

# BORDER SECURITY, IMMIGRATION AND ASYLUM BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

### Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”), in relation to the Border Security, Asylum and Immigration Bill (“the Bill”). It has been prepared by the Home Office.
2. On introduction of the Bill in the House of Commons, the Home Secretary made a statement under section 19(1)(a) of the Human Rights Act 1998 (“the HRA”) that, in her view, the provisions of the Bill are compatible with the Convention rights.

### Summary of the Bill

3. On 17 July 2024, the King’s Speech 2024 confirmed that the Government will introduce the Bill to deliver enhanced powers to tackle organised immigration crime whilst providing for strong and effective border security and supporting and strengthening the asylum and immigration system.
4. The Bill is in four parts.
5. **Part 1** of the Bill contains a number of measures relating to border security:
  - a. Chapter 1 makes the Border Security Commander a statutory office holder, with the authority to convene and set strategic priorities on border security across relevant government and law enforcement partners; and
  - b. Chapter 2 sets out new and enhanced powers to strengthen border security. This includes:
    - i. New criminal offences to tackle organised immigration crime, including offences related to supplying or handling items for use in immigration crime, collecting information likely to be useful to a person in connection with an unlawful journey to the UK, and endangering others during an unlawful sea crossing to the UK.
    - ii. New and enhanced powers to enable the search and the seizure of electronic devices to review information relevant to facilitation offences and to gather intelligence linked to organised immigration crime.
    - iii. Expanded data-sharing capabilities to assist in the development of the intelligence picture of organised immigration crime. Specifically, a new information sharing power enabling HMRC to share data it holds for custom functions with the Home Office, other government

departments and the police in order to identify suspicious patterns, activity, or intelligence, and a new information sharing power enabling the DVLA to share information relating to its trailer registration scheme more freely in order to enhance border security.

- iv. Expressly permitting immigration detention at any stage of the deportation process so that individuals can be detained at the time the Secretary of State provides notice, in any form, that she is considering making a deportation order against a person.
- v. Enabling the biometrics of persons detained in Scotland to be taken at ports, bringing the position in Scotland into line with that in England, Wales and Northern Ireland.

6. **Part 2** of the Bill includes measures to support and strengthen the asylum and immigration system. It:

- a. provides for the repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024 in full;
- b. provides for the repeal of provisions in the Illegal Migration Act 2023 that have never been commenced and are not required, for example the Duty to Remove and associated provisions, whilst retaining those provisions where there remains operational benefit;
- c. amends the governance arrangements relating to the Immigration Services Commissioner; and
- d. introduces a power to enable a wider cohort of trained personnel to be able to take biometric information and provide for the ability to take biometric information outside of a visa application process, for example during a crisis response or evacuation.

7. **Part 3** of the Bill includes measures relating to crime prevention, including:

- a. new offences criminalising the possession of, and making, adapting, importing, supplying or offering to supply of, specified articles for use in serious crime;
- b. new powers strengthening the operation of Serious Crime Prevention Orders (“SCPOs”) including by giving courts an express power to impose electronic monitoring, and new notification requirements where SCPOs are imposed; and
- c. introducing interim SCPOs to enable preventative action (whilst the courts consider a full application) or continued investigation in pursuit of a prosecution.

8. **Part 4** of the Bill includes miscellaneous matters including providing retrospective statutory authority for fees charged for certain services provided on behalf of the Home Office and Department for Education in connection with the comparability and recognition of qualifications obtained in the UK and overseas. It also includes powers for consequential amendment and provides for the commencement of the Bill.

## ECHR rights and key principles

9. This section sets out the ECHR rights which the Government considers are engaged by the Bill measures and the key principles relating to their application. Substantive consideration of those ECHR rights in respect of the Bill measures is then set out below.

### Articles 2 and 3

10. Articles 2 (the right to life) and 3 (freedom from torture and inhuman or degrading treatment) are absolute rights which cannot be derogated from (except, in respect of Article 2, in respect of deaths resulting from lawful acts of war). They enshrine the basic values of democratic societies and must be interpreted and applied so as to make their safeguards practical and effective.

### Article 5

11. Article 5 (the right to liberty and security) provides that no one shall be deprived of his liberty save in specified cases (set out in Article 5(1)) and in accordance with a procedure prescribed by law. Procedural safeguards, including that a person detained must have the right to speedily challenge their detention, and a right to compensation for any violation of the Article, are set out in Article 5(2) to (5). At its core, Article 5 protects the individual against arbitrary deprivation of their right to liberty.
12. It is a restricted right and so may be subject to limitations where the deprivation falls within the exhaustive list of authorised circumstances set out in Article 5(1) and be “in accordance with a procedure prescribed by law”. The specified conditions in which a deprivation is to be permissible are to be interpreted narrowly. To be lawful, the measure must conform to domestic law, meet the standard of lawfulness under the ECHR (which includes that the domestic law is sufficiently accessible to the individual, and sufficiently precise to enable the individual to foresee the consequences), and be proportionate and not arbitrary. Where deprivation is, or has become, arbitrary or disproportionate it will be in breach of Article 5.

### Article 6

13. Article 6 (the right to a fair trial) provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (Article 6(1)). It includes a number of express or implied guarantees: the concept of a fair trial encompasses matters such as the right of access to a court, presumption of innocence, burdens of proof and evidential presumption. It also requires specified procedural safeguards to be met where an individual is charged with a criminal offence.

14. Article 6 is a restricted right; it may be derogated from and is to be applied flexibly, although any restriction must not impair the essence of the aim and must pursue a legitimate aim and comply with the principles of proportionality and legal certainty. It is not permissible to read any implied restrictions into the rights expressly provided for and the overarching right to a fair hearing is not to be balanced against any other right or interest.

#### Article 8 and A1P1

15. Article 8 and Article 1 of the First Protocol (“A1P1”) are qualified rights, which means that interference with the rights may be permissible:

- a. Article 8 protects the right to respect for a person’s private and family life, their home and their correspondence;
- b. Article 1 Protocol 1 protects a person’s right to the peaceful enjoyment of their possessions.

16. These articles require that any interference must be in accordance with or prescribed by the law. This requires that there be a lawful domestic basis for it, the law must be adequately accessible to the public, and its operation must be sufficiently foreseeable, so that people who are subject to it can regulate their conduct. The law must contain sufficient safeguards to avoid the risk of arbitrary interference.

17. Article 8 also requires that any interference is necessary in a democratic society (requiring a pressing social need for the interference) and a proportionate means of achieving a legitimate aim, namely the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others. European Court of Human Rights (“ECtHR”) case law has established that states have a wide margin of appreciation in assessing whether a pressing social need exists.

18. A1P1 similarly requires that any deprivation of possessions serves a legitimate aim in the public (or general) interest, is proportionate and subject to the conditions provided for by law. Paragraph 2 of A1P1 permits a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. ECtHR case law in respect of A1P1 similarly demonstrates that states have a wide margin of appreciation in assessing what is “in the public interest”.

#### Article 14

19. Article 14 of the ECHR enshrines the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. It does not provide a free-standing right to equality and can

only be relied upon where the facts of the case are within the “ambit” of another Convention right. However, a breach of that other right is not required.

20. In order to prove discrimination under Article 14 there must be a difference in treatment between the individual and other persons in relevantly similar situations, on a ground protected by Article 14 ( a protected “status” 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), which does not have an objective and reasonable justification (i.e. pursues a legitimate aim by means proportionate to that aim). Differential treatment may therefore be lawful, where justified.

