclosures about sexual harassment can form the basis of a protected disclosure and ensuring that any disclosure about sexual harassment which would not qualify for protection under the existing list of relevant failures in section 43B(1) will now be covered. The Government expects that this measure will strengthen the position for workers in respect of Article 10.

Article 11 ECHR

121. Article 11 provides that:

> "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*"

122. The following provisions are considered to engage the right to freedom of peaceful assembly and freedom of association with others under Article 11:

(i) Pay and conditions of school support staff in England;
(ii) Power to establish the Adult Social Care Negotiating Body;
(iii) Right to statement of trade union rights;
(iv) Right of trade unions to access workplaces;
(v) Conditions for trade union recognition;
(vi) Industrial action ballots: turnout and support thresholds;
(vii) Facilities provided to trade union officials and learning representatives;
(viii) Facilities for equality representatives;
(ix) Protection against dismissal for taking industrial action;
(x) Collective redundancy: extended application of requirements;
(xi) Blacklists: additional powers.

Pay and conditions of school support staff in England (Clause 28)

123. Clause 28 of the Bill provides for the establishment of the School Support Staff Negotiating Body ("SSSNB") and provides a statutory framework for the negotiation of school support staff terms and conditions by that body. The Secretary of State must prescribe school support staff organisation and school support staff employer organisation members of the SSSNB through secondary legislation.

124. Article 11 rights include a negative right of association, i.e. a right not to join an association (*Sigurður A. Sigurjónsson v. Iceland,* 1993, § 35; *Vörður Ólafsson v. Iceland*, 2021, § 45). School support staff may not wish to join a trade union but feel that they nevertheless have to in order to be represented on the SSSNB.

125. There are established collective bargaining arrangements in relation to school support staff and the contracts of most school support staff already incorporate terms that have been agreed through that process (either as a result of the collective bargaining process or through the adoption of those terms by employers as a matter of policy). The introduction of mandatory national arrangements will ensure consistency across the education workforce, professionalising these roles and driving improvements in education standards.

126. This clause allows the Secretary of State to prescribe employer and employee representative membership of the SSSNB and so could engage Article 11 and be seen as interfering with a trade union's activities (*Ecodefence and Others v. Russia*, 2022, §§ 81 and 87). States may place restrictions on trade unions, provided this is a proportionate means of achieving a legitimate aim (*Sidiropoulos and Others v. Greece*, 1998, § 40). The Government considers that the impact of any exclusion from the SSSNB would be limited, and is proportionate. eEmployee representative members of the SSSNB will comprise of all those trade unions who are currently recognised as part of national collective bargaining arrangements. They represent the vast majority of school support staff. Limiting the membership of the SSSNB as above will ensure the body can function effectively to protect the rights and freedoms of school support staff.

Power to establish the Adult Social Care Negotiating Body (Clauses 29, 30, 32 and 33)

127. Clauses 29, 30, 32 and 33 contain powers for the Secretary of State to create an Adult Social Care Negotiating Body, and to make provision in regulations about (amongst other things) membership of the negotiating body and terms of appointment, as well as set out its remit, the matters it may consider, and how it may consider them. The intention is that membership of the body will include officials of trade unions representing the interests of adult social care workers as well as employer representatives. Clause 31 defines "social care worker".

128. Implicit in Article 11 is a negative right of association i.e. a right not to join or a right to withdraw from an association, (*Sigurður A. Sigurjónsson v. Iceland,* 1993, § 35;

Vörður Ólafsson v. Iceland, 2021, § 45). Workers in the adult social care sector may not wish to join a trade union but feel that they nevertheless have to in order to be represented on the Adult Social Care Negotiating Body.

129. However, the UK's legislative framework for collective bargaining already allows a recognised trade union to negotiate on behalf of the entire workforce rather than just its members alone.

130. The Government believes there are strong public interest arguments to justify the introduction of mandatory arrangements. In particular, the voluntary bargaining framework has not been able to address the imbalance in bargaining power between employers and social care workers and many social care workers receive pay at or only slightly above the national minimum wage. This in turn has led to an unsustainable recruitment and retention crisis in the adult social care sector. These clauses aim to address this crisis by establishing a mechanism for the Secretary of State to implement improved terms and conditions for social care workers that have been agreed by representatives of the sector.

Overview of Part 4 – Trade Unions and Industrial Action etc

131. The measures in Part 4 engage and enhance the rights within the scope of Article 11, as they enhance the rights of trade unions, trade union representatives and workers. Therefore, the Government does not consider that there is any interference with Article 11 rights.

132. As set out in *Demir and Baykara v Turkey* [2008] ECHR 1345 the substance of the right of association enshrined in Article 11 "*affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests"* [paragraph 141].

133. The package of measures contained in Part 4 goes beyond what is required in order for a statement of compatibility to be made in relation to Article 11, as summarised below.

(i) The repeal of legislation (the Trade Union Act 2016 and the Strikes (Minimum Service Levels) Act 2023) that, whilst compatible with Article 11, was criticised for being restrictive for trade unions and their members, particularly in relation to industrial action. For example, the Parliamentary Joint Committee on Human Rights criticised the Strikes (Minimum Service Levels) Bill 2023, in terms of Article 11 risks (10th report Session 2022-23).

(ii) Building on the existing framework of the Trade Union and Labour Relations (Consolidation) Act 1992, the Bill contains a range of measures to enhance

rights of trade unions and trade union members. For example, rights for trade unions to access workplaces through access agreements, to be regulated by the Central Arbitration Committee; new rights for trade union representatives to facilities; and new rights for equality representatives.

(iii) The Bill provides rights in relation to workers – both trade union members and non-members. Critically, the Bill enables protection from detriment for those taking industrial action – which will mean the Trade Union and Labour Relations (Consolidation) Act 1992 will no longer be incompatible with Article 11. The Supreme Court in the case of *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12 issued a declaration under section 4 of the Human Rights Act 1998 that section 146 of Trade Union and Labour Relations (Consolidation) Act 1992 is incompatible with Article 11. The Bill makes provision to change that position, in part via subsequent secondary legislation, to ensure that the legislative framework providing employment protections for those taking part in industrial action is fully compliant with Article 11.

134. Further details on these measures are considered below.

Right to statement of trade union rights (Clause 45)

135. This clause imposes a duty on employers to inform workers of their right to join a trade union alongside the existing written statement provided to workers when they start work containing the main conditions of employment. The right to join a trade union is a key element of Article 11. Also implicit in Article 11 is the right not to join a trade union. The Government considers that requiring employers to inform workers of their right to join a trade union does not interfere with the rights of those who do not wish to join a trade union, as the duty is limited to informing and reminding workers of their existing right to join a trade union. Those who do not wish to join a trade union are free to do so.

Right of trade unions to access workplaces (Clause 46)

136. This clause makes provision for access agreements, to enable trade unions to access workplaces for specified purposes, to meet, represent, recruit or organise workers (including non-union members); and to facilitate collective bargaining – this is likely to lead to an enhancement of Article 11 rights.

