CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

MEMORANDUM BY THE HOME OFFICE / MINISTRY OF JUSTICE / MINISTRY OF DEFENCE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Crime and Policing Bill. The memorandum has been prepared by the Home Office, Ministry of Justice and Ministry of Defence.

2. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt. Hon. Yvette Cooper MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

3. The Bill supports the delivery of the Government's Safer Streets Mission to halve knife crime and violence against women and girls in a decade and increase public confidence in policing and the wider criminal justice system. It aims to support neighbourhood policing and give the police the powers they need to tackle anti-social behaviour, crime and terrorism, whilst introducing reforms to ensure that law enforcement agencies perform to the highest standards expected by the public and focus on front-line policing.

4. The Home Office, Ministry of Justice and Ministry of Defence consider that clauses of, and Schedules to, this Bill which are not mentioned in this memorandum do not give rise to any human rights issues.

Summary of the Bill

5. The Bill is split into 15 Parts.

6. **Part 1** deals with **anti-social behaviour** ("ASB") by making provision for Respect Orders to tackle persistent ASB; amending the powers of the police, local authorities and other agencies to tackle ASB (including by amendments to the Anti-Social Behaviour, Crime and Policing Act 2014); enabling the Secretary of State, by regulations, to require relevant authorities to provide information about ASB incidents and their response; removing the requirement for the police to issue a warning before seizing a vehicle (such as off-road bikes, motorbikes and e-scooters) being driven anti-socially; and conferring a power on the Secretary of State to issue guidance to local authorities in England about their enforcement powers in respect of fly-tipping.

7. **Part 2** makes provision about **offensive weapons.** It introduces a new offence relating to the possession of a bladed article or offensive weapon with intent to use it to cause unlawful violence (or a person to apprehend such unlawful violence) or

serious damage to property, or to enable another person to cause such violence or damage; increasing the maximum penalty for offences relating to the possession, sale etc. of offensive weapons and knives; and providing the police (and service police of the armed forces) with a new power to seize bladed articles where they are lawfully on private premises and have reasonable grounds to suspect the article would be used in connection with unlawful violence.

8. **Part 3** makes provision about **retail crime** by introducing a new offence of assaulting a retail worker and requiring the court to impose a Criminal Behaviour Order on those convicted of such offence; and repealing section 22A of the Magistrates' Courts Act 1980 which provides that that low-value shop theft is a summary offence unless the defendant elects a jury trial.

9. **Part 4** makes provision in respect of the **criminal exploitation of children and vulnerable people**. It introduces a new offence of child criminal exploitation, makes provision for child criminal exploitation prevention orders, and criminalises the practice of 'cuckooing' (whereby criminals take over the home of another person without their consent for the purpose of committing specified offences).

10. **Part 5** contains several measures relating to **sexual offences and offenders**.

    a) Chapter 1 creates new or amends existing sexual offences in relation to children, including: a new offence of making, possession, adaptation or supply of digital files or models designed to create child sexual abuse material; extension of the "paedophile manuals" offence to cover AI (artificial intelligence) generated images; a new offence of administering or moderating of electronic services who facilitate the production or distribution of child sexual abuse material; amends existing offences to capture a broader range of culpable behaviour where a person engages in sexual activity in the presence of a child or person with a mental disorder. It also creates a new statutory aggravating factor for grooming behaviour where the court is considering the seriousness of a child sex offence and extends the powers of Border Force officers to compel individuals at the border to unlock their electronic devices for search on suspicion of possession of digital child sexual abuse material.

    b) Chapter 2 places a duty on persons undertaking regulated activity (such as teachers and health care professionals) to report child sexual abuse, subject to specified exceptions, and creates an offence of preventing a person subject to the duty from complying with it.

    c) Chapter 3 makes further provisions about sexual offences. It confers a power on the Secretary of State to issue guidance to the police on the disclosure of information for the purpose of preventing child and other sex offences; introduces new offences of taking or recording an intimate photograph or film without consent, and installing equipment with intent to

enable that to happen; amends the offence of exposure (in section 66 of the Sexual Offences Act 2003); and replaces the offence of sexual penetration of a corpse (in section 70 of the Sexual Offences Act 2003) with a broader offence of "sexual activity with a corpse".

d) Chapter 4 deals with the management of registered sex offenders ("RSOs"). The provisions require RSOs to notify the police of any new name seven days before using it and if they intend to be absent from their home address for five days or more; and requires certain RSOs to notify the police before entering certain premises at which children are present. They also amend the procedure for RSO notifications: amending the procedure in Scotland and Northern Ireland for specifying the police stations at which notifications are to be made; empowering the police to enable certain notifications virtually (rather than at a police station); and enabling the police to review whether a RSO subject to indefinite notifications requirements should be discharged from the requirements, without an application. The provisions also empower the police to prohibit a RSO from changing their name on identity documents without authorisation from the police and reduce the rank of police officer who may authorise an application for a warrant to search a RSO's home address.

11. **Part 6** makes provision about **stalking**, by enabling a court to make a stalking protection order on the conviction or acquittal of a defendant at a criminal trial and conferring powers on the Secretary of State to issue guidance to relevant public authorities about stalking and to the police about the disclosure of information about the identity of alleged stalkers.

12. **Part 7** makes other provision for the **protection of persons.** It creates a new administering a harmful substance (including by spiking) offence; introduces a new broader offence of encouraging or assisting serious self-harm; criminalises the detention of a child outside the UK without the appropriate consent and enables employers to access enhanced criminal records checks, which include a check of the children's barred list, for those working with children in a supervised capacity.

13. **Part 8** provides for new offences to prevent **theft and fraud**. It introduces new offences to criminalise the possession, importation, manufacture, adaptation, supply or offering to supply of electronic devices for use in vehicle theft; new offences relating to the possession or supply of a "SIM farm" with associated powers of entry and search for evidence of those offences; and offences relating to the possession or supply of other electronic communications technologies that can be used to facilitate fraud via. electronic communications network and services (with such technologies specified in regulations made by the Secretary of State).