## ECHR analysis by measure

### ***Part 1: Border Security***

#### **Clauses 13 and 14: Supplying, or handling, articles for use in immigration crime**

21. Clauses 13 and 14 introduce new offences to criminalise the supply, offer to supply, and other acts in relation to, any articles the defendant knows or suspects are to be used in connection with an offence under section 24 (illegal entry and similar offences) or 25 (assisting unlawful immigration to member state or the United Kingdom) of the Immigration Act 1971 (“IA 1971”). A defendant will have a defence where they can show a reasonable excuse for their action.
22. These offences strengthen the ability of law enforcement agencies to tackle the supply chains for the people smuggling networks.

#### A1P1

23. A1P1 is potentially engaged by clauses 13 and 14 as the effect of the clauses is to interfere with people’s use of their property, including items that could be possessed for legitimate purposes. However, the clauses will not prevent people continuing to use and possess the items for those lawful purposes. The offences will only be engaged if the defendant knows or suspects the articles are to be used in connection with an offence under section 24 or section 25 of the IA 1971.
24. Further, mere possession of an article would not be an offence. There would need to be some active step taken with regard to the article. A person will have a defence if they can show a reasonable excuse for the relevant action. The Bill provides expressly that the cases in which a person has a reasonable excuse for this purpose include, but are not limited to, cases where: (a) their action was for the purposes of carrying out a rescue of a person from danger or serious harm, or (b) they were

- acting on behalf of an organisation which (i) aims to assist asylum-seekers, and (ii) does not charge for its services.
25. The extent of the interference is also limited by the fact that it must be proved beyond reasonable doubt that the defendant had actual knowledge or suspicion that the article is to be used in connection with immigration crime.
26. The justification for any interference with A1P1 rights is as follows:
27. *In accordance with the law*: The definition of “article” is broad but clear and has precedents in other legislation. Certain articles are clearly excepted. The relevant time for the knowledge or suspicion is the time at which the relevant act (such as the supply or offer to supply) is carried out: it would not be an offence to become suspicious afterwards. There is sufficient certainty about the scope of the offence for people to avoid committing it.
28. *Legitimate aim*: This measure pursues the legitimate aim of disrupting the criminal networks engaged in smuggling people to the UK, and is necessary to protect national security, public safety, prevent crime and disorder and protect other persons’ rights and freedoms.
29. *Proportionate*: The intrusions into A1P1 rights are proportionate. The objective of the offences – to stop people taking active, preparatory steps towards engaging in organised immigration crime – is sufficiently important to justify the intrusions; the offence is rationally connected to that objective, as it requires knowledge or suspicion of use in immigration crime; it is no more than necessary to accomplish the objective, for example it includes a reasonable excuse defence; and it strikes a fair balance between the rights of the individual and those of the community: the measure is sufficiently flexible to enable prosecution of those criminals who quickly adapt their methods to defeat routine controls and avoid detection, but items essential to the wellbeing and safety of migrants themselves are excluded from the scope of the offence.
30. Accordingly, the Government is satisfied that the offences in clauses 13 and 14 are compatible with A1P1.

#### Article 14 (with A1P1)

31. Article 14 may be engaged on the basis that clauses 13 and 14 are based on suspicion, a low threshold, which might affect some prospective customers of certain goods disproportionately based on their perceived or actual nationality, race or ethnicity.
32. The measures are within the ambit of A1P1 since it could affect a person’s ability to acquire, use or dispose of belongings including for lawful reasons. Race, colour, language and national origin are characteristics listed in Article 14 and might form the basis for a

supplier's suspicion about their prospective customer. The measures may in practice have a greater adverse impact on people not only from parts of the world associated with high levels of migration to the UK but also on those subject to mistaken assumptions about their origins or status.

33. The Government considers that any discrimination resulting from these measures is objectively and reasonably justified, for the same reasons as described in relation to A1P1 above, and accordingly considers that the measures are compatible with A1P1.

#### Article 6

34. Clauses 13 and 14 are considered to engage Article 6(2) due to the "reverse burden" whereby the defendant is required to show a reasonable excuse for their action.
35. Article 6 does not prohibit rules which transfer the burden of proof to the accused, provided certain tests are met: that they are within "reasonable limits" and "justified: see *Salabiaku v. France* (10519/83 [1988] ECHR 19 (7 October 1988)).
36. The Government considers that those tests are met in relation to clauses 13 and 14. The defendant will know whether they have a reasonable excuse for their actions. Furthermore, the burden transferred is only an evidential burden: the defendant need only adduce "sufficient evidence" to "raise an issue" with respect to that excuse.
37. For the offence of "supply or offering to supply" in clause 13, intention to make the supply or the offer is required. In terms of the offence relating to "handling an article known or suspected to be for use in immigration crime" in clause 14, the offence would still require intention to assist or to act for the benefit of someone else. Suspicion (or knowledge) would need to be present at the time the article is supplied, offered, received or disposed of.
38. Accordingly, the Government is satisfied that the measures are compatible with Article 6.

#### **Clause 16: Collecting information for use in immigration crime**

39. Clause 16 introduces a new offence to criminalise the collection, recording, possession, viewing, or otherwise accessing by means of the internet, of information likely to be a useful to a person organising, preparing for or undertaking a journey involving the unlawful transportation of one or more individuals into the UK. The offence will only be committed if that action or possession is in circumstances where there is a reasonable suspicion that the record or document, or any

information contained in it, will be used by the person or any other person in organising or preparing for such a journey (or part of such a journey). The defendant will have a defence where they can show that the information was only for their own journey or that they had a reasonable excuse for their action.

40. The policy objective for the new offence is to allow law enforcement agencies to act early in combatting the preparation of organised immigration crime.

#### Article 6

41. As above in relation to clauses 13 and 14, Article 6(2) is engaged due to the defendant being required to discharge the burden of proof in relation to the defence of reasonable excuse and for the person planning their journey.
42. Article 6(2) does not prohibit rules which transfer the burden of proof to the defendant so long as they are within reasonable limits and justified. The Government considers that those tests are met, as both defences in this clause involve the defendant showing matters that are within their own knowledge and, accordingly, is satisfied that the measure is compatible with Article 6.

#### Article 8

43. Article 8 is likely to be engaged by clause 16 as this measure has the effect of interfering with people's right to respect for their private life.
44. The justification for any interference with Article 8 rights is as follows:
45. *In accordance with the law*: The measure will have a lawful basis in domestic law and contain sufficient safeguards to prevent against arbitrary interference, including that the offence is subject to a reasonable excuse defence. It will also include an express reasonable excuse defence that, at the time of the person's action or possession, the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person organising preparing for or undertaking a journey of the kind described above. This will protect from liability those who inadvertently click on a website link or open an email without being aware of its contents.
46. The other express reasonable excuse defences are, in summary, as follows: organising or preparing for a journey other than the type of journey mentioned above, carrying out work as a journalist, academic research, carrying out or preparing for the carrying out of a rescue of a person from danger or serious harm, providing or preparing for the

provision of medical care or emergency shelter or supplies, or the person was acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services. It is also open to a defendant to argue another reasonable excuse defence if they consider other circumstances in their case give rise to a reasonable excuse not mentioned on the face of the Bill.

47. *Pursuing a legitimate aim*: The measure pursues the legitimate aim of disrupting the criminal networks engaged in smuggling people to the UK which is necessary to protect national security, public safety, prevent crime and disorder and protect other persons' rights and freedoms.