Conditions for trade union recognition (Clause 47)

137. Clause 47 is described above at paragraph 86.

138. This clause simplifies the process of union recognition and the law around statutory recognition thresholds. This is also in compliance with case law: refusal and restrictions on granting legal-entity status to trade unions amounts to an interference with Article 11 (*Sidiropoulos and Others v. Greece*, 1998, § 31; *Koretskyy and Others v. Ukraine*, 2008, § 39; and delays to the registration procedure similarly amount to such interference (*Ramazanova and Others v. Azerbaijan*, 2007, § 60; *Aliyev and Others v. Azerbaijan*, 2008, § 33).This clause would enable trade unions to gain statutory recognition more easily. The human rights of trade unions and their members, in particular under Article 11, are somewhat improved by the proposals.

Industrial action ballots: turnout and support thresholds (Clause 54)

139. This clause removes the requirement that in all ballots for industrial action, at least 50% of the trade union members entitled to vote must do so in order for the ballot to be valid. It also repeals the minimum threshold of support that must be satisfied in ballots for industrial action in defined important public services. Currently in order for a ballot in these important public services to lead to industrial action, a trade union must obtain the support of at least 40% of all union members entitled to vote in the ballot. Removing these restrictions will arguably enhance the ability of trade unions and their members to exercise Article 11 rights.

Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives (clauses 50 and 51)

140. These clauses are described above at paragraph 83. These rights enhance the rights of trade union representatives. A new right for trade union equality representatives to take time off for specified purposes, and to have access to accommodation and other facilities, enhances Article 11 rights.

Protection against dismissal for taking industrial action (Clause 60)

141. The Supreme Court made a declaration of incompatibility in *Mercer* [2024] UKSC 12 and held that section 146 of the Trade Union Labour Relations and Consolidation Act 1992 was incompatible with Article 11. Employees who are dismissed for taking part in lawful strike action have some statutory remedies for unfair dismissal; however, there is currently no express statutory (or other) protection in domestic law against action taken by an employer short of dismissal for participation in lawful strike action. This clause provides workers with the right not to be subject to detriment of a prescribed description to prevent, deter or penalise the worker for taking industrial action. The Government plans to consult on what forms of detriment should be prohibited, in order to strike a fair balance between the competing interests of employers and workers.

Collective redundancy: extended application of requirements (Clause 23)

142. Clause 23 amends employers' obligations in relation to collective redundancy consultation. The current legislation requires employees to consult with appropriate representatives when proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The proposed amendment would remove the scope of "establishment" from the relevant legislation. This change would mean the collective redundancy consultation obligation would apply across the whole business, rather than being limited to individual establishments.

143. This change is likely to enhance employees' rights under Article 11, because it will expand employers' obligations to consult a recognised trade union, or if there is not one, employee representatives, on proposed redundancies.

Blacklists: additional powers (Clause 53)

144. Clause 53 is intended to strengthen the Article 11 right, as it will widen the scope of blacklisting protection, protecting individuals from detriment as a result of trade union membership or activities.

Article 14 ECHR

145. Article 14 provides that:

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

146. Article 14 does not provide a free-standing right to non-discrimination; rather, it provides a right to non-discrimination in the enjoyment of other Convention rights.

147. The following provisions are considered to engage Article 14:

(i) Right to guaranteed hours;
(ii) Shifts: right to reasonable notice;
(iii) Right to payment for cancelled, moved and curtailed shifts;
(iv) Dismissal for failing to agree to variation of contract, etc.;
(v) Dismissal during pregnancy;
(vi) Dismissal following period of statutory family leave;
(vii) Parental leave: removal of qualifying period of employment;
(viii) Paternity leave: removal of qualifying period of employment;
(ix) Bereavement leave;

(x) Protection of disclosures relating to sexual harassment;
(xi) Statutory Sick Pay: removal of waiting period;
(xii) Statutory sick pay: lower earnings limit etc;
(xiii) Public sector outsourcing: protection of workers;
(xiv) Pay and conditions of school support staff in England;
(xv) Power to establish the Adult Social Care Negotiating Body.

Right to guaranteed hours (Clause 1)

148. Clause 1 provides that an employer must offer a contract to a qualifying worker, reflecting the hours worked regularly (to be defined in regulations) during the reference period (to be set out in regulations, but anticipated to be 12 weeks). That contract, or variation to an existing contract, shall be permanent unless e it is reasonable for the contract to be entered for a limited term, to carry out a specific task, or in relation to the occurrence of an event or where there will be temporary need (a definition to be supplemented in regulations).

149. One possible ground of challenge is that the regulation making powers provide for potential discrimination against those zero-hours workers and workers who fall outside the scope of "regularity" and / or of "low hours contract".

150. Regulations will set both the definition of what is "regular work" and the threshold of what is considered "low hours" contracts.

151. It is arguable that Article 14 (in conjunction with Article 1 of Protocol 1 ("A1P1") as noted at paragraph 209), will be engaged as a result of making the regulations on both the "regularity" and "low hours contracts" as both sets of regulations will contribute to applying the provisions only to those who meet the definition of regularity, and similarly for what is considered low hours and could exclude some workers. The element of regularity will also apply to the low hours contracts which will further restrict the scope.

152. It is unlikely that from among zero-hours workers or among those on low hours, workers who fall within the scope and those fall outside the scope due to a difference of hours worked would be able to show a difference of treatment on grounds of "other status". This is in line with *Peterka v the Czech Republic* (21990/08, 4 May 2010), which found that the nature and length of an employment contract did not amount to an 'other status'.

153. In the unlikely situation in which those workers may be in a comparable situation, the Government is confident that it could objectively justify this difference in treatment by reference to the need to target the policy towards those who most need it. The Government is seeking to address exploitative contracts where workers work "regularly" but are guaranteed no hours, or low hours that they regularly exceed. The Government is not looking to ban situations where individuals are content to work odd hours offered to them to supplement their income.

154. The Government considers that this policy is within the realm of economic and social policy decision-making for which the 'manifestly without reasonable foundation' test would be the most suitable.

155. In addition, since section 6 of the Human Rights Act 1998 will apply to the power to make regulations, that power must be exercised in a manner compatible with the Convention Rights. The Government believes that the provisions on "qualifying workers" are compatible with the Convention; and those containing regulation making powers are capable of being exercised in a manner which is compatible with the Convention.

Shifts: rights to reasonable notice; and Right to payment for cancelled, moved and curtailed shifts) (Clauses 2 and 3)

156. Clauses 2 and 3 are described above at paragraph 24.

157. As discussed elsewhere in this memorandum, the policy on notice of shifts is considered to be within the ambit of Articles 6 (see paragraph 24), 8 (see paragraph 59) and A1P1 (see paragraph 216).

158. Only workers on zero-hours contracts and arrangements and other contracts to be specified in regulations by reference to a maximum number of hours or pay (and therefore likely workers on low hour contracts) will beare in scope of the policy as it is aimed at providing predictability to those who do not otherwise have this.