14. **Part 9** provides for three new offences relating to **public order**: (a) wearing or otherwise using an item that conceals identity in a public place within a designated

locality; (b) possession of pyrotechnics at protests; and (c) climbing on a specified war memorial.

15. **Part 10** confers new or modified **powers on the police and other law enforcement agencies**. It provides investigative agencies with a power to apply to the court for an order that a third-party entity involved in the provision of internet protocol ("IP") addresses and internet domain names should prevent access to an IP address or domain name; provides police (and the service police) with a new power to enter and search premises (private or public) where stolen goods have been electronically tracked to premises and there are reasonable grounds to believe the goods are on the premises and that it is not reasonably practicable to obtain a warrant; and a connected power for seizure of stolen goods and theft offence evidence where necessary to seize to prevent damage or disappearance; makes changes to the existing regime of police and law enforcement access to the Driver and Vehicles Licensing Agency (DVLA) driver register to expand such access, and enables the Secretary of State to make regulations about access to driver licensing information by the police and other law enforcement agencies; expands police powers to test persons in police detention on arrest or after charge (for persons aged 14 and over) to also permit drug testing for specified Class B and Class C drugs (in addition to specified Class A drugs) and to take an additional sample for drug testing, where the first is unsuitable or insufficient; and expands the cohort of foreign national offenders who can be given a conditional caution requiring them to leave the UK to also include those who have limited leave to remain in the UK.

16. **Part 11** reforms the **confiscation regime** in England and Wales and Northern Ireland in Parts 2 and 4 of the Proceeds of Crime Act 2002 respectively and introduces **costs protections** for law enforcement agencies in civil recovery proceedings in the High Court under Part 5 of that Act.

17. **Part 12** makes further provision for the **management of offenders**. The provisions extend the criteria for polygraph testing to people released on licence, under probation supervision, who have been convicted of murder and are assessed as posing a risk of sexual offending; to those who are sentenced concurrently for a sexual and non-sexual offence where the sentence for the sexual offence expires before or during the licence of the non-sexual offence; and to offenders sentenced for offending which is considered to be linked to terrorism before the Counter Terrorism Act 2008 ("CTA 2008") was commenced, or following commencement of the CTA 2008 but before the Counter-Terrorism and Sentencing Act 2023 was commenced for offences outside the specified list contained in Schedule 2 to the CTA 2008. They also require offenders serving community and suspended sentences to notify their probation officer or Youth Offending Team of changes to their names or personal contact information.

18. **Part 13** makes provision about **the police**. The provisions reform the arrangements for the handling of complaints against the police and the

investigation of conduct matters and create a power for the Secretary of State to make certain provision by secondary legislation about appeals by chief officers of police, local policing bodies and the Independent Office for Police Conduct to Police Appeals Tribunals.

19. **Part 14** introduces new powers and modifies existing powers to in relation to **terrorism and national security.** They make provision for Youth Diversion Orders to disrupt young people involved in terrorism and divert them from the criminal justice system; amend the Terrorism Prevention and Investigation Measures and State Threats Prevention and Investigation Measures regimes to better manage the risk from those involved in terrorism or hostile state activity by limiting their access to bladed articles and other articles capable of being used as a weapon; amend section 13 of the Terrorism Act 2000 to apply the offences relating to the wearing of uniform or the publication of images relating to a proscribed organisation to conduct in prisons and other places of detention and to enable the police to seize any article displayed in a public place if it arouses reasonable suspicion that an individual is a supporter or member of a proscribed group, without the need for the article to be used in criminal proceedings; extend the notification requirements for those convicted of offences deemed to be connected to terrorism; add an additional offence (breaching a foreign travel restriction order) to be captured by the terrorist offenders sentencing, restricted release, and management on licence regimes; and ensure that terrorism sentences with a fixed licence period available for terrorist offenders in Northern Ireland are handed down consistently with the equivalent sentence in England and Wales.

20. **Part 15** contains **miscellaneous and general provisions**. Specifically, the provisions enable the UK and devolved governments to make regulations giving effect to international law enforcement information-sharing agreements; and provide for a corporate body or partnership to be held criminally liable where a senior manager commits any offence while acting within the actual or apparent authority granted by the organisation, replacing provisions in the Economic Crime and Corporate Transparency Act 2023 which were confined to specified economic crimes.

PART 1 – ANTI-SOCIAL BEHAVIOUR

Respect Orders

21. Chapter 1 of Part 1 creates Respect Orders. These provisions are broadly based on Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 ("ASBCPA 2014"). A court may make a Respect Order against a person aged 18 or over if they are satisfied, on the balance of probabilities, that the respondent has engaged in or threatens to engage in ASB, and the court considers it necessary to make the order for the purpose of preventing the respondent from engaging in ASB. An order may, for the purpose of preventing ASB, prohibit the respondent from doing, or require the respondent to do, things specified in the order (including excluding a person from home in cases of violence). They are preventive orders, aimed at

reducing the possibility of harm to the public; the legislative aim is the prevention of behaviour that is likely to cause harassment, alarm or distress.

22. The Respect Order is based on Part 1 of the ASBCPA 2014 and permits the relevant authority to make an application without notice, apply for an interim order and to vary or discharge the order.

23. It is an offence for a person, without reasonable excuse, to do anything the person is prohibited from doing, or to fail to do anything the person is required to do, by the Respect Order. A respondent who has been issued with a Respect Order which requires them to participate in a particular activity must be given a warning letter from the person responsible for supervising the activity before action may be taken for failure to comply[1].

24. A person who commits an offence is liable on summary conviction to imprisonment for a term not exceeding the general limit in the magistrates' court or a fine (or both); on conviction on indictment to imprisonment for a period not exceeding 2 years or a fine (or both).