48. *Proportionality*: The intrusions into Article 8 rights are proportionate. The objective of the offence – to stop people taking active, preparatory steps towards engaging in organised immigration crime – is sufficiently important to justify the intrusions; the offence is rationally connected to that objective; it is no more than necessary to accomplish the objective; and strikes a fair balance between the rights of the individual and those of the community.

49. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

#### Article 14 (with Article 8)

50. Article 14 may be engaged on the basis that clause 16 will treat individual migrants planning only their own journey (who will have a defence) differently from those planning a journey for members of their own family (whether or not the defendant is to accompany them).

51. In the event Article 14 is engaged, the Government considers such interference to be objectively and reasonably justified on the same basis as Article 8 (above).

#### **Clause 18: Endangering another during sea crossing to UK**

52. Clause 18 introduces a new criminal penalty for a person who makes a journey by sea to the United Kingdom from France, Belgium, or the Netherlands in contravention of certain section 24 IA 1971 offences, where, during that journey, the person did an act that endangered the life of another person, or created a risk of serious personal injury (whether physical or psychological) to another person (the "Endangerment Offence").

#### Article 2

53. Article 2 incorporates a positive duty to protect life, which requires the Contracting State to take all appropriate steps "in the context of any activity, whether public or not, in which the right to life may be at stake" (*Öneriyildiz v. Turkey* (Appln no. 48939/99) at [71]). Namely:

- a. to have appropriate legal regimes and administrative systems in place to provide general protection for the lives of citizens and persons (the “Systems Duty”);
- b. to take operational steps to protect a specific person or persons when on notice that they are subject to a risk to life of a particularly clear and pressing kind (the “Operational Duty”);
- c. certain positive obligations of a procedural nature regarding investigation of and the opportunity to call state authorities to account for potential breaches of the substantive obligations to which it gives rise (the “Investigative Duty”).

54. In line with the UK’s search and rescue obligations, the UK owes a duty of care to all migrants arriving by small boat under Article 2 ECHR. In that context, the Systems Duty in Article 2 is engaged by clause 18.

55. The Systems Duty was most recently summarised in *R (MG) v SSHD* [2023] 1 W.L.R. 284 which held that, at its lowest level, public authorities have a duty to adopt administrative measures to safeguard life. The appropriateness or type of measures required to safeguard life depends on the context to which the right to life may be at stake, with a public authority under an obligation to implement measures to reduce the risk to life to a reasonable minimum, again dependant on the context.

56. In terms of Article 2 interference, it was held in *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28, that an assessment of an interference with Article 2 ECHR applies only where a claim arises that actual harm has occurred, as opposed to a hypothetical scenario where harm may arise. Further, any such interference with an ECHR right requires a causal link. In *Opuz v Turkey* (2010) 50 EHRR 28 it was held that a breach of Article 2 ECHR will be established where it was found that the State failed to take reasonable measures within their power to avoid that risk to life.

57. As noted above, given that the measure enables the prosecution (with an increased sentence attached) of those who act in a manner where they endanger the lives of others on the boat or placed others at risk of serious injury, the Government are of the view that clause 18 will enhance the general protection for the lives of irregular migrants. Therefore, the Government considers that the Endangerment Offence is compatible with Article 2.

## Article 8

58. Whilst not on the face of the legislation, parents who bring their children on the type of journeys that the Endangerment Offence captures will be excluded from prosecution in almost all circumstances (as is the case with existing sections 24 and 25 IA 1971 offences). Any decision to prosecute a parent would be made by the Crown Prosecution Service (“CPS”) on a case-by-case basis pursuant to their current policy on prosecuting immigration offences, and prosecutions may be brought only

in the most serious of circumstances. Although it is very unlikely, there is no absolute bar to prosecuting parents who have taken their children on journeys which come within the ambit of the Endangerment Offence, which could result in the break-up of families. As such, Article 8 rights are engaged.

59. The justification for any interference with Article 8 rights is as follows:
60. *In accordance with the law*: Given that the rights under Article 8 are not 'absolute', the interference is in accordance with the law. Prosecutorial discretion, where CPS policy is normally not to prosecute parents, is therefore an appropriate safeguard in ensuring that an interference is only implemented where necessary and in the public interest (see below concerning proportionality).
61. *Pursuing a legitimate aim*: The Endangerment Offence pursues the legitimate aim of deterring individuals from entering/arriving in the UK by dangerous irregular routes in order to prevent avoidable losses of human life. There are also strong social-economic justifications for pursuing this measure concerning the economic consequences of diverting UK resources to rescuing persons in the Channel who are arriving/entering the UK illegally, and the existing strain on the UK's judicial system in processing asylum claims.
62. *Proportionate*: The CPS will be required to exercise their prosecutorial discretion when determining whether or not to prosecute and will apply a public interest test as part of this. The prosecution of parents will only occur where there are the most serious allegations. Where found guilty, the Article 8 ECHR rights of a convicted person, and their family members, will also fall to be considered by the sentencing judge in the ordinary manner. The increased sentencing attached to the Endangerment Offence is therefore a proportionate means of achieving a legitimate aim.
63. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

#### **Clauses 19 to 26: Powers of search etc in relation to electronic devices**

64. Clauses 19 to 26 include new powers of search (clause 20), associated powers of seizure and retention (clause 21), duty to pass on items seized (clause 22), and powers to access, copy and use information contained on an electronic device "relevant article" (clause 23).
65. The powers can be applied to a "relevant person": someone who has arrived in or entered the UK without the required leave to enter or entry clearance, or in breach of a deportation order, or without a required electronic travel authorisation. As such, the cohort to whom the power applies is "irregular migrants" including small boat arrivals and people arriving by clandestine means, such as a lorry drop.

66. These powers are exercisable when an immigration officer or a police constable who has received authorisation from a superintendent (“authorised officer”) has reasonable grounds to suspect that a relevant person is in possession of a relevant article, which is anything which appears to the authorised officer to be a thing on which information that relates, or may relate, to the commission (whether in the past or future) of an offence under section 25 or 25A IA1971 (facilitation offences) is, or may be, stored in electronic form.
67. The powers, while invasive, are narrowly defined, and are solely for the purpose of recovering information about the facilitation offences.

### Article 8

68. The new powers engage a person’s private and family life, as protected by Article 8, because the electronic devices searched may contain correspondence and confidential private communication likely to contain personal data and private information. The seizure of electronic devices will also restrict an individual’s ability to communicate with others.
69. The justification for any interference with Article 8 rights is as follows:
70. *In accordance with the law*: Both domestic courts and Strasbourg have found that in order for a search power to be in accordance with the law, they not only have to have a basis in domestic law but also contain sufficient safeguards to prevent against arbitrary interference (see: *Gillan v UK*, application number 4158/05; *Beghal v UK*, application number 4755/16, and in *R (on the application of Roberts) v Metropolitan Police Commissioner*, [2015] UKSC 79)).
71. In *R (HM) v SSHD* [2022] EWHC 695 (Admin) the High Court ruled that the power of seizure in section 48 of the Immigration Act 2016 could not be used to seize a phone during a search of a person and that the “blanket policies” for seizures of phones were unlawful. This measure can be distinguished from the case of *HM*, as officers will only be seizing phones where there is a reasonable suspicion that a relevant person is in possession of a relevant article. This provides a threshold and process for authorised officers to act with discretion when deciding if a phone should be seized and, alongside all the safeguards listed below, demonstrates that phones will not be seized on a blanket basis when these powers come into force.
72. The safeguards in these clauses include:
- a. the powers are only exercisable on the basis of reasonable suspicion, and only enable the powers to be exercised for specific purposes linked to the facilitation of a breach of immigration law;
  - b. the powers are only to be used once per entry, when an irregular migrant is encountered, with usage only applied after using Home Office internal immigration systems to ensure individuals