159. The workers on such contracts are more likely to be young, female or from a minority ethnic background. Age, sex and race should all be considered to be 'statuses' for the purpose of Article 14. Being on a zero or low hours contract (or not) should not however in itself be an 'other status' for the purpose of Article 14 in line with *Peterka v the Czech Republic* (21990/08, 4 May 2010), which found that the nature and length of an employment contract did not amount to an 'other status'.

160. The majority of older workers, males and those not from a minority ethnic background who do not benefit from the policy would not be in an analogous position to those workers who are young, female or from a minority ethnic background in scope of the policy. This is because they would not be on zero or low hours contracts and would not suffer from the same unpredictability that the policy is aimed at preventing.

161. The application of the policy to those on zero and low hours contracts and therefore any difference in treatment between comparable/analogous groups of workers is considered to be objective and reasonable. As such, the Government considers that any indirect discrimination would be justified.

162. The Government considers it to be a legitimate aim to ensure that workers have more predictability of when they are required to work and therefore when they will be paid so that they can in turn better plan their home lives and finances and ultimately reduce stress, anxiety and income precarity.

163. The Government is legislating on a matter of social policy and should generally be permitted to legislate unless it is manifestly without reasonable foundation for the purpose of Article 14.

164. It is considered appropriate and proportionate to target the policy at those on zero and low hours contracts rather than all workers as those are the workers that face the greatest level of unpredictability of when they will need to work and what income they will receive.

165. Section 6 of the Human Rights Act 1998 will apply to Ministers when exercising regulation-making powers and prevent them from making regulations that breach Article 14. Accordingly, the Government will at that point ensure that any regulations are compatible with Article 14.

Dismissal for failing to agree to variation of contract, etc. (Clause 22)

166. Clause 22 makes it automatically unfair to dismiss an employee where they have refused to agree to a variation in contractual terms or to dismiss an employee with a view to replacing or re-engaging them on varied contractual terms. The exception to this is where the employer can show the variation would eliminate or prevent financial difficulties, and the employer could not have avoided the variation. If an employer can demonstrate this, then the Employment Tribunal would consider whether the dismissal was fair in all of the circumstances, having regard to factors specified in the Bill, which include whether the employer has consulted on the variation in contractual terms or offered the employee anything in return for agreeing to a variation. This is a change from current legislation in which variation in contractual terms would not be automatically unfair and could be justified as being 'some other substantial reason' for the dismissal.

167. It is arguable that Article 14 (in conjunction with A1P1 as noted at paragraph 227), could be engaged as a result of the clause applying only to employees who are employed for the purposes of a business and therefore not to employees employed by private individuals for non-business reasons.

168. The ECtHR has found that status in relation to employment can be regarded as an "other status" for the purposes of Article 14. It is likely that employees employed in a non-business setting (as compared to those employed by a business) could be regarded as having an "other status" for the purpose of Article 14. However, the required justification for a difference in treatment based on this status will be lesser, as is it an acquired characteristic rather than an innate one (*R (oao RJM) v SSWP* [2008] UKHL 63). This provision is more likely to exclude domestic workers, who are

generally more likely to be women. However, the exclusion is not being applied 'on the basis' of sex.

169. A person who is employed by a private individual may not be considered to be in an analogous position to a person employed by a business. For example, a person employed by a private individual is likely to be aware that their employment status is not based solely (or even primarily) on the financial position of their employer, but also their employer's personal needs and reasons for employing the employee, which may change over time.

170. The aim of the clause is to improve security of work by reducing instances where an employer can dismiss an employee for refusing to agree to a variation in their contractual terms and conditions. The Bill allows for an exception to this clause when a business is in financial difficulty and the change to terms and conditions are unavoidable.

171. The impact on those who are employed by a private individual is expected to be low because often services in non-business settings are provided by self-employed individuals, rather than employees.

172. The policy is not aimed at employees who are employed in a private setting, as the Government is not seeking to interfere with private individuals who employ people outside of a business setting. The Government considers it would be disproportionate if a private individual had to be in financial difficulty before they were able to change the contractual terms of those they employ in a non-business setting.

173. Employees who are not employed by a business will still be able to bring ordinary unfair dismissal claims if they wish to challenge a dismissal for a refusal to agree revised contract terms.

174. The Government believes that any interference with Article 14 rights that may be produced by this clause is justified.

<u>Dismissal during pregnancy; and Dismissal following period of statutory family leave (Clauses 20 and 21)</u>

175. Clauses 20 and 21 are described above at paragraph67 67.

176. Article 14, read with Article 8, is almost certain to be engaged. If the creation of tailored, and more favourable, dismissal protections is limited to pregnant women / new mothers, this may constitute more favourable treatment on the grounds of sex under the ECHR. The ECHR recognises the legitimacy of more favourable treatment which is a response to the biological realities of pregnancy and new motherhood (*Petrovic v Austria* [1998] 33 EHRR 307 (ECtHR); *Konstantin Markin v Russia* (No. 20078/06, 22 March 2012)). The extension of protection into a period after a return from maternity leave may require more robust justification, but there is substantial

and consistent evidence of the particular and overwhelming risk that this cohort of employees bears in relation to their job security. The Government believes that the enhanced protection is justified as a proportionate response to that risk, and as part of the advancement of important social policy aims.

177. However, as power to provide protection is also being extended to include employees returning from periods of those types of family-related leave which are potentially of significant length, the Government does not believe that there is a prima facie infringement of the Convention which would require justification, as there is no less favourable treatment of persons in an analogous position. Even if there were a prima facie infringement, the Government believes that any such infringement would be proportionate in light of the policy aims being pursued.

Parental leave: removal of qualifying period of employment; and Paternity leave: removal of qualifying period of employment (Clauses 11 and 12)

178. Clauses 11 and 12 are described above at paragraph 69.

179. Paternity leave and parental leave support respect for family life and so fall within the ambit of Article 8. In the case of *Weller v. Hungary* (44399/05) the European Court of Human Rights recognised parental status as an "other status" for the purposes of Article 14.

180. The purpose of paternity leave is to care for the child newly born or adopted or to support the mother or the person with whom the child is placed for adoption. Making the right to paternity leave a day one right, makes it consistent with maternity leave which is already a day one right. As the majority of persons who take maternity leave are women and the majority of persons who take paternity leave are men, this will bring the entitlement to these two types of leave more in line with each other. In the case of parental leave, this is equally available to all parents, regardless of their sex. Therefore, there is no obvious disadvantage to any person in creating a day one right to paternity leave and to parental leave and the proposed measures will enhance existing entitlements to leave.

Bereavement leave (Clause 14)

181. Clause 14 provides powers for a new form of bereavement leave for employees, alongside the existing entitlement to bereavement leave for employees whose child under the age of 18 has died. In clause 14 the enhanced entitlement for employees to take bereavement leave applies will apply to all employees and, therefore, there is no obvious disadvantage to any person in providing for a new entitlement for employees to take bereavement leave on the death of a family member. The relationships with the deceased that will give rise to the entitlement, the extent of the entitlement and the amount of leave that an employee can take, will be set out in secondary legislation. The powers to make this secondary legislation are not framed

in a way which would require them to be exercised incompatibly with the ECHR. The policy intention is to apply the new entitlement equally across all protected characteristics under the Equality Act 2020. In addition, since section 6 of the Human Rights Act 1998 will apply to the power to make regulations, that power must be exercised in a manner compatible with the ECHR.