Article 5 – Right to liberty and security

25. Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. The provisions give the court the discretion to impose prohibitions on an individual. The court may only impose proportionate prohibitions or requirements which restrict an individual's movement. The ECtHR has held, in *Guzzardi v Italy*[2], that the different between restriction on movement and deprivation of liberty is one of degree or intensity, rather than nature or substance. The domestic courts have held, in individual cases, that no deprivation of liberty arose from control orders imposing a curfew alongside other restrictions on conduct. The provisions allow courts to determine appropriate prohibitions which do not amount to the kind of arbitrary detention proscribed by Article 5. Accordingly, the Government is of the view the provisions are compatible with Article 5.

Article 6 - Right to a fair trial

26. Respect Orders engage the civil limb of Article 6, as they relate to the determination of civil rights and obligations. It is assessed that they do not amount to a "criminal charge" within the meaning of Article 6(2) and (3) ECHR. The Government is satisfied that the proceedings where a Respect Order may be imposed satisfy fair trial requirements. The rules which govern the imposition of the order ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards. The compatibility of a civil standard for analogous civil preventative orders with Article 6 ECHR was recently affirmed

[1] This will be 12 months ending with the date of the failure, the person has been given a warning letter.
[2] (40146/98)

by the Supreme Court in *Jones v Birmingham City Council*[3]. The Government is satisfied that the provisions do not, therefore, violate Article 6 and adequate safeguards exist to ensure procedural fairness.

27. Breach of a Respect Order amounts to a criminal offence. Proceedings taken for breach of a criminal behaviour order are criminal in character under domestic law and constitute a "criminal charge" for the purposes of Article 6. The usual processes and appeal routes apply as for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6.

Articles 8, 9, 10 and 11 – Right to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression and freedom of assembly

28. The new Respect Order enables the court to impose orders with a range of conditions, which may include conditions such as prohibiting the recipient from contacting specified individuals and attending certain locations, requiring an individual to desist from doing a specified act and requesting the surrender of something being used in ASB which is causing harassment alarm or distress, such as alcohol. Similarly to civil injunctions (under section 1 of the ASBCPA 2014) a Respect Order may exclude a person from home in cases of violence or risk of harm.

29. As such, the Respect Order may engage Article 8 if an order is imposed which prohibits the recipient from contacting a person who may be a family member, or precluding the recipient from entering a specified area where it transpires the recipient has friends or family. Article 9 may be engaged in circumstances where the recipient states that those people/places that they wish to assemble with are part of their religious, political or philosophical group. Article 10 may be engaged insofar as any prohibition or requirement interferences with freedom of expression by prohibiting noise, or an individual communicating in a specified way or with specified persons, which the recipient asserts interferes with their freedom of expression (political or religious opinions). Finally, it is possible Article 11 may be engaged if (for example) an order prohibited the recipient from meeting with specified groups of people thereby limiting freedom of assembly or association.

30. The Government is satisfied that the provisions are lawful, and any interference arising will be a proportionate interference with these qualified rights. The new provisions are necessary to disrupt the problem of a long-term ASB in local environments and combat the increase in ASB which is responsible for causing harassment alarm and distress. They pursue the legitimate aim of protecting the health and rights of others as well as the prevention of crime and disorder. The provisions are "lawful" as the tests for imposition of prohibitions or requirements are clearly set out in primary legislation (prescribed by law) and the circumstances

[3] Jones v Birmingham City Council 2023 UKSC 27

in which such prohibitions or requirements may be imposed may be committed are sufficiently foreseeable for the general public.

31. Any prohibitions or requirements imposed will strike the right balance between the subject of the order's convention rights, and the rights of others. Judicial decisions as to which prohibitions or requirements to impose in a Respect Order will ensure that any interference is justified and proportionate in the individual case. Respect Orders are targeted at those who commit ASB which results in harassment alarm and distress which is a serious concern to the Government. There is also a right to appeal, or to seek variation or discharge or an order, which further mitigates against any risk of unjustifiable interference with convention rights.

Anti-social behaviour: increase of maximum penalty for CPN, PSPO or EO

32. Clauses 3 to 5 make amendments to ASB powers under the Antisocial Behaviour Crime and Policing Act 2014 ("ASBCPA 2014"). Clause 4 increases the maximum financial penalty that is applicable for breach of a community protection notice (CPN), public spaces protection order (PSPO) or an expedited order (EO).

Article 1, Protocol 1 - Right to peaceful enjoyment of property

33. The imposition of a financial penalty would be a deprivation for Article 1 of Protocol 1 ("A1P1") purposes and could amount to a disproportionate interference with rights under A1P1 in certain circumstances.

34. However, whilst these amendments increase the potential financial penalty that may be levied, they do not alter the regime in which CPNs, PSPOs and EOs operate, and all the relevant legislative safeguards will continue to apply. For example, those authorised to issue fixed penalty notices ("FPNs") will continue to have discretion as to whether to issue a FPN or not and may only do so where they have reason to believe that an offence has been committed in relation to a breach of a CPN, PSPO or EO. Authorised persons may determine the amount of the financial penalty that is specified (up to the statutory maximum) to ensure that any fine is proportionate and the usual appeal mechanisms would remain available to challenge a penalty that was excessive. Additionally, an individual could choose not to pay the FPN and – instead – be prosecuted for the offence (with attendant fair trial rights etc).

35. The Government is satisfied that any interference with A1P1, as qualified right, is justified in the public interest in protecting public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others and that it is therefore a control of use of property "in accordance with the general interest" under paragraph 2 of A1P1.

Seizure of motor vehicles used in a manner causing alarm, distress or annoyance

36. Clause 8 removes the requirement (under section 59 of the Police Reform Act 2002) for police to issue a warning before seizing a vehicle (such as off-road bikes, motorbikes and e-scooters) being driven anti-socially.