- identified have not been subject to the power previously and have leave to enter and/or remain in the UK;
- c. only immigration officers and certain police constables (those who have obtained clearance from a superintendent), and in the future any persons specified in regulations, will be authorised to use the powers;
  - d. the Home Office will issue non-statutory guidance about the use of the powers and training which will be required for authorised officers exercising those powers;
  - e. sections 50, 51, 55 and associated sections of the Criminal Justice and Police Act 2001 (“CJPA”) will apply to the exercise of the powers, meaning there is an established process in place, for seizure and retention, and protection of legally privileged material;
  - f. the use of the powers will be subject to judicial review, and individuals who have had items seized under section 50 or 51 CJPA may make an application to the courts for return of the property seized, and the individuals will have rights relating to written notice and requirements for examination and return of seized property (see sections 52 and 53 CJPA);
  - g. there will be no intimate searches, and only outer clothing is to be removed;
  - h. any item seized will have to be returned when it is no longer necessary for an authorised officer or the Secretary of State to retain it, subject to the duty to pass on items seized, at clause 22;
  - i. the Home Office already has systems in place which are data protection compliant. These same systems and policies will be adhered to, to ensure that data is retained lawfully and securely;
  - j. authorised officers (and anyone else authorised to use them) will have to operate the powers, including the power to retain, in accordance with the ECHR, as they will be subject to the duty to act in a compatible manner under section 6 HRA.

73. Given the above safeguards, the Government considers the powers to be in accordance with the law.

74. *Pursuing a legitimate aim:* The Government considers that the provisions pursue the legitimate aims of the prevention of disorder and crime, and the protection of the rights and freedoms of others. Those who cross the Channel illegally are facilitated in doing so by members of organised criminal groups. In crossing the Channel, whether by small boat or clandestinely, they endanger not only their own lives but also the lives of those who are forced to rescue them from highly dangerous situations. There have been numerous deaths of both adults and children crossing the Channel, and an increase in the number of people crossing in this way. Gathering information from electronic devices will allow law enforcement to better understand travel routes, international and domestic facilitation networks, to disrupt their activity, and identify UK based subjects facilitating organised immigration crime with a view to prosecuting and disrupting financial networks.

75. These powers have been extended to police constables to ensure relevant articles can be seized in areas which are not routinely covered by immigration officers. These areas include the road networks and non-official port zones such as beaches where police are often the first inland responders to clandestine entries. Collection of this data is often time sensitive. If powers are not extended to the police, there is likely to be a gap in our intelligence on organised immigration crime and missed opportunities for preventing exploitative gangs causing threats to the lives of migrants taking dangerous journeys to reach the UK.
76. *Proportionality*: The powers are discretionary and limited in scope. When exercising them, authorised officers (and anyone else authorised to use them) will be required to act in accordance with section 6 HRA and therefore will be required to assess the necessity and proportionality of using the powers in each case.
77. The Government considers that Article 8 is also capable of being engaged by the new powers as “legally privileged” material (within the meaning given by section 65(1) of the CJPA) will be capable of being seized by those able to use the powers. The Department considers that it is proportionate to ensure legally privileged material can be seized, otherwise there is a real concern that individuals will use this as an excuse to not have their phones seized. In scenarios where an individual says their device contains legally privileged material and/or the officer suspects the device does contain such material, the CJPA and the accompanying safeguards will apply. This will ensure that where it is discovered, legal privilege will be respected and dealt with following the appropriate statutory process.
78. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

#### A1P1

79. A1P1 will be engaged by the use of the powers in clauses 19 to 26 where authorised officers (and anyone else authorised to use them) seize and retain items which they find in the course of exercising the new search powers or where they see a relevant article in the possession of a relevant person or which appears to have been in their possession. Such seizure will be an interference with the enjoyment of personal possessions for the purposes of A1P1. This is a control of use, with the intention to return the device once it ceases to be retained under clause 21(5).
80. The justification for any interference with A1P1 rights is as follows:
81. *In accordance with the law*: The powers of seizure and retention are in accordance with the law because they are expressly set out in the Bill

and are formulated with sufficient precision to enable a person to know how and when they may be exercised.

82. *Pursuing a legitimate aim*: The policy pursues the legitimate aim of the prevention of disorder and crime, and the protection of the rights and freedoms of others. The information which will be obtained from the articles seized could result in evidence being available for use in a criminal prosecution and could provide information useful for intelligence on the operation of organized immigration crime. This will assist the Home Office in taking steps to combat such crime, assisting in suppressing criminality and reducing the risk of those crossing, and those who rescue them, being hurt or losing their lives.
83. *Proportionality*: The Government considers that these powers are proportionate. Property will only be seized and retained if there are no other less intrusive means of obtaining the information on the article sought and the property seized will only be retained for as long as necessary and in accordance with clause 21(5). Furthermore, the powers are proportionate because the duration of the interference will be as short as is necessary to enable the information to be extracted and/or for any prosecution to take place. There are also suitable safeguards in place to support the proportionality of the powers (see Article 8 above).
84. Accordingly, the Government is satisfied that the measures are compatible with A1P1.

### **Clauses 27 to 29, 32 and 33: Supply of customs information by HMRC**

85. Clause 27 creates an information sharing power for HMRC, and clauses 28 and 29 regulate how shared information may be used and disclosed onwards by recipients. This will enable HMRC to share any information it holds in connection with its customs functions with various recipients including government departments, governments of foreign countries, the police and certain international bodies.
86. Information held by HMRC in connection with its customs functions includes a great deal of information identifying people and businesses. For example, the names of consignors and consignees of consignments and information relating to incidents of goods seizure. This information will be very useful to other government departments, including the Home Office, which will use it to improve the targeting of law enforcement action against organised crime at the border.
87. The ability of recipients to use and further disclose the information is restricted on the face of the legislation.
88. The offence of wrongful disclosure, as set out at section 19 of the Commissioners for Revenue and Customs Act 2005, will apply to anyone who discloses information from which people and businesses can be identified in breach of these restrictions.

## Article 6

89. Article 6 is engaged as the clauses extend an existing criminal offence of wrongful disclosure (see above).
90. The Government is satisfied that any interference in Article 6 rights is justified. The Government considers that the prohibition on onward disclosure is necessary in order to protect customs information identifying people and businesses, and the imposition of a criminal offence is an additional safeguard that reflects the seriousness of wrongful disclosure in these circumstances. This is an extension of the offence that already applies to HMRC officers to maintain the same standards of protection this information is subject to when held by HMRC. This provision is not retrospective and a person that is charged with a criminal offence will have the right to a fair and impartial trial in the criminal courts of the United Kingdom and will have the opportunity to make any case known. Accordingly, the Government is satisfied that the measure is compatible with Article 6.