Protection of disclosures relating to sexual harassment (Clause 18)

182. Clause 18 is described above at paragraph 119.

183. Whistleblowing is within the ambit of Article 10. Clause 18 does not change the application of the whistleblowing framework. This means that those individuals who do not fall within the extended definition of "worker" in section 43K (and section 230) of the Employment Rights Act 1996 are not in scope of the Bill measure regarding disclosures about sexual harassment. Those who do not fall within the definition of worker may constitute an 'other status' for the purposes of Article 14, for example, charitable trustees, volunteers or contractors. Where these individuals are part of an organisation, they may be in an analogous position to workers of the same company (*Gilham v Ministry of Justice* [2019] 1 W.L.R. 5905).

184. Those who work within an organisation in a potentially analogous position but who do not fall within the extended definition of a worker may argue their right to speak up about sexual harassment is infringed because this could not amount to a protected disclosure. As the Bill measure does not change the scope of those protected by the whistleblowing framework, this is an existing point of interference which is also applicable to our addition of sexual harassment to the legislation.

185. The policy objective behind the whistleblowing framework seeks to protect the public at large by giving workers who are aware of wrongdoing in the workplace a route to make disclosures about this to their employers and provide accompanying protection from retaliatory detriment or dismissal. Workers within an organisation are most likely to be those with 'insider information' of the type which could constitute the subject of a disclosure and are also those most likely to be discouraged from raising concerns internally because of their subordinate status in the workplace and their reliance on their employer for their livelihood. Additionally, workers may owe duties to their employer, such as those of confidentiality and so need the protection of the framework when making a disclosure which might otherwise breach these. This puts workers in a different situation to, for example, volunteers who are not risking the loss of their livelihood and would not owe contractual duties to an employer. For these reasons the Government considers that it is justified for protections to be focused on workers as the group most in need of this type of protection.

186. The Government is legislating in an area of social policy, and in line with *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223 should be accorded a wide margin to legislate in this area unless it is manifestly without reasonable foundation to do so.

Statutory Sick Pay: removal of waiting period; and Statutory sick pay: lower earnings limit etc (Clauses 8 and 9)

187. Clauses 8 and 9:

(i) remove the prohibition on employees earning below the Lower Earnings Limit being entitled to Statutory Sick Pay ("SSP");
(ii) create a new lower rate of SSP. The new rate of SSP means that employees will be paid the lower of (a) a defined percentage of their normal weekly earnings; and (b) a flat weekly rate (currently £116.75 per week), and;
(iii) remove the waiting period for SSP and make it available from day 1 of a sickness absence.

188. These measures require employers to pay SSP to eligible workers in circumstances where they are not currently required to do so. These circumstances are where: (a) the period for which the employee is incapable of work lasts for three or fewer days; (b) for the first three qualifying days (days on which an employee would otherwise be required to work); and (c) where the employee earns less than the Lower Earnings Limit.

189. Imposing burdens on employers to pay sick pay falls within the ambit of A1P1.

190. Potential differential treatment may arise where employers argue that imposing additional costs upon them, despite their different sizes or natures, would be unlawfully discriminatory. Size of employer, and particular types of employer, are likely to be "other" statuses for the purposes of Article 14.

191. Imposing obligations on all employers to pay SSP under the amended rules, and amending the rate of SSP, are considered to be objectively justified and proportionate.

192. The Courts are likely to afford a wide margin of discretion in relation to this matter of social and economic policy, and are likely to accept the judgement of the legislature unless it is manifestly unreasonable.

193. The Government considers that a regime of minimum pay in relation to sickness can only properly and fairly function where the relevant rules apply to all eligible employees equally. As such, having decided that it is correct to extend SSP to the low paid and to remove the waiting period, it is clearly justified for these changes to apply to all employers, without distinction. The additional costs on employers, even small enterprises, are not sufficient to undermine this justification.

Public sector outsourcing: protection of workers (Clause 25)

194. Clause 25 contains a power to make regulations and imposes a duty to publish a code of practice in relation to relevant outsourcing contracts (under which functions previously performed by a public authority's workers are to be performed by a subcontractor).

195. The Government considers that these measures are within the ambit of A1P1. Whilst the right to participate in procurement is not protected by A1P1, it is a modality of the exercise of A1P1; that is to say, suppliers participate in procurement with a view to obtaining a contract which would, as an asset, be protected by A1P1.

196. The Government considers that Article 14 is engaged to the extent that the procurement measure set out in the Bill has the potential to discriminate against suppliers on the basis that the supplier themselves or their services are based in or provided from another country. This would particularly be the case where a supplier is based in a country with lower employment standards, and is consequently able to price their services lower than competitors from countries with more developed employment standards.

197. Whilst the Government recognises that the exercise of the power to make regulations and to publish a code of practice could have the effect of making it less attractive to bid for UK contracts for suppliers connected to certain countries, there is no obstacle to them doing so. A supplier who has lost their competitive edge due to increased costs as a result of regulations or a code of practice could arguably make a case that there is indirect discrimination on the basis of nationality (as prohibited by Article 14). Where an applicant establishes a rebuttable presumption of indirect discrimination in the application of a measure, the burden of making that rebuttal lies with the state.

198. To the extent that this could amount to an infringement of Article 14 read alongside A1P1, the Government considers these measures to be firmly in the public interest. These measures are intended to ensure fairness between groups of employees working on the same contract, which in turn promotes the provision of good quality public services.

199. The UK is subject to a number of international obligations in relation to non-discrimination in procurement, and care will be taken to ensure that any measures required by regulations or set out in a code of practice are designed in such a way that their application cannot lead to unlawful indirect discrimination against suppliers or, where that is not possible, will be subject to appropriate exemptions, as permitted by this clause.

Pay and conditions of school support staff in England (Clause 28)

200. Clause 28 is described above at paragraph 123.

201. As set out above and below, these measures are considered to be within the ambit of Articles 11 (paragraph 123) and A1P1 (paragraph 264). The ECtHR has found in a number of cases that status in relation to employment can be regarded as "other status" for the purposes of Article 14. Local authorities employ school support staff and other staff, who may have been evaluated as carrying out work of equal value to school support staff for the purposes of domestic equal pay claims. Improved terms for school support staff could give rise to equal pay claims from other local authority employees, framed as breaches of Article 14 (when read with Article 11 or A1P1).

202. These provisions ensure all schools employ school support staff on consistent terms that are appropriate to their roles in schools. The SSSNB also has a remit to advise on training and career progression for these staff. Together, these measures will support the professionalisation of this workforce and improve educational standards in schools.

203. The Government considers that the powers in the Bill can be exercised compatibly with Article 14 and guidance can be issued to employers to assist them in implementing changes to terms and conditions. Further, Part 8 of the Education Act 2002 contains a separate pay and terms and conditions statutory framework for school teachers. There is, therefore, precedent for establishing different frameworks for more specialist negotiation of pay and conditions of local government employees in the education sector. Other local government employees will continue to benefit from existing collective bargaining processes, allowing for their representation by trade unions.