37. The seizure of a vehicle by police without a prior warning may interfere with individual's right to peaceful enjoyment of their property (A1P1) and may engage the civil limb of their right to a fair trial (Article 6). The Government is satisfied this measure is justified as a necessary and proportionate means of combatting the anti-social use of vehicles.

Article 1, Protocol 1 – Right to peaceful enjoyment of property

38. A seizure of a vehicle being used in an anti-social manner is not a permanent removal. This type of interference is usually considered permitted 'control of use of property' under A1P1(2), rather than 'deprivation of possessions'. Existing regulations set out mechanisms by which the legal owner of the vehicle can recover the seized vehicle.

39. There is a risk that a vehicle could be seized and retained by the police where the vehicle is not owned by the person committing the offending behaviour. This would mean adversely affecting the property rights of a third party that is not engaged in the criminal activity. However, the existing regulations provide safeguards in those circumstances, as an owner can claim their vehicle back from the police without charge. Moreover, in those instances the vehicle will often have already been stolen and the owner will therefore have already been deprived of their vehicle by the person who stole it. The notification and retrieval process are likely to assist the lawful owner in reclaiming their vehicle.

Article 6 – Right to a fair trial

40. The initial decision to seize a vehicle will be made by police and not a court and will be based upon a police constable's reasonably held belief that a vehicle is being used in a manner which meets the relevant threshold. The provisions constitute a forfeiture measure that may adversely affect property rights of third parties, in the absence of any threat of criminal proceedings against them, therefore engaging the civil limb of Article 6.

41. Existing regulations set out the requirement to send a seizure notification detailing the process of returning the vehicle to the legal owner where they can be identified. The seizure notification is provided to the person who is or appears to be the legal owner of the vehicle and details the method by which the vehicle can be released.

42. Where an individual using the vehicle in an anti-social manner legally owns the vehicle, the police will, at the point of seizure, provide the individual with the reasons why the constable is seeking to seize the vehicle and explain the retrieval process. The individual may challenge any seizure decision or conduct of the police

constable via the usual police complaint channels. They can retrieve their vehicle by following the retrieval process as notified to them.

43. Where the individual does not legally own the vehicle, they cannot retrieve the vehicle following the seizure. However, it is not their property and therefore Article 6 is not engaged as there is no determination of their civil rights.

PART 2: OFFENSIVE WEAPONS

Possession of weapon with intent to use unlawful violence etc.

44. Clause 10 creates a new offence for a person to be in possession of a bladed article or offensive weapon with intent to use the weapon in unlawful violence or to cause serious unlawful damage to property themselves, or to enable another person to do so.

Article 8 and Article 1, Protocol 1 – Rights to respect for private and family life, home and correspondence and peaceful enjoyment of property

45. The police seizure of a weapon may impact the individual's right to private life (Article 8) and peaceful enjoyment of their property (A1P1). However, the provision targets possession with intent to commit 'unlawful violence' and 'unlawful damage to property'. In the Government's view, the new measures are necessary and proportionate to disrupt the long-term trend of an increase in serious violence and knife crime (the prevention of disorder or crime and the rights and freedoms of others).

Article 5 – Right to liberty and security

46. Article 5 is engaged as the creation of a new criminal offence may result in a deprivation of liberty. However, it falls within the authorised circumstances prescribed by Article 5(1) where deprivation is lawful, namely detention after conviction of a competent court (Article 5(1)(a)). The constituent elements of the offence and penalties will be set out in primary legislation; the Government is satisfied the penalties are proportionate to the nature and severity of the offending.

Article 14 – Protection from discrimination (with A1P1)

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

Maximum penalty for offence relating to offensive weapons

48. Clause 11 increases the maximum penalty for offences relating to the possession, sale etc. of offensive weapons and knives and the sale of knives to under 18s from 6 months' imprisonment or a fine or both to 2 years' imprisonment or a fine or both.

Article 5 – Right to liberty and security

49. Any deprivation of liberty arising from a sentence of imprisonment will fall within the authorised circumstances prescribed by Article 5(1) where deprivation is lawful, namely detention after conviction of a competent court (Article 5(1)(a)). The constituent elements of the offence and penalties continue be set out in primary legislation; the Government is satisfied the penalties are proportionate to the nature and severity of the offending. The increase in penalties is a necessary deterrent to disrupt the long-term trend of an increase in serious violence and knife crime (the prevention of disorder or crime and the rights and freedoms of others).

Power to seize bladed articles etc.

50. Clause 12 provides the police with a power to seize, retain and destroy bladed articles (any article which has a blade or is sharply pointed), to include those lawfully held, if the police lawfully encounter such articles in private property and they have reasonable grounds to suspect that the article is likely to be used in connection with unlawful violence. Clause 13 makes equivalent provision for the service police.

Articles 6, 8 and 9 and Article 1, Protocol 1 - Rights to a fair trial, private and family life, home and correspondence, freedom of thought conscience and religion and peaceful enjoyment of possessions

51. The provision permits the seizure of bladed articles, which are otherwise lawfully held, which will interfere with individual's right to peaceful enjoyment of their property (A1P1) and may engage with their private life (Article 8). They may also interfere with individual's right to freedom of thought, religion and belief (Article 9), as some bladed articles may be held for religious reasons – such as the Sikh kirpan (an article of faith which resembles a knife or sword). They may also interfere with an individual's right to a fair trial (Article 6) because the decision to seize an item will be made by the police and not a court.

52. The Government is satisfied the measures are justified as a necessary and proportionate means of combatting and tackling the continuing increase in knife crime, by enabling harmful weapons to be seized before unlawful violent acts can occur (pursuing the legitimate aims of public safety, the prevention of crime and protecting the health and rights and freedom of others). The Government is satisfied there is no existing alternative means for the police to intercede before harm is caused to take custody of items held in private which are likely to be used for such criminality; this power is therefore necessary to enable the police to prevent that wider harm occurring. Additionally, where an individual has a "good reason" for possessing the item (as for example is the defence for possession of bladed articles in public under the Criminal Justice Act 1988), such as for religious reasons, it is expected the police will take this into account in determining whether

the item is likely to be used in violence (i.e. it de facto is not because its core purpose in the individual circumstances is for use in religious ceremonies).