## Article 8

91. The disclosure of identifying customs information, which these clauses provide for, engages, and may interfere with, the Article 8 rights of a potentially large number of persons. The justification for any interference with Article 8 rights is as follows:
92. *In accordance with the law:* These clauses give HMRC the discretionary power to share customs information. When exercising this discretion, HMRC must continue to apply normal public law principles, human rights considerations and the clauses explicitly retain the protections provided by the UK data protection and investigatory powers legislation. The scope of the discretion afforded to HMRC, and recipients of the customs information, is clearly set out in the clauses.
93. *Legitimate aim:* By permitting the sharing and better use of customs information across Government and the police, and with various international partners, the clauses will further various legitimate aims including the economic wellbeing of the UK, crime prevention and national security. For example, access to large volumes of customs information will enable the Home Office to better tackle border related crime, such as organised immigration crime and smuggling. Using the analytical tools available to the Home Office, customs information will enable the detection of anomalies and patterns, which will help identify organised criminal activity, the details of which can be passed onto law enforcement agencies.
94. *Proportionate:* While the potential pool of information is large, the new power is discretionary and purely permissive. HMRC, as a government department, will be required to exercise its discretion in accordance with public law principles, human rights and data protection legislation.

HMRC will only disclose information where any interference with Article 8 rights is necessary and will only disclose relevant amounts of information to further the legitimate interest being pursued. Government departments and police further disclosing customs information for specified purposes will also be subject to the same requirements, and other disclosures will only be permitted with HMRC's consent. This assists in ensuring the proportionality of the interference in Article 8 rights.

95. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

### **Clauses 30 to 33: Supply of trailer registration information**

96. Clause 30 creates an information sharing power for the Secretary of State for Transport. This power relates to information held by the DVLA for the purposes of Part 2 of the Haulage Permits and Trailer Registration Act 2018 ("trailer registration data") and will enable this dataset to be shared with the Home Office, HMRC, the NCA, the police and authorised persons in Gibraltar and the Crown Dependencies (specified members of those territories' police/customs/immigration organisations). This power will be available where the information will be of use for certain purposes, specified in subsections (3)-(10), related to the functions of the recipient.

97. Clause 31 regulates how shared information may be disclosed onward by recipients.

98. Recipients within the UK will be able to disclose the information they receive for use for specified purposes. In respect of the Crown Dependencies and Gibraltar recipients, their ability to use and disclose onward the information will be subject to restrictions in their respective laws, including their data protection legislation.

### **Article 8**

99. The disclosure of identifying information, which these clauses provide for, engages, and may interfere with, the Article 8 rights of registered keepers of UK trailers.

100. The power will enable the Secretary of State for Transport (acting through the DVLA) to share trailer registration information, which includes some personal information, more widely than it currently does, and for the recipients of trailer registration information to use it for a wider range of purposes than is currently possible. The identifying information to be shared and processed as a result of this measure is limited to the name, address and contact details of all registered keepers of UK registered trailers, and the fact that they are the registered keepers of particular trailers.

101. For example, at present the DVLA is able to supply the Home Office with trailer registration information for use for immigration purposes (using the power in section 20 of the Immigration and Asylum Act 1999). However, the Home Office is restricted from using this data set for any other purpose, such as a customs purpose or broader law enforcement purposes. This measure will enable the DVLA to supply the Home Office with the entire dataset on a rolling basis so that it can be used, in conjunction with other data held by the Home Office, to create intelligence to support a wider range of Home Office border-related and law enforcement functions.
102. As a consequence of this measure, information about any person who registers a trailer under the DVLA trailer registration scheme, which is mandatory for UK trailers that move internationally, are likely to have their personal/identifying information, including their address, shared with the Home Office and other law enforcement agencies, for use for various border and law enforcement related purposes.
103. The justification for any interference with Article 8 rights is as follows:
104. *In accordance with the law:* This measure gives the DVLA the discretionary power to share trailer registration information. When exercising this discretion, the DVLA must continue to apply normal public law principles, human rights considerations and the clauses explicitly retain the protections provided by the UK data protection and investigatory powers legislation. The scope of the discretion afforded to the DVLA is clearly set out in the clauses.
105. *Legitimate aim:* Having better access to the DVLA's trailer registration information is necessary to enable the Home Office, HMRC and law enforcement agencies to tackle border related crime, such as people trafficking and smuggling. In the case of the Home Office, the ability to use this information for a wider range of its functions than is currently possible will enable it to effectively respond to the activities of organised criminal gangs at the border, where those gangs use registered trailers as part of their operations, and will enable the Home Office and partners to take steps to prevent loss of life due to people being trapped inside refrigerated trailers.
106. *Proportionate:* The potential pool of information is relatively modest (circa 40k trailers currently registered under the scheme) and the new power is discretionary and purely permissive. The DVLA, as part of a government department, will be required to exercise its discretion in accordance with public law principles, human rights and data protection legislation. Government departments and police further disclosing information for specified purposes will also be subject to the same requirements. This assists in ensuring the proportionality of any interference in Article 8 rights.

107. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

**Clauses 34 and 35: Provision of biometric information by evacuees etc**

108. Clauses 34 and 35 will create a power for authorised persons to collect biometric information from persons that would be subject to UK immigration control if the UK Government is considering facilitating their exit from a third state or territory. In contrast to the current law, it will enable biometric information to be captured without individuals needing to make a UK immigration application.

109. This power is intended to be used where the UK is arranging an evacuation or facilitating a person's exit from a third country.

Article 8

110. The retention of fingerprints engages and interferes with Article 8 ECHR, as confirmed in *S and Marper v UK* (2009) 48 E.H.R.R. 50 ("*S and Marper*") at [84]. It is possible that the capture and retention of photographs of a person constitutes an interference with Article 8 ECHR, however caselaw is not conclusive on this point.

111. The justification for any interference with Article 8 rights is as follows:

112. *In accordance with the law*: The powers for authorised persons to collect biometric information from persons who would be subject to UK immigration control are in accordance with the law because they are expressly set out in the clause and are formulated with sufficient precision to enable a person to know how and when they may be exercised. The retention of the biometric information is subject to appropriate safeguards (a statutory purpose limitation and period limitation of up to 5 years – see below).

113. *Legitimate aim*: The capture of biometrics prior to facilitating a person's exit from a state or territory will enable the Government to fix a person's identity to their biometrics and assist in identifying persons of concern (e.g. on national security or public safety grounds) or those seeking to travel on lost or stolen documents. This will enable UK resources to be focused only on genuine persons, will support the security of the evacuation/facilitated exit and will safeguard diplomatic relationships by ensuring that those who exit to third countries have been screened against national security and public safety watchlists.

114. *Proportionate*: The biometric information may be retained for as long as the Secretary of State considers necessary for stipulated purposes (immigration, nationality, national security and law enforcement), subject to a statutory long-stop of 5 years. This will allow for the person's identity to be quickly and accurately verified in the event they subsequently seek

to enter the UK: some persons may seek to travel to the UK immediately whilst others may wish to rely on support in neighbouring countries to make entry clearance applications. The retention period also allows sufficient time to manage operational uncertainties (e.g. verifying individuals who are in a transit location, such as the Sovereign Base Area) and complex cases where further national security/criminal investigation is required.

115. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

### **Clause 36: Provision of biometric information at ports in Scotland**

116. Clause 36 will remove the current limitation in Scotland on powers to take biometric samples during detention under Schedule 7 to the Terrorism Act 2000 or Schedule 3 to the Counter-Terrorism and Border Security Act 2019, so that they apply to a person detained at a port in Scotland, bringing the position in Scotland into line with that in England, Wales and Northern Ireland.