<u>Power to establish the Adult Social Care Negotiating Body (Clauses 29, 30, 32, 35 and 37)</u>

204. Clauses 29, 30 and 32 are described above at paragraph 127. Clause 35 gives the Secretary of State the power to ratify an agreement reached by the Adult Social Care Negotiating Body and the effect of the ratification will be to impose terms and conditions, including in relation to pay, into the employment contracts of adult social care workers. The same result would be achieved in circumstances where the Negotiating Body has been unable to reach an agreement (and other specified circumstances are met) and the Secretary of State decides to exercise his powers to make regulations under clause 37. The expectation is that these imposed terms will result in a pay rise for many adult social care workers. The aim of the clauses is to improve the pay, and other terms and conditions of employment for social care workers.

205. Local authorities employ adult social care workers and other staff, who may have been evaluated as carrying out work of equal value to adult social care workers for the purposes of domestic equal pay claims. Improved terms for adult social care workers could give rise to equal pay claims from other local authority employees, framed as breaches of Article 14 (when read with Article 11 or A1P1). Unjustified differences in pay between the two groups would breach the principle of non-discrimination in Article 14.

206. The Government considers that the powers in the clauses can be exercised compatibly with Article 14. If ratification of an agreement under clause 35 will lead to a pay rise for certain social care workers, guidance on equal pay can be provided to help employers ensure they remain compliant with Article 14 when they implement the change.

Article 1 of Protocol 1 ECHR

207. Article 1 of Protocol 1 ("A1P1") provides that:

> *"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.".*

208. The following provisions are considered to engage Article 1 of Protocol 1:

(i) Right to guaranteed hours;
(ii) Shifts: rights to reasonable notice;
(iii) Right to payment for cancelled, moved and curtailed shifts;
(iv) Dismissal for failing to agree to variation of contract, etc.;
(v) Policy about allocating tips etc: review and consultation;
(vi) Statutory sick pay: removal of the lower earnings limit;
(vii) Statutory sick pay: removal of the waiting period;
(viii) Public sector outsourcing: protection of workers;
(ix) Collective redundancy: extended application of requirements;
(x) Pay and conditions of school support staff in England;
(xi) Power to establish the Adult Social Care Negotiating Body;
(xii) Rights of trade unions to access workplaces;
(xiii) Facilities provided to trade union officials and learning representatives;
(xiv) Facilities for equality representatives;
(xv) Conditions for trade union recognition;
(xvi) Enforcement of labour market legislation by Secretary of State.

Right to guaranteed hours (Clause 1)

209. Clause 1 is described above at paragraph 148.

210. The Government believes that A1P1 may be engaged by the provision relating to guaranteed hours, which require that a binding contract be made between the employer and the qualifying worker, requiring therefore that the employer pays those workers' wages for the set number of guaranteed hours, until a contract be lawfully terminated. Employers' income can only be considered to be a possession for A1P1 purposes if it has already been earned, or where an enforceable claim to it exists (*Ian Edgar (Liverpool) Ltd v. the United Kingdom* (dec.), 2000, *Denisov v. Ukraine* [GC], 2018, § 137, *Gyulumyan and Others v. Armenia* (dec.), 2023, § 101.

211. The Department believes that to the extent that there is any interference with the employers' or business' rights under A1P1 in respect of their monies it is necessary to determine whether this interference amounts to a deprivation of property in accordance with the second rule of A1P1, or a control of the use of property, in accordance with the third rule.

212. The Government would contend that if there is any interference with the employers' and businesses' possessions, that they are not deprived from their possession as reflected in some of the cases on expropriation and as explained in the ECtHR's own "Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights". The Government would instead contend that the interference amounts to a control of use, in that the employer is directed in the spending of its funds in the form of wages payable for guaranteed hours of work.

213. If it is considered that there is an interference in the meaning of A1P1 with the employers' or businesses' possessions, then the Government would contend that it is justified as it pursues a legitimate aim and is proportionate. Interference in A1P1 rights may be justified if it serves a legitimate public or general interest (*Béláné Nagy v. Hungary* [GC], 2016, § 113; (*Lekić v. Slovenia* [GC], 2018, § 105).

214. The legitimate aim is to give workers a guaranteed contract which reflects the hours they work, seeking to end "exploitative practices" where workers have no certainty they would be provided with work (or only for a low number of hours for some), but in reality they work for the employer on a regular basis.

215. The Government's assessment is that the measure is proportionate since the guaranteed hours to be offered to a qualifying worker would reflect the hours regularly worked by that worker. There would therefore be no significant material change caused by the interference in terms of the wages that the employers will be bound to pay compared to the wages they currently pay under the zero-hours or low hours arrangements.

<u>Shifts: rights to reasonable notice; and Right to payment for cancelled, moved or curtailed shifts; (Clauses 2 and 3)</u>

216. Clauses 2 and 3 are described above at paragraph 24.

217. The Government believes that A1P1 may be engaged by these provisions as they require an employer to pay a worker money, i.e., transfer their assets to the worker. However, as set out at paragraph 210 above, there are limits to when employers' future income can be considered to be a possession for A1P1 purposes.

218. To the extent that A1P1 is engaged, it is necessary to determine whether this interference amounts to a deprivation of property, in accordance with the second rule of A1P1, or a control of the use of property, in accordance with the third rule.

219. It is only in situations where the applicant's ownership is actually or effectively extinguished that a case will amount to a deprivation of property. By way of contrast, there are many cases in which an applicant loses their property which do not amount to a deprivation of property for the purposes of A1P1.

220. The provisions on notice of shifts in this Bill contain provisions to regulate the payment of workers and therefore regulate the transfer of ownership of money as between the employer and the workers. The Bill does not extinguish the employer's right to their money, but instead creates provisions meaning that the employer must, in certain situations, ultimately transfer the ownership of the money to the workers. The Department's assessment is that the Bill would involve a control of the use of the money rather than a deprivation in the sense of an expropriation.

221. This is particularly so given that the employer can generally avoid having to pay the worker and therefore retain their assets by ensuring that workers are provided with reasonable notice of their shifts and changes to these. Further, there are likely to be exceptions from the duty to make payment for certain circumstances outside of the employer's control.

222. If it is considered that these provisions constitute an interference in the meaning of A1P1 with the employer's possessions, then the Government would contend that it is in accordance with the law and justified as a proportionate means of achieving a legitimate aim.

223. As above, the provisions on notice of shifts are aimed at ensuring that workers have more predictability of when they are required to work and therefore when they will be paid so that they can in turn better plan their home lives and finances and ultimately reduce stress, anxiety and income precarity. The Government considers this to be a legitimate aim for the purposes of A1P1.

224. Many employers rarely cancel shifts and already pay workers for cancelled shifts. Additionally, the policies will only apply to employers employing workers on zero-hours contracts and arrangements and contracts of a type to be specified in regulations by reference to a maximum amount of hours or renumeration, i.e., likely low hour contracts, so they should only affect a proportion of employers (as most workers are not on such contracts).