53. Additionally, the legislation contains safeguards to ensure the power is exercised in a proportionate way: critically, the threshold test for seizure and destruction is reasonable grounds for suspecting that the article would be likely to be used in connection with unlawful violence if it were not seized (which requires evidence, which may be challenged in any prosecution, as to intended unlawful use); the police will be required to give the individual a notice stating the reason why the relevant article was seized; and appeal routes are available (both to the police through their complaints processes and to a magistrates' court) which may result in the item being returned if wrongfully seized. Where the individual has a "good reason" for possessing the item (such as for religious reasons), the police will take this into account in their determination of whether they have reasonable grounds to suspect that the item will be used to commit unlawful violence if not seized. These safeguards also ensure compliance with the civil limb of Article 6; the individual may challenge the seizure of the item through the complaints processes and to the magistrates' court.

Article 14 – Protection from discrimination

54. As to Article 14, it is possible that the police will seize bladed articles from premises in urban areas (where there is a greater prevalence of knife crime) more frequently than from rural areas, which may impact minority ethnic communities. The Government is satisfied the legislation has sufficient safeguards to mitigate disproportionate application. Seizure can only take place where there are reasonable grounds for suspecting that the relevant article is likely to be used in connection with unlawful violence; as such, the basis for the seizure is reasonable suspicion as to use in criminality, not an individual's protected characteristics.

PART 3: RETAIL CRIME

Assault of retail workers: offence and duty to make a criminal behaviour order

55. Clause 14 will create a new offence of assaulting a retail worker whist at work. The clauses define "a retail worker" and "retail premises". The offence is punishable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences or to a fine (or both).

56. Clause 15 imposes a duty on the court to make a criminal behaviour order ("CBO") where a person has been convicted of an assault retail worker, unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender which justify not making an order.

Article 5 – Right to liberty and security

57. Article 5 is engaged as the creation of a new criminal offence may result in a deprivation of liberty. However, it falls within the authorised circumstances prescribed by Article 5(1) where deprivation is lawful, namely detention after

conviction of a competent court (Article 5(1)(a)). The constituent elements of the offence and penalties will be set out in primary legislation; the Government is satisfied the penalties are proportionate to the nature and severity of the offending.

58. Upon conviction of this offence there is a presumption that the court will impose a CBO if the court does not impose a custodial sentence or make a youth rehabilitation order, community order or a suspended sentence. The court must make a CBO unless there are exceptional circumstances which (i) relate to the offence or the offender, and (ii) justify not making the CBO or, (iii) the court makes an application for absolute discharge under s79 in respect of the offences. As such the court will still have discretion to not impose a CBO, but the presumption is that an order will be made if applied for. The presumption does not interfere with or fetter the Prosecutor's decision as to whether or not it is appropriate to apply for a CBO, and for an application to be made the Prosecutor will still have to be satisfied that the defendant has engaged in behaviour that has caused or is likely to cause harassment alarm or distress, and that they consider that making an order will help in preventing the offender from engaging in such behaviour (s331(2)).

59. There are no mandatory prohibitions or requirements that are to be imposed under a CBO, as such the court continue to have flexibility as to what is proportionate (and must act compatibly with the ECHR, including Art 5, when determining which prohibitions or requirements are to be imposed). It is not assessed that the imposition of such conditions (which could, for example, include geographical restrictions or curfews) would amount to a deprivation of liberty; they would be mere restrictions on liberty. As such, the measure is considered compatible with Article 5 of the ECHR.

Article 8 – Right to respect for private and family life, home and correspondence

60. The presumption in favour of imposing a CBO on conviction may, indirectly, engage Article 8: a CBO may impose prohibitions or requirements on an individual, such as geographical restrictions, which may interfere with an individual's private or family life. The Government is satisfied that any such conditions imposed (at the discretion of the Court) will be a justified and proportionate interference with the rights, in pursuit of the legitimate aims of public safety or economic wellbeing of the country or the prevention of disorder or crime, or the protection of rights and freedoms of others. The legislative aim of the measure is to prevent violent retail crime; and prohibitions and requirements will be targeted at that aim (such as, for e.g., prohibiting an individual from attending the shop where the assault took place). The statutory regime for imposition of a CBO (including pursuant to this presumption) are clearly prescribed by law (set out in primary legislation. As such, it is considered the measure is compatible with Article 8.

Theft from shop triable either way irrespective of value of goods

61. Clause 16 provides for the abolition of low-value shoplifting as a summary only offence. This provision repeals s.22A of the Magistrates' Court Act 1980. The result is that low-value shoplifting of goods worth £200 or less, which would previously have been treated as a summary-only offence unless the defendant elected trial in the Crown Court, will now in all cases be treated as the either-way offence of theft, contrary to section 1 of the Theft Act 1968. The maximum penalty will therefore be one of 7 years' imprisonment, rather than the six months' maximum penalty for the summary-only offence. The measure potentially engages Article 5 ECHR.

Article 5 – Right to liberty and security

62. While setting a maximum penalty generally falls outside the scope of the Convention, raising the maximum penalty for low-value shoplifting could potentially engage Article 5. A sentencing court in England and Wales must follow any relevant sentencing guidelines unless satisfied that it would be contrary to the interests of justice to do so. Irrespective of whether the offence is treated as a summary-only offence or an either-way offence, the applicable sentencing guidelines remain the Theft from a Shop or Stall sentencing guidelines. The Government therefore is satisfied that this measure is compatible with Article 5 ECHR because the change in maximum penalty will not give rise to the potential for a disproportionately severe sentence, since the sentence will result from an assessment of the factors set out in the sentencing guideline.