117. At present the samples can only be taken from a person detained at a police station in Scotland.

118. The amendment will mean that in Scotland fingerprints or non-intimate samples (e.g. a DNA mouth swab) may be taken by a police officer as long as he is satisfied that it is necessary to do so in order to assist in determining whether the person is or has been involved in the commission, preparation or instigation of acts of terrorism or hostile state activity; or, in the case of fingerprints only, that the fingerprints will assist in ascertaining the person's identity where the person has refused to identify themselves or where the officer has reasonable grounds for suspecting that person is not who they claim to be.

#### Article 8

119. The retention of fingerprints engages and interferes with Article 8 ECHR (*S and Marper*, at [84]). The ECtHR has confirmed that the interference for fingerprint retention is not as substantial as for cellular samples or DNA profiles (*S and Marper*, at [86] and [120]). The justification for any interference in Article 8 rights is as follows:

120. *In accordance with the law*: The power to enable biometric samples to be taken during detention in Scotland is clearly and expressly set out in the Bill and amends the existing regime which itself is subject to a number of safeguards to ensure ECHR compliance, including restrictions on retention. This can be contrasted to the blanket approach in *S and Marper*, at [119].

121. *Legitimate aim*: The capture of biometrics at ports and in the border area for national security purposes will enable the detection of threats to

national security and are justified as an essential tool to tackle terrorism and hostile state activity. The provisions act as an aspect of border control rather than criminal investigation; hence there being no requirement of reasonable suspicion. For that reason and given the intrusive nature of these powers, it is considered rational, justified and proportionate to use these in port and border areas and, in the context of national security, where people travelling through expect to be subjected to this type of check.

122. *Proportionate*: The retention of biometrics is subject to restrictions. If the biometrics are required for national security purposes, retention is subject to a statutory purpose limitation and a period limitation review at 5 years. This can be contrasted to the blanket approach in *S and Marper*, at [119].

123. Accordingly, the Government is satisfied that the measure is compatible with Article 8.

## ***Part 2: Asylum and Immigration***

### **Clause 37: Repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024 (“the SORA”)**

124. The SoRA engaged principally the following Convention rights and, in addition, Article 13 of the ECHR (right to an effective remedy):

- a. Article 2 (right to life);
- b. Article 3 (prohibition of torture, in human and degrading treatment);
- c. Article 8 (right to respect for family and private life).

125. A statement under section 19(1)(b) of the HRA was made in relation to the SoRA. No decisions have been made by the Secretary of State, Immigration Officers, or courts and tribunals, which are, or have been, subject to the provisions of the SoRA. The repeal of the SoRA accordingly does not raise any ECHR issues.

### **Clause 41: Detention and exercise of functions pending deportation**

126. Clause 41 amends the current powers contained in paragraph 2(2) to Schedule 3 of the IA 1971, permitting the Secretary of State to detain individuals liable to deportation and clarifying the current position so that those liable to deportation can be detained:

- a. while the Secretary of State considers whether to make a deportation order; and
- b. where the Secretary of State decides to make a deportation order, pending the making of the deportation order.

127. The clause clarifies the position as to the powers of detention in cases of deportation and ensures it is clear in legislation that detention in any deportation case commences at the point the Secretary of State is

considering whether to make a deportation order. As a clarificatory measure, the powers in the clause are to be treated as always having had effect.

128. The clause also amends section 141 of the Immigration Act 1999 (fingerprinting) and regulation 2 of the Immigration (Collection, Use and Retention of Biometric Information and Related Amendments) Regulations 2011 (photographs) to clarify that fingerprints and photographs can be taken when the Secretary of State is considering making a deportation order. This is necessary as biometric information is taken upon detention.

129. The clause also amends section 51(2) of the Immigration Act 2016 (power to direct prison officer or prison custody officer to search for nationality documents) to clarify that the Secretary of State may direct a prison officer or prisoner custody officer to search for nationality documents when the Secretary of State is considering making a deportation order. This is necessary as a person may be searched for their nationality documents at any stage pending deportation.

#### Articles 5

130. Article 5 is engaged as those liable to deportation will be deprived of their liberty.

131. The Government considers that the measure is not incompatible with Article 5. Article 5(1)(f) specifically provides for “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”. Any interference with Article 5 is justified as it is in accordance with the law and proportionate to achieve a legitimate aim. The clause clarifies the statutory basis for the current use of the power and there is a strong public interest in not disrupting the detention power for the purposes of effective immigration control and public safety. There are some cases where the power to detain pending deportation is necessary because of a real and significant national security risk where no alternative detention power exists.

132. The power to detain already exists in other areas of immigration law. In addition, anyone will continue to be notified as to the reasons for their detention, they will have the opportunity to apply for immigration bail or to seek a writ of *habeas corpus* and their detention will be subject to regular reviews so the positive obligations imposed by Article 5(4) will be met.

133. Article 5(5) ECHR states “*everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*”. It is the Government’s position that the clause complies with Article 5(5) because there is no

contravention with Article 5 more broadly and therefore no freestanding right to compensation (see above).

## Article 8

134. This measure may interfere with Article 8 privacy and family life rights by separating an individual from their family members. The amendments to the biometrics and document searching provisions may also engage Article 8.

135. The justification for any interference in Article 8 in respect of the power to collect and hold biometrics information, and to search for nationality documents, is as follows:

136. *In accordance with the law:* The law governing detention, including the principles deriving from *Hardial Singh* [1984] 1 WLR 704 (approved by the House of Lords in *R (Lumba) v SSHD* [2012] 1 AC 245), is set out in the Home Office's detention guidance and partially codified in section 12 of the Illegal Migration Act 2023, as follows:

- a. the power to detain under Schedule 3 to the IA 1971 authorises detention pending removal and cannot be used for another purpose;
- b. the power of detention is implicitly limited to the period of time reasonably necessary for the purpose of removal;
- c. if before the expiry of the reasonable period it becomes apparent that removal cannot be effected within a reasonable period of time, the power to detain should not or should no longer be exercised; and
- d. it is implicit that the Secretary of State should exercise all reasonable expedition to ensure that all necessary steps are taken for removal within a reasonable period of time.

137. The power to collect and hold biometric information, and to search for nationality documents, is also in accordance with the law as it has been understood and operationalised since the current deportation process was introduced.

138. *Legitimate aim:* This measure promotes the legitimate aims of effective immigration control, public safety and the prevention of disorder and crime. The power to collect and hold biometric information, and to search for nationality documents, pursues the legitimate aim of identifying individuals when detaining them during the deportation process which is operationally vital in the interests of effective immigration control, public safety and the prevention of disorder or crime. These are important operational steps needed to progress the release and deportation of the detained individuals.

139. *Proportionate:* The clause is a proportionate means to achieve the legitimate aim (above) on the basis that it does not increase the use of detention pending deportation, rather it clarifies the law, and any

decisions to detain will be case-specific and subject to the safeguards outlined above. For the other functions of the clause, the Government considers that the powers are proportionate because these powers already exist and are necessary in the deportation process. The amendments clarify that these functions can be administered at the point of detention pending deportation.

140. The power to collect and hold biometrics information, and to search for nationality documents, is a modest interference with Article 8 rights. It is necessary and proportionate to identify individuals when detaining them during the deportation process, and to obtain any documentation in their possession to assist with, and possibly expedite, their deportation.

#### **Clause 42: Powers to take biometric information**

141. This clause will amend section 141 of the Immigration and Asylum Act 1999, which allows certain “authorised persons” to take biometric information (fingerprints) from certain foreign nationals (broadly, irregular migrants and persons subject to enforcement action). The current list of “authorised persons” is exhaustive and permits constables, immigration officers, prison officers, officers of the Secretary of State authorised by her, and removal centre contractors to take fingerprints.