225. Where employers are subject to the provisions, the sums involved are likely to be relatively small. In particular, the maximum amount that employers would need to pay

in compensation ordered by a tribunal for short notice cancellation/curtailment will not exceed what the worker would have earned from working the relevant hours (and is likely to be lower than this). Further, payment should usually only be required where an employer has acted unreasonably. To the extent that an employer may have to pay for circumstances outside of their control, this is considered proportionate to ensure that employers rather than workers take on the risks associated with short notice shift changes given that employers are more capable of doing so.

226. Finally, it is anticipated that the provisions will lead to significant benefits for workers on zero-hours and low hours contracts, as set out above. The interference with employers' property is therefore considered to be proportionate.

Dismissal for failing to agree to variation of contract, etc. (Clause 22)

227. Clause 22 is described above at paragraph 30.

228. In current legislation, variation in contractual terms would not be automatically unfair and could be justified as being for some other substantial reason. The Government believes that the change in position could amount to an interference with A1P1. Rights protected under A1P1 include businesses' right to conduct their operations and manage their assets.

229. The amendment could interfere with these rights by reducing the range of scenarios in which an employer can fairly dismiss or replace an employee to achieve a variation in contractual terms, affecting the employer's assets and economic interests.

230. To the extent that the provisions constitute some interference with the A1P1, the Government is satisfied that such interference is justified, as follows.

231. The Government considers that the amendment serves the public interest, as it creates more security in work, potentially preserving jobs, or reducing reductions in employees' contractual terms unless truly necessary.

232. In the Government's assessment, making such dismissals automatically unfair will deter employers from using dismissal and re-engagement or replace techniques to reduce an employee's terms and conditions unless it is truly necessary due to the employer being in financial difficulty.

233. The exceptions in the clause mean that variation to contracts is still available to employers where necessary, striking the right balance between:

(i) reducing instances of employers unfairly varying an employee's contractual terms, and increasing the security of employee's employment, and;
(ii) the employers' right to conduct their operations and manage their assets.

234. While this may have a financial impact on a businesses' ability to manage their assets, it is balanced against the substantial benefit to workers. Any interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Sporrong and Lönnroth v. Sweden*, 1982, § 6, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], 2007, § 52, 53).

235. If employers truly need to use dismissal to vary contractual terms, they have the exemption available to them, under which the Employment Tribunal could find such a dismissal fair having regard to all the circumstances. The Government therefore considers any interference with employers' property rights is proportionate.

Policy about allocating tips etc: review and consultation (Clause 10)

236. Clause 10 requires relevant employers consult with workers on the distribution and allocation of tips when developing or updating their written tipping policy. The current legislation requires employers to pass all tips, service charges and gratuities on to workers without deductions. It also mandates that employers have a written policy on tip allocation where these tips are paid on more than an occasional and exceptional basis. However, the legislation does not currently require employers to consult with workers when developing these policies. The statutory Code of Practice only encourages employers to consult with workers to seek broad agreement that the allocation system is fair, reasonable, and clear.

237. The Government believes that the requirement to consult workers when developing polices for distributing and allocating tips, service charges and gratuities may interfere with employers' right to peaceful enjoyment of possessions under A1P1. This represents an external imposition on employers' ability to independently make decisions regarding the administration and allocation of these funds while taking into account the statutory Code of Practice. It is arguable that although tips, service charges, and gratuities are ultimately intended for workers, they are still part of employers' overall business revenue and financial management.

238. The primary aim of the provisions is to protect workers' rights. Current legislation already mandates that these payments must be passed to the workers. The amendment is rooted in the public interest by promoting fairness and transparency in the workplace. The provisions introduce a procedural obligation (consultation) and do not deprive employers of their property. Employers retain the power to distribute and allocate the tips while having regard to the Code of Practice.

239. The Government considers that the amendment strikes a balance between protecting workers' financial interests and respecting the employers' right to control their business operations. To the extent that the provisions constitute some interference with the A1P1, the Government is satisfied that such interference is justified.

Statutory sick pay: lower earnings limit etc (Clause 9)

240. Clause 9 is described above at paragraph 187.

241. The Government believes that A1P1 is engaged by the extension of SSP to employees who earn below the Lower Earnings Limit (and are currently excluded from eligibility to SSP). This measure has the effect of requiring that the employer pay wages to particular employees at a specified rate in circumstances where the employer would not currently be required to use their property to pay the employee a wage. The Government believes that this may amount to an interference with the employer's rights under A1P1 in respect of their monies, which would be required to be spent on SSP.

242. The Government would contend that if there is any interference with the employers' possessions, that they are not deprived of their possession. These provisions do not extinguish the employer's right to their money, but instead specifies new circumstances in which the employer must transfer the ownership of the money to particular employees. The Government would contend that the interference amounts to a control of use, in that the employer is directed in the spending of its funds in the form of wages payable as SSP.

243. The legitimate aim associated with this measure is ensuring that all employees, including the lowest paid, receive sick pay when they are incapable of work due to ill health. This provides low paid employees with financial protection during any period of ill health, avoiding employees incurring a financial penalty when taking leave as a result of ill health. This in turn discourages presenteeism, ensuring that employees are discouraged from attending work when they have short term, contagious illnesses. The effect of these measures will, therefore, both provide support to low paid employees during periods of ill health and produce overall benefits to the economy by reducing the financial costs associated with presenteeism.

244. The Government's assessment is that the Lower Earning Limit measure is proportionate. Extending SSP to the low paid, at a comparatively low rate, is likely to impose limited additional costs on employers but the positive effect on employees, and on the wider economy, is likely to be significant. As such, the Government considers that any interference in the rights of employers is proportionate to the overall benefit both to low paid employees and to the wider economy.

Statutory Sick Pay: removal of waiting period (Clause 8)

245. Clause 8 is described above at paragraph 187.

246. The Government believes that this measure may amount to an interference with the employer's rights under A1P1 in respect of their monies, which would be required to be spent on SSP.

247. The Government would contend that any interference amounts to a control of use which is justified as it has a legitimate aim and is proportionate. The Courts afford a wide margin of appreciation to states in determining what is in the general or public interest (*Béláné Nagy v. Hungary* [GC], 2016, § 113), (*James v UK* [1986] 8 EHRR 123; para 46*, Jacobson v Sweden* [1990] 12 EHRR 56), para 55).

248. The legitimate aim associated with this measure is ensuring that employees receive sick pay from the first day of their absence. This will provide important support to employees whilst also discouraging presenteeism, which in turn benefits the wider economy.

249. The Government's assessment is that the measure is proportionate. It is unlikely to impose substantial additional costs on employers but the positive effect on employees, and on the wider economy, is likely to be significant.

Public sector outsourcing: protection of workers (Clause 25)

250. Clause 25 is described above at paragraph 194.

251. A right to participate in procurement exercises and to be awarded public contracts do not amount to "possessions" protected by A1P1. In these cases, there is no enforceable claim, or legitimate expectation, to bid for or to be awarded a contract.