PART 4: CRIMINAL EXPLOITATION OF CHILDREN AND OTHERS

Child Criminal Exploitation – Offence and consequential amendments

63. Clause 17 introduces a new offence of child criminal exploitation ("CCE"). It will be an offence where an adult does an act to or in respect of a child, with the intention of causing the child to engage in criminal activity (at any time), and either the child is under the age of 13, or the child is under the age of 18 and the adult does not reasonably believe that the child is aged 18 or over. The offence is an either way offence, subject to a maximum penalty of 10 years' imprisonment or an unlimited fine (or both). Clause 35 makes consequential amendments to the Proceeds of Crime Act 2002 and the Youth Justice and Criminal Evidence Act 1999 in relation to protection of witnesses and lifestyle offences.

Article 5 – Right to liberty and security

64. Article 5 is engaged as the creation of a new criminal offence of CCE may result in a deprivation of liberty. However, it falls within the authorised circumstances prescribed by Article 5(1) where deprivation is lawful, namely detention after conviction of a competent court (Article 5(1)(a)). The constituent elements of the offence and penalties will be set out in primary legislation; the Government is satisfied the penalties are proportionate to the nature and severity of the offending. The procedural safeguards required by Article 5(2) to (4) will be assured through the ordinary procedure of the criminal justice system.

Article 6- Right to fair trial

65. Article 6 is engaged as the creation of a new criminal offence of CCE may result in a criminal trial, and in particular because where the act relates to a child under 13, it need not be proved that the adult reasonably believed that the child was under 18. There are two core elements to the offence: (a) an act being done to or in respect of a person with the intention of causing them to engage in criminal activity; and (b) that person is a child. As to the second element, the offence will be made out automatically where the child is under the age of 13 (i.e. on strict liability); or where the child is under 18, where the adult does not reasonably believe that the child is aged 18 or over.

66. The Government is satisfied that strict liability as to age where the child is under 13 is justified and Article 6 compliant. Strict liability is not in itself incompatible with Article 6[4], nor is its imposition incompatible with the presumption of innocence. The House of Lords in *G*[5] confirmed this and the more general proposition that Article 6(2) does not affect the substance of the matters which may be legitimately proscribed by the content of the criminal law (provided that the burden of proving the matters selected for proscription is on the prosecution). Similarly, the ECtHR has held presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention (*Falk v. the Netherlands*[6]*),* provided they are confined within reasonable limits which strike a balance between the importance of what is at stake and the rights of the defence; any interference must be reasonably proportionate to the legitimate aim sought to be achieved (*Janovic v. Sweden*[7]*; Salabiaku v. France*[8]*).* The Government is satisfied any interference is justified to protect an extremely vulnerable cohort of victims – young children. It is confined within reasonable limits (i.e. 13 and under) that consider the objectives of the offence (to protect children from criminal exploitation) and the protection of the defendant's rights (strict liability is only one part of the offence; proof of intent to encourage the child to criminality is also required). Moreover, the burden will always be on the prosecution to prove that the child was under 13 beyond reasonable doubt.

67. Adding CCE as a criminal lifestyle offence in POCA 2002 may also engage a person's Article 6 rights (right to fair trial) as section 10 of POCA provides that a number of assumptions are to be made by the court in determining the benefit from criminal conduct during confiscation proceedings. The criminal lifestyle assumptions require the defendant to account for the last six years of financial activity, to prove that it does not represent benefit from crime. There is no discretion to disapply these provisions under the existing law. However, the Government is satisfied that any interference is justified. There are currently two ways in which the

[4] Muhamad [2002] EWCA Crim 1856; Barnfather v Islington Education Authority [2003] EWHC 418 (Admin)
[5] [2008] UKHL 37
[6] Application No. 66273/01
[7] Application No. 34619/97
[8] Application no. 10519/83

defendant may seek to disapply the criminal lifestyle assumptions: by adducing evidence to demonstrate that the application of an assumption would be wrong, and by demonstrating that the application of an assumption would lead to a serious risk of injustice (section 10(6)(b) of POCA). Whilst case law has interpreted section 10(6)(b) narrowly, assumptions by way of reverse burden have long been held to be a "*fair and proportionate response to the need to protect the public interest*." (*R v Benjafield*[9]) and not to constitute an unlawful interference with Article 6(1). Moreover, there is further provision in this Bill to ensure that the serious risk of injustice test is not construed unduly narrowly (see paragraph 3 of Schedule 14 to the Bill), and that the criminal lifestyle assumptions will only apply if the court is asked to apply them by the prosecutor (see paragraph 2 of Schedule 14 to the Bill).

Article 8 - Right to respect for private and family life, home and correspondence

68. Article 8 may be engaged as the creation of a new offence of CCE may constitute an interference with a person's Article 8 rights to a private and family life, in so far as it criminalises a wide range of acts done by an adult, which may occur in the course of their private and /or family life. The Government is satisfied that any interference is justified as it will be in accordance with the law (prescribed in primary legislation); necessary for the prevention of disorder and crime (as it seeks to criminalise persons who deliberately target children to commit criminality); and is proportionate (as the actus reus is sufficiently restricted by the mens rea – the intention of causing the child to engage in criminal activity).

Article 8 and Article 1, Protocol 1 – Rights to private and family life, home and correspondence and peaceful enjoyment of property

69. Adding CCE as a criminal lifestyle offence in POCA 2002 engages the Article 1 Protocol 1 right of the offender (and potentially of third parties) and potentially Article 8 (due to the significant overlap between the scope of A1P1 and Article 8, since the concept of "home" under the latter provision might fall within the concept of "property" under the former). The orders require offenders to divest themselves of interests in property (including money) so that they may pay a sum equivalent in value to their benefit from crime. The Government is satisfied that any such interference is justified as the purpose of the confiscation regime is fundamentally, to deprive offenders of the benefit of crime. As such, inclusion of the offence may be justified in the same way that other criminal lifestyle offences may be justified.