142. The clause adds an additional cohort to the “authorised persons” list: contractors at short-term holding facilities (“STHFs”). STHFs are legally distinct from removal centres and are designed for short-term detention whilst immigration authorities decide how to deal with a migrant.

143. The clause also creates a power for the Secretary of State to designate further “authorised persons” by secondary legislation under the negative procedure.

#### Article 8

144. The retention of fingerprints engages and interferes with private life under Article 8 ECHR: *S and Marper*, at [84].

145. However, the Government does not consider that the modest amendments made by this clause will interfere with Article 8. Any further designation of “authorised persons” by secondary legislation will be subject to a further ECHR analysis.

146. The justification for any interference in Article 8 rights is as follows:

147. *In accordance with the law*: The provision sets out clearly the additional cohort who will be able to take fingerprints under section 141 of the Immigration and Asylum Act 1999. It is accordingly formulated with sufficient precision for the public to know whether the person has authority to take such biometric information.

148. *Legitimate aim*: The measure will support national security and public safety by ensuring there are sufficient authorised persons to take biometric information.

149. *Proportionate*: The measure will resolve in a proportionate way the operational pressures on STHFs due to the significant volume of irregular migrants arriving there, and the current limitations on who can take biometric information, risking arrivals not having their identity fixed against biometric information. In addition, the power to designate further authorised persons is justified as it will enable the Home Office to respond quickly in emergency situations. This will provide greater resilience in the department's biometric taking abilities.

150. Accordingly, the Government considers the measure is compatible with Article 8.

### ***Part 3: Prevention of serious crime***

#### **Clauses 43 and 44: Offences relating to things for use in serious crime**

151. Clause 43 will introduce new offences to criminalise the importing, making, modifying, supplying, offering to supply and possession of certain articles for use in serious crime (including vehicle concealments) and of electronic devices for use in vehicle theft. In the case of articles for use in serious crime, the offence will be made out where it can be proven that a reasonable person in the defendant's circumstances would have suspected that the article would be used in any serious crime (based on the definition of "serious offence" in the Serious Crime Act 2007 ("the 2007 Act")), or where the defendant intends to so use it in any serious crime.

152. The policy objective for these offences is to strengthen how law enforcement agencies confront rapidly evolving tools and technologies which, whilst currently legal, have few legitimate purposes and are being exploited by serious criminals. Such articles include vehicle concealments used to conceal and transport illicit goods, templates for 3D-printed firearms components and pill presses used in the supply of illegal drugs.

#### **A1P1**

153. A1P1 is likely to be engaged by these clauses as these measures have the effect of restricting people's use of their own property.

154. The justification for any interference in A1P1 rights is as follows:

155. *In accordance with the law*: This measure is provided for in clear terms, it is modelled on precedents in other legislation and there is sufficient certainty about the scope of the offences for people to avoid committing them.

156. *Legitimate aim*: These clauses are intended to reduce the prevalence of serious crime, by enabling law enforcement to restrict the supply and circulation of articles which facilitate such crime, where currently the individuals who supply, import, make or adapt such articles are able to keep sufficient distance from the crime to avoid prosecution.

157. The ECtHR has recognised crime prevention and improving public safety as a public interest for the purposes of A1P1 and held that because of their direct knowledge of their society and its needs and resources, the national authorities must enjoy a wide margin of appreciation in determining not only the necessity of the measure of control concerned but also the types of loss resulting from the measure for which compensation will be made; the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable legislative measures introducing controls on the ownership or use of particular articles in the interests of public health or safety (see *Andrews v United Kingdom*, App. No.37657/97, Judgment of September 26, 2000).

158. *Proportionate*: To ensure proportionality, the offence concerning articles for use in serious crime will only be made out where the circumstances give rise to a reasonable suspicion that the relevant article will be used in connection with any serious offence. The common law defence of duress may also be used in situations of exploitation.

## Article 6

159. These provisions engage Article 6(2) relating to criminal proceedings regarding the "reverse burden". This is because it is irrelevant for the purposes of the offence whether the person intends to use the item in connection with a serious offence; rather, the individual's state of mind is a defence - with reference to an objective test of reasonable suspicion.

160. As set out above in relation to clauses 13 and 14 (offences relating to articles for use in immigration crime and collecting of information for use in immigration crime), Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish a defence, provided that certain conditions are met.

161. The proposed offence has the legitimate aim of the protection of the public from serious crimes, including illegal drug offences, firearms offences and disrupting serious organised crime. The imposition of a reverse burden of proof is necessary in order to successfully prevent the importing, making, modifying, supplying, offering to supply and possession of articles that are notoriously used in serious crime. Were the prosecutor required to prove intent or knowledge of the article's use in serious crime, it would not be possible to achieve this objective as those who deal in these articles are able to keep a sufficient distance from the crime so as to have no actual knowledge of it and so evade prosecution. These articles facilitate the proliferation of serious

organised crime and serious crime which causes an immeasurable harmful impact on society.

162. The defendant will be afforded an opportunity to demonstrate that they did not intend, nor could they reasonably have suspected, that the articles were going to be used in any serious crime. They will be asked to establish facts that are within their knowledge or to which they will have ready access (for example, the defendant has a serious heart condition and can demonstrate that they are on a prescribed drug for which they require a pill press).

163. Furthermore, the burden transferred is only an evidential burden: the defendant need only adduce “sufficient evidence” to “raise an issue” with respect to that excuse.

164. The Government accordingly considers that the measure is compatible with Article 6.

### **Clauses 46 to 50: Serious Crime Prevention Orders (“SCPOs”)**

165. Clauses 46 to 50 strengthen the operation of SCPOs under Part 1 of the 2007 Act, by:

- a. giving courts an express power to impose electronic monitoring;
- b. allowing additional agencies to apply to the High Court for an SCPO;
- c. introducing notification requirements;
- d. allowing the Crown Court to make an order on its own motion or on an application on acquittal; and
- e. introducing interim SCPOs.

166. SCPOs are civil preventative orders which can impose tailored prohibitions, restrictions and requirements on a person for a period of up to five years to prevent or disrupt their involvement in serious crime. The terms of an SCPO might relate to, for example: business and financial dealings, use of premises or items, provision of goods or services, employment of staff, association with individuals, means of communication or restrictions on travel.

167. SCPOs may be imposed where a court is satisfied that a person has been involved in serious crime, and it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime. There is an indicative list of ‘serious offences’ in Schedule 1 to the 2007 Act for which an SCPO can be applied. Serious offences include fraud, money laundering, terrorism, drug and people trafficking.

### **Article 8 - electronic monitoring requirements**

168. Clause 46 deals with the imposition of electronic monitoring on individuals subject to an SCPO (new sections 5B, 5C and 5D of the 2007

Act). The physical wearing of an electronic monitoring tag and the collection of data of an individual's whereabouts will interfere with the Article 8 rights of the individual.

169. The justification for any interference with Article 8 is as follows:

170. *In accordance with the law*: The legislation is clear and precise and accessible as envisaged by *Malone v UK* [1985] 7 EHRR 14. The power is based on the approach taken in sections 35 to 37 of the Domestic Abuse Act 2021 ("the DAA 2021"). There is, therefore, legislative precedent for such provisions.

171. *Pursuing a legitimate aim*: The imposition of electronic monitoring is part of the state's positive obligations to prevent serious crime. Electronic monitoring will improve the effectiveness of SCPOs which are intended to disrupt, prevent and deter individuals' involvement in serious crime and will enable law enforcement authorities to monitor and enforce compliance with SCPOs more effectively.