252. Loss of goodwill as a result of the removal of such rights may, in limited circumstances, also engage A1P1. However, the powers taken in this Bill, and their eventual application, are not capable of removing rights to participate in a procurement.

253. The Government recognises that the number and breadth of outsourced services contracts means that it is possible that there exist suppliers (in very small number) whose business depends upon successfully bidding for outsourced services contracts with UK public authorities, and whose success is founded on local staffing costs allowing them to put forward the most competitive bid.

254. To the extent that there is any residual interference, and in the limited circumstances where there is loss of goodwill, the Government is content that the interference serves the public interest, complies with conditions provided for by law and passes the fair balance test.

255. The powers are delimited by the purposes expressed on the face of the Bill and, importantly, contain sufficient flexibility to allow their requirements to be tailored to specific types of contracts or contexts, including, where appropriate, by the inclusion of exemptions. These provisions are accessible, precise and foreseeable and therefore compatible with the rule of law.

Collective redundancy: extended application of requirements (Clause 23)

256. Clause 23 is described above at paragraph 31.

257. The Government believes that applying the collective redundancy consultation obligation across a whole business, rather than it being limited to individual establishments, could amount to an interference with A1P1, which for businesses includes the right to conduct their operations and manage their assets.

258. The Government recognises that this provision could interfere with employers' ability to manage their workforce efficiently, and increases their potential financial liability, affecting their assets and economic interests.

259. To the extent that the provisions constitute some interference with A1P1 rights, the Government is satisfied that such interference is justified, as follows.

260. The increased scope for protective provisions pursues several legitimate aims in the general interest including an enhanced protection of the rights of workers so that more workers benefit from collective consultation during the redundancy process.

261. In the Government's assessment, the possibility of a protective award will encourage employers to comply with the redundancy consultation process, making actual awards less likely. The Government believes that the increased scope of the collective consultation requirements, and the consequent increase in the potential for protective awards to be made, is necessary to compel large employers to take consultation seriously across their entire operation.

262. The potential financial impact on businesses is balanced against the substantial benefit to workers. Employers can avoid financial liability by following the proper procedure and consultation requirements. The award is currently capped at 90 days' pay per affected employee and courts have some discretion in setting the award amount, which allows them to take mitigating circumstances into account, to ensure the amount awarded is proportionate.

263. The interference with employers' property rights is therefore considered to be proportionate.

Pay and conditions of school support staff in England (Clause 28)

264. Clause 28 is described above at paragraph 123.

265. The Government considers that A1P1 may be engaged in two ways by these measures, through interference with:

(i) the individual employment rights of members of school support staff, and

(ii) the contractual rights of academy trusts arising from funding agreements between the trust and SoS.

Individual school support staff employment contracts:

266. The Government considers that the impact on individuals and therefore any interference with A1P1 rights will be limited.

267. Most school support staff are employed in accordance with the National Joint Council (NJC) for Local Government Services National Agreement for pay and conditions which covers all local authority employees (and is therefore not specific to school support staff). The Government will gather more detailed information about the terms on which support staff are employed and consider the extent to which any protection of existing terms and conditions is necessary to ensure that changes to support staff contracts made through secondary legislation are fair. The Bill provisions also prevent the imposition of less beneficial terms than those a member of school support staff is currently working under in respect of a period prior to the secondary legislation being made.

268. The Government therefore considers that these provisions are capable of being exercised in a manner that is ECHR compliant.

Academy trust funding agreements:

269. Academy trusts are independent charitable companies that have entered into a funding agreement with the Secretary of State for the provision of state funded education. Whilst it has not been determined by the Courts, the Government considers that they are highly likely to be considered hybrid public authorities for the purposes of section 6 of the Human Rights Act 1998. The Government considers it unlikely that an academy trust would be considered a victim for the purposes of the ECHR and the Human Rights Act 1998.

270. In any event, the impact of these provisions on academy trusts and therefore any infringement of their A1P1 rights is likely to be limited. The majority of academies already employ support staff on NJC terms and these measures are unlikely to result in significant changes to the terms they currently use. Further, there is precedent for imposing statutory requirements on academy trusts.

271. Overall, these provisions ensure greater consistency across all schools in both the maintained and academy sector. Agreements reached by the SSSNB will be the product of meaningful engagement by employee and employer representatives (including those representing academy trusts). To the extent that A1P1 is engaged, the Government considers that any interference can be justified on the grounds that the public interest in providing tailored employment terms and conditions for school support staff and improving recruitment to and retention in these roles with the aim of improving educational standards in schools outweighs any limited interference with property rights. These provisions can therefore be exercised in an ECHR compliant manner.

Power to establish the Adult Social Care Negotiating Body (Clauses 29, 30, 32, 35 and 37)

272. Clauses 29, 30, 32, 35 and 37 are described above at paragraph 204.

273. Caselaw on A1P1 relates to either deprivation of property or control of its use. A ratified agreement reached by the Adult Social Care Negotiating Body might set a uniform standard or a minimum floor of pay and other terms and conditions for social care workers. The Government considers that this would be considered a form of 'control of use', and not deprivation.

274. Any interference with A1P1 must strike a "fair balance" between public interest demands and the requirement to protect an individual's fundamental rights. Unlike other pay-setting legislation such as the National Minimum Wage Act 1998 which prescribes a minimum wage floor, an agreement reached by the Negotiating Body will be the product of meaningful negotiation between parties representing impacted employers and workers. As such, the parties will have the opportunity to reach an agreement that strikes a fair balance between their respective interests.

275. Further, the margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in the public interest. There is a clear public interest in improving the working conditions of social care workers in order to address the recruitment and retention crisis in the sector and ultimately improve the quality of care received by social care users.

276. The Government considers that these clauses are a proportionate way to address the crisis in social care, and that any associated interference with A1P1 rights is justified.

Rights of trade unions to access workplaces (Clause 46)

277. Clause 46 is described above at paragraph 34.

278. The access framework provides access to workplace premises and facilities such as a meeting room. As such, the Department considers that A1P1 is engaged by the provisions relating to the access framework. This would be a control of use of property, rather than deprivation of property.

279. An A1P1 interference must strike a "fair balance" between public interest demands and the requirement to protect an individual's fundamental rights. The margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in the public interest.

280. If it is considered that there is an interference in the meaning of A1P1 with the employers' or businesses' possessions, then the Government would contend that it is justified as it pursues a legitimate aim and is proportionate.

281. The margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in the public interest. There is a clear public interest in allowing trade union officials to be able to meet workers face to face, and it is also important for workers that trade union officials are able to do so.

282. There are various safeguards that apply to the access agreement framework. These include that the CAC must make determinations in accordance with the access principles – these contain safeguards on the face of the primary legislation, for example by referencing that access should be in a manner that does not unreasonably interfere with the employer's business.

283. Additionally, the Secretary of State can prescribe in regulations when the CAC must take as reasonable that officials are not to have access. This is a right to request an access agreement, which in the event of a dispute, an access agreement can be imposed by the CAC including the terms and conditions of entry – these can provide for date/time/length of access/location/names etc, which can limit the interference as to what is needed and what is proportionate.