Child Criminal Exploitation Prevention Orders

70. Clauses 18 to 30 and Schedule 4 make provision for Child Criminal Exploitation Prevention Orders ("CCEPO"). These are new civil preventative orders which may be imposed on an adult (person aged 18+) by the criminal court dealing with an individual at the end of criminal proceedings, or by a magistrates court "on application" by law enforcement bodies.

[9] [2002] UKHL 2, [2003] 1 AC 1099 at [8] (Lord Steyn)

71. To impose a CCEPO, the court must be satisfied that:
    a) either (a) the individual is convicted for a CCE offence (or found not guilty by reason of insanity, or to be under a disability but to have done the act charged against them, in respect of such offence); or (b) on the balance of probabilities that the individual has engaged in conduct associated with causing children to engage in criminal conduct; and
    b) there is a risk that the defendant will seek to cause children, or any particular children, from being caused to engage in criminal conduct; and
    c) the order is necessary to protect children from that risk.

72. A CCEPO may only include prohibitions or requirements which are necessary for the purpose of protecting children from engaging in criminal conduct. The order will be tailored to the specific circumstances of each case. Such prohibitions may include, for example, not being in a particular place, not being with particular persons or not participating in particular activities. The requirements may include, for example, attending at a particular place at a particular time. A condition requiring notification of the individual's name and address, and change of name and address, to the police may also be imposed, at the Court's discretion ("the notification condition").

73. The Court may impose a "full" CCEPO or, where a hearing is adjourned, an "interim" CCEPO. A without notice application may be made, but only an interim CCEPO may be imposed following such application – and an interim order may only be made where the court thinks it necessary to do so.

74. In relation to CCEPOs:
    a) the person concerned (and others) may apply to vary or discharge an order;
    b) the person concerned (and others in certain circumstances) may appeal the making, variation or discharge of an order;
    c) a "full" CCEPO has a mandatory minimum duration of at least 5 years (where it is made on conviction) or 2 years (in all other cases), but may be discharged prior to that date with the consent of the person concerned and a relevant chief officer of police;
    d) where the person concerned is required to comply with the limited notification condition, notification of false information (knowingly) is an offence (with a maximum penalty of 5 years imprisonment, or a fine, or both);
    e) breach of an order without reasonable excuse is an offence (with a maximum penalty of 5 years imprisonment, or a fine, or both).

75. The CCEPO is not a penalty[10]. The legislative aim is the protection of children from being exploited by criminal gangs and to prevent adults from harming children by drawing them into a world of criminality. It does not operate to punish, and the

[10] See Welch v United Kingdom (17740/90)

prohibitions and requirements are statutorily confined to those "necessary" for protective and preventative purposes.

Article 5 – Right to liberty and security

76. Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. The provision gives the court discretion to impose prohibitions and/or positive requirements on an individual. But, if doing so, the court may only impose prohibitions or requirements restricting an individual's movements (e.g. curfew, attendance at a particular location, geographical restrictions) not those amounting to the kind of arbitrary detention proscribed by Article 5. The ECtHR has held, in (*Guzzardi v Italy*[11]), that the difference between restriction on movement and deprivation of liberty is a matter of degree not substance and account must be taken of a wide range of factors including: type, duration, effect and manner of implementation. The domestic courts have held, in individual cases, that no deprivation of liberty arose from a control order imposing a curfew alongside other restrictions on conduct[12]. Accordingly, the Government is of the view that the provisions are compatible with Article 5 as the Court may only impose restrictions of a degree and intensity only amounting to a restriction on movement[13].

77. Article 5 is also engaged as breach of a CCEPO, and notification of false information, are criminal offences which can result in the arrest and detention of an individual. The applicable power of arrest lies in section 24 of the Police and Criminal Evidence Act 1984. The penalty for the offences is set out in the legislation; the Government is satisfied the penalties are proportionate to the nature and severity of the offending. Consequently, the penalty and power of arrest are in accordance with a procedure prescribed by law and fall within the permissible grounds in Article 5(1), namely: the lawful detention of a person after conviction (Article 5(1)(a)); the lawful arrest or detention of a person for non-compliance with the lawful order of a court (Article 5(1)(b); and the lawful arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (Article 5(1)(c). The protections provided for by Article 5(3) in respect of arrest are met and offender subject to the order is able to appeal against conviction and sentence.

Article 6 – Right to fair trial

78. In relation to Article 6, the Government is satisfied that the proceedings where a CCEPO may be imposed, varied, or discharged satisfy fair trial requirements within the civil limb of Article 6. The rules which govern the procedure for making of an order (on application or at the end of criminal proceedings) ensure participation of the person concerned in the court process (including by the availability of legal aid

[11] [1980] ECHR 5,
[12] Secretary of State for the Home Department v E [2007] UKHL 47, [2008] 1 A.C. 499, [2007] 10 WLUK 803
[13] See, e.g. De Tommaso v Italy; Guzzardi v Italy; Medvedyev and Others v. France; Creanga v Romania

and rights of legal representation) and a fair and public hearing within a reasonable time by an independent and impartial tribunal.

79. The Government is satisfied that the proceedings for the making or variation (etc.) of a CCPEO do not amount to a criminal charge for the purposes of Article 6(2) and (3)[14]. Crucially, the legislative aim underpinning CCEPOs is the prevention of CCE not the punishment of perpetrators, as assured via the statutory conditions. Applying the established three-part test in *Engel v Netherlands*[15]: (1) the domestic classification of the proceedings are civil; (2) the essential nature of the proceedings is also civil (a conviction / finding of guilt is not a precondition for CCEPO: even for "on conviction" orders it is simply a gateway criterion and the court must additionally be satisfied that there is a future risk of CCE and the order is necessary to prevent that risk[16]); and (3) the nature and severity of the consequences that may flow from the proceedings are the imposition of prohibitions or requirements relating to the individual's conduct, for the preventative purpose. Whilst these may, for example, include curfews, supervision requirements, contact restrictions or geographic restrictions, they are not comparable with a criminal sanction[17] and can be no more restrictive than are judged necessary to achieve the preventative object of the order[18].