172. *Proportionate*: An independent court will be responsible for imposing the requirement. The court will be bound to consider each application on a case-by-case basis. The court will consider factors including the risk the individual poses to the public, the nature of the crimes they are considered to be at risk of being involved with or have been convicted of, the individual's personal circumstances (for example, medical conditions, housing, dependents, family ties, community ties, employment), and any other relevant circumstances. Any imposition of electronic monitoring can be discharged or varied by the court and it would be subject to the review of the appellate courts, who must act in way that is compatible with section 6 HRA, which provides further procedural safeguards.

173. Further, the Secretary of State, will be required to publish a Code of Practice, relating to the processing of data gathered in the course of electronic monitoring, setting out the expectations, safeguards and broad responsibilities for the collection, retention and sharing of information gathered on such orders. Police forces who hold the data will also be required to process the data in accordance with the Data Protection Act 2018.

#### Article 6 – Interim serious crime prevention orders ("ISCPO")

174. Clause 47 will introduce a new 'interim' SCPO on application to the High Court.

175. Any agency with the authority to apply directly to the High Court for an SCPO would also have the authority to apply for an ISCPO on an *ex parte* basis and may be granted by the court on an *ex parte* basis.

176. If an ISCPO is granted without notice, then it will be served on the defendant together with a summons giving a date for the defendant to attend court. The court should set the date for the court hearing at the time it grants the ISCPO. Here, the defendant would have the right to make representations.
177. The purpose of an ISCPO is to provide for the immediate mitigation of potential risks and prevent harm to the public before criminal activities take place.
178. This measure may engage Article 6(1) of the ECHR on the basis of the imposition of an ISCPO without notice to the defendant.
179. The Government considers that any interference in Article 6 rights is justified as it serves a legitimate public or general purpose and is a proportionate means of achieving that purpose. Here, the legitimate public purpose is the protection of the public from serious crime including risk to life. In considering proportionality, it will need to be demonstrated that the risk to the public requires such a measure, and the power to impose an ISCPO is necessary. For instance, in determining whether to impose an ISCPO, the court will only do so if it considers it 'just to do so'. The ISCPO will only be able to contain such prohibitions, restrictions or requirements, and such other terms, as the court considers appropriate to protect the public by preventing, restricting or disrupting involvement by the person in serious crime. Safeguards which are in place for the making of a SCPO will also apply to ISCPOs, for instance, they will not be able to be imposed on a defendant under the age of 18. The existence of a right of appeal and ability to apply to the court to vary or discharge the order for the defendant and third parties affected by the ISCPO affords safeguards envisaged by Article 6.
180. There are many legislative precedents for *ex parte* orders sought in the civil courts. The new provisions in these clauses are based on the approach taken in section 28 of the Modern Slavery Act 2015.

#### Article 8 – Notification requirements

181. Clause 49 deals with the imposition of new notification requirements (new section 15A and Schedule 1A of the 2007 Act). The notification requirements engage Article 8 as they interfere with a person's right to privacy by requiring the individual to notify the police of certain personal information including: the person's name and, if the person uses one or more other names, each of those names as well as usernames for social media and gaming sites and the person's home address. The more personal information a person is required to provide to the police, the greater the interference with a person's right to their private and family life under Article 8.
182. The justification for any interference with Article 8 rights is as follows:

183. *In accordance with the law*: The measure is drafted in clear and precise terms. These requirements are already capable of being imposed by the courts; section 5(3) and section 5(5) of the 2007 Act, provide examples of prohibitions, restrictions and reporting requirements that may be imposed on persons by a SCPO, which include the same as are detailed above.
184. *Pursues a legitimate aim*: This measure pursues the legitimate aim of the prevention of crime.
185. *Proportionate*: Suitable safeguards are in place to ensure proportionality of any interference. The subject has the right to apply to discharge an SCPO in which case the notification requirements will no longer apply (although the court will not be able to vary the notification requirements set out on the face of the Bill). Police forces who hold the data will also be required to process the data in accordance with the Data Protection Act 2018. The ICO will also be consulted on this aspect of the provisions.
186. There is legislative precedent for this measure. New sections 15A and Schedule 1A are based on the equivalent provisions in sections 41 to 43 of the DAA 2021.
187. The Government is satisfied that all of the measures concerning SCPOs and ICPOs are compatible with ECHR rights.

***Part 4: Miscellaneous and General***

**Clause 51: Validation of fees charged in relation to qualifications**

188. Clause 51 establishes retrospective power for the charging of fees for services related to the comparability, recognition or assessment of qualifications obtained outside and within the United Kingdom. It has been determined that these fees in whole or part require, or may require, a statutory basis. This statutory basis has not been in place for a part or the whole of the period of their being charged by several government departments, currently the Home Office and the Department for Education

**A1P1**

189. It is arguable that those affected will be deprived of a “possession” within the meaning of A1P1 as their ability to bring successful claims for restitution of fees paid will be curtailed. However, where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it. The existence of a “genuine dispute” or an “arguable claim” is insufficient (*Kopecný v Slovakia* (2005) 41 EHRR 43, ECtHR (Grand Chamber), at [52]). Although there is settled case law, following the House of Lords

judgment in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 that money paid to a public authority in taxes or other levies pursuant to either a mistake in law or other reasons such as failure to construe legislation correctly is recoverable as of right, there are notable differences in the instant case. Most significantly, the fees were not paid to a public authority but to a third-party contractor. The Government, therefore, considers that those who paid fees do not have a claim with a sufficient basis in national law to constitute a possession for these purposes.

190. Assuming for the purposes of this memorandum that there is a relevant “possession”, the measure is likely to constitute an interference with it.

191. However, the legislation also resolves the existing breach of A1P1 rights that arises from the fact that fees have been charged without statutory authority, as the charges are not in accordance with law. (Noting this is not necessarily the case in respect of the UK ENIC service, which is considered to be a commercial service which does not require statutory authority, but which is included in the legislation for the avoidance of doubt).

192. The Government considers that retrospective legislation in the circumstances of this case is clearly justified and proportionate. Service users paid reasonable fees for a service they received and it is in the public interest that they bear some of the costs of the service. The fees could lawfully have been authorised by legislation but, due to an error, were not. It is foreseeable that fees will be charged for these services and that Parliament would seek to rectify a technical mistake in the legal framework to ensure the original intention is secured and to avoid the damage to the public interest that would flow from the loss of a substantial amount of already-collected fees.

193. Reimbursement of the fees paid (plus potentially interest and costs) would amount to a windfall. Either defending or settling proceedings or establishing a repayment scheme would require significant expenditure of public money to the detriment of the general interest.

## Article 6

194. In relation to Article 6, there are grounds for argument that Article 6 is not engaged at all:

- a. First, there are no existing proceedings seeking recovery of these sum;
- b. Second, tax disputes are outside the scope of “civil rights and obligations” within the meaning of Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer, because they belong exclusively to the realm of public law (*Ferrazini v. Italy* (2002) 34 EHRR 1068, ECtHR (Grand Chamber), at [21–31]). Although we are concerned with the payment of fees for statutory

services rather than taxes per se, arguably the same analysis applies.

195. In the event Article 6 is engaged, any interference is justified on the basis of the same arguments for justification for A1P1. The legislation will not affect any existing claims, and potential claimants will know from the point at which the legislation is introduced that it is the Government's intention to change the law to regularise the situation before any claims are brought.