284. The employer who does not comply can ultimately face a penalty, the intention is to consult on the approach to penalties, and the clauses provide that the Secretary of State can set the maximum penalty level in regulations. Exercise of that power will need to be in accordance with Convention rights under section 6 Human Rights Act 1998.

285. The Government considers that these clauses are a proportionate way to ensure the fundamental rights in Article 11 are respected, and that any associated interference with A1P1 rights is justified.

<u>Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives (Clauses 50 and 51])</u>

286. Clauses 50 and 51 are described above at paragraph 83.

287. These clauses arguably engage and interfere with the "control of use" of the employer's property under A1P1. This is framed as an obligation on the employer to permit, rather than a right for the employee, and in any event the 'right' is conditional on what is reasonable in all the circumstances, having regard to any relevant provisions of a code of practice. The code of practice will provide more detailed guidance as to what may be reasonable. It is a legitimate aim to ensure that rights to freedom of association under Article 11 are fully realised, and it is important that trade union officials are able to fulfil their duties, and may need reasonable access to

facilities such as meeting rooms in order to do that. This approach is proportionate and is confined to what is reasonable in all the circumstances, and so the Government considers the provisions to be compatible with A1P1.

Conditions for trade union recognition (Clause 47)

288. Clause 47 is described above at paragraph 86.

289. These provisions simplify the process of union recognition and the law around statutory recognition thresholds. This enables trade unions to gain statutory recognition more easily. The human rights of trade unions and their members, in particular under Article 11, are somewhat improved by the proposals.

290. The Government believes that A1P1 rights for employers are engaged and, arguably, interfered with by the proposals, albeit any interference is very indirect and contingent

291. The provisions make it somewhat more likely that trade unions will obtain statutory recognition for, in particular, collective bargaining in relation to pay, hours and holidays of the workers in the bargaining unit. In turn, such collective bargaining could potentially disadvantage the employer and, arguably, make the employer's existing contracts of employment less valuable as a result of the additional costs which they might carry for the employer. However, our proposals do not affect the outcome of recognition of a trade union. It also remains within the control of the employer to decide on its approach to negotiation in collective bargaining and any ultimate agreement of terms. Our proposals do not enable the imposition of terms of employment on employers or workers.

292. A1P1 is a qualified right. Any interference will be in accordance with the law, clearly set out in the Act, as amended by our Bill.

293. Each of our three proposals has a legitimate aim, being the protection of the rights and freedoms of trade unions and their members and other workers in a bargaining unit. This is also in the general interest.

294. The proposals are pursued in a proportionate way. It will remain the case that statutory recognition of the trade union will only be obtained where there is clear majority support for recognition among those workers in the bargaining unit who exercise their right to vote on the matter.

Enforcement of labour market legislation by Secretary of State (Clauses 72 to 112)

295. Clauses 72 to 112 are described above at paragraph 43.

296. The Government considers that the following aspects of the FWA provisions engage A1P1:

Investigatory powers

297. Clause 79 provides a power for the Secretary of State to seize documents following entry into business premises (see subsection (4)). Clause 81 provides for the retention of documents provided in response to a requirement under clause 78 or seized under clause 79. Documents are possessions within the meaning of A1P1. The power is to retain documents for "so long as is necessary in all the circumstances". The Government considers that these powers to seize and retain documents could be said to interfere with the right to peaceful enjoyment of possessions, as they prevent persons from dealing with documents belonging to them as they see fit (which could include disposal of those documents).

298. The Government considers that the enforcement of labour market legislation is in the public interest. It falls within the socio-economic sphere, in relation to which a wide margin of appreciation is usually afforded to states (see the case of *James v UK* cited at paragraph 247). The ECtHR will respect the legislature's judgement on such matters unless it is manifestly without reasonable foundation (see the case of *Béláné Nagy v Hungary* cited above at paragraph 213). It is important for enforcement authorities to be able to investigate suspected breaches of employment law in order to protect employees and workers and secure their rights. Ensuring compliance with labour market requirements also benefits law-abiding businesses and ensures a level playing field for competition between businesses.

299. The investigatory powers are set out on the face of the Bill and are, therefore, provided by law. Further, they comply with the rule of law because the provisions are sufficiently precise, accessible and foreseeable. The powers are subject to safeguards to prevent them being used in an arbitrary way, as follows.

300. The power to retain documents applies for so long as is necessary in all the circumstances (clause 81(2)), thereby building a proportionality test into the power itself. Further, under subsection (3), the power is not available where it would be sufficient to take a photo or a copy of a document. Generally, the Secretary of State and other delegate authorities (e.g. HMRC) are public bodies and therefore bound to act in accordance with public law principles, including ECHR rights (section 6 Human Rights Act 1998).

Expanded regime for LMEUs and LMEOs

301. The Bill provides that both LMEUs and LMEOs may contain prohibitions, restrictions or requirements ("measures") that fall within subsections (2) or (3) of clauses 85 and 91. Under subsection (2) of each clause, a measure may be for the purpose of: (a) preventing or reducing the risk of the respondent not complying with relevant legal requirements, or (b) bringing information about the undertaking or order to the attention of interested persons. In practice, measures could require respondents to

deal with their property in a certain way; e.g. by requiring employers to comply with record-keeping requirements (e.g. the duty in section 9 of the NMWA 1998) or, potentially, requiring them to dispose of documents that could give rise to breaches (e.g. employee blacklists). The Government therefore considers that the LME regime engages A1P1 and potentially interferes with it (depending on the precise measures adopted in an LMEU or LMEO).

302. As set out above in relation to investigatory powers, the Government considers that the enforcement of labour market legislation is in the public interest. It is important for enforcement authorities to be able to take action against serious breaches of employment law in order to protect employees and workers and secure their rights. Ensuring compliance with labour market requirements also benefits law-abiding businesses and ensures a level playing field for competition between businesses.

303. The powers relating to LMEUs and LMEOs will be set out on the face of the Bill and will, therefore, be provided by law. They comply with the rule of law because the provisions are sufficiently precise, accessible and foreseeable. The powers are subject to safeguards to prevent them being used in an arbitrary way.

304. The powers relating to LMEUs and LMEOs are subject to detailed requirements and a clear procedure, thereby striking a balance between the rights between persons whose rights are affected and the general community. What constitutes a valid “measure” for an LMEU or LMEO is set out in the legislation (either primary or secondary). The Secretary of State must give a notice to a person that it invites to give an LMEU and there are provisions regarding the maximum length of an LMEU and release from an LMEU. To obtain an LMEO, the Secretary of State must apply to court and the court may only make an LMEO if certain conditions are satisfied. There are provisions regarding the maximum length of an LMEO and the variation and discharge of LMEOs. Finally, a respondent may appeal against the making of an LMEO or the making of (or refusal to make) a variation or discharge order.

305. Generally, the Secretary of State and other delegated authorities (e.g. HMRC) are public bodies and therefore bound to act in accordance with public law principles, including ECHR rights (section 6 Human Rights Act 1998).