80. The Government is, accordingly, satisfied that the use of the civil standard of proof (balance of probabilities) does not violate Article 6 of the ECHR (notwithstanding that breach of an order is a criminal offence). In *Jones v Birmingham City Council* the Supreme Court held Article 6(1) does <u>not</u> require the criminal standard of proof to be satisfied in analogous civil preventative orders (gang injunctions) and the ECtHR has similarly held that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed *(Saliba v Malta*)[19]. The existence of prescribed rights of appeal, and the ability to subsequently apply to the court to vary or discharge the order, afford further safeguards. As such, the Government is satisfied that the provision is compatible with Article 6 and adequate safeguards exist to ensure procedural fairness.

81. The provision for interim CCEPOs to be imposed following <u>*a without notice*</u> application is also considered compatible with Article 6. The procedure incorporates adequate safeguards to protect the interests of the potential subject of the order and, so far as possible, complies with the requirement to provide

[14] See, by analogy, McCann v Chief Constable of Manchester [2002] UHL 39; Gough v Chief Constable of Derbyshire Constabulary [2001] All ER (D) and Jones v Birmingham City Council Court of Appeal: [2018] EWCA Civ 1189.
[15] (1979-80) 1 EHRR 647; explained in domestic terms in Gale v Serious Organised Crime Agency [2011] 2 WLR 2760.
[16] Benham v United Kingdom (Application no. 19380/92). Guzzardi v Italy (1981) 3 EHRR 333, paragraphs 82 to 83; Ozturk v. Germany (Application No. 8544/79).
[17] Tommaso v Italy [2017] ECHR 205 in which the Grand Chamber at [143] confirmed that special supervision was not comparable to a criminal sanction.
[18] Secretary of State for the Home Department v MB [2007] UKHL 46
[19] (Application No 24221/13) [2016] ECHR 1058 at para 67.

adversarial proceedings and equality of arms: only an interim order may be imposed following a without notice application; the court would only impose such an interim order, after a without notice hearing, where it considers it "necessary to do so. In making that assessment, the Court will be required to consider the necessity of the order and any prohibitions contained in it and balance the need to take protective action against the need to limit interference with the potential subject of the orders rights[20]. An interim order may only impose prohibitions (with the limited exception of the notification condition); and the subject of the order may appeal against its making or make an application to vary or discharge the interim order. In practice, without notice applications will only be made (and consequently without notice interim orders imposed) in exceptional or urgent situations, such as where an immediate risk to specific or general children is present and where serving notice would cause unacceptable delay or risk the defendant absconding or causing imminent harm to potential victims or witnesses. It is considered, therefore, that the Article 6(1) right to a fair hearing is adequately protected.

82. Breach of a CCEPO, and notification of false information (where the notification condition is imposed), amounts to a criminal offence, punishable on conviction to a maximum term of imprisonment of five years or a fine (or both). Proceedings taken in respect of these offences acre criminal in character under domestic law and constitute a 'criminal charge' for the purposes of Article 6. The usual processes and appeal routes apply as for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearing meet the criminal limb of Article 6. The Government is therefore satisfied that the processes fully respect Article 6 right.

Articles 8, 9, 10 and 11 – Rights to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association

83. A CCEPO may impose such prohibitions or requirements, including the notification condition, as it considers necessary for the purpose of protecting children generally, or any particular children, from being caused to engage in criminal behaviour. Depending on their content, the prohibitions or requirements imposed may engage Articles 8 (e.g. prohibiting attending particularly localities or contacting or residing with particular children, which may interfere with private or family life); Article 9 (e.g. prohibition entering particular locations or being at particular locations, which may interfere with abilities to attend a place of worship); Article 10 (e.g. prohibiting use of particular means of social media or use of the internet, which may interfere with freedom of expression); and/or Article 11 (e.g. imposing a curfew requirement of making non-association provision, which may interfere with freedom of assembly or association).

84. These are qualified rights. The Government is satisfied that any interference which arises will be in accordance with the law, in pursuance of a legitimate aim and proportionate. The interferences (the prohibitions/requirements) will be in

[20] By analogy see R v R [2104] EWFC 48; and DS v AC [2023] EWFC 46.

accordance with the law as there will be clear provision in primary legislation governing the basis on which the court may make an order. These are formulated with sufficient precision to enable a person to know in what circumstances and the purpose, and intended extent to which, the powers can be exercised. Statutory safeguards exist to ensure any interference is necessary and proportionate. The measures must be necessary for the purpose of protecting children from being caused to engage in criminal behaviour (which will mitigate risks of children being encouraged to commit criminality, but also the harm (physical and psychological) caused to children by the means of exploitation such as use of violence, threats, coercion, manipulation (such as befriending and grooming) and debt-bondage), which reflects the legitimate aims of public safety, the prevention of crime and protecting the rights and freedoms of others. The Court, in exercising its discretion as to whether to impose prohibitions or requirements, must ensure any conditions imposed are proportionate. The Court is, additionally, specifically required to take into account any potential conflict with the times at which the defendant normally attends work or an educational establishment, or conflict with their religious beliefs, or compliance with any other court order or injunction (for example, there could be an exception to a "curfew" provision to allow attendance at work or college environment or religious attendance). These protections will ensure that any CCEPO is proportionate.

85. The Government is satisfied the mandatory minimum duration of CCEPOs, being 2 years or 5 years, is compatible with Articles 8, 9, 10 and 11. This is proportionate to the serious harm caused by CCE, the inherent vulnerability of children and likely duration required before potential victims reach maturity and the intimidation, manipulation and coercive control frequently involved in CCE. The longer duration, 5 years, only applies where an individual has been convicted of an offence. Safeguards exist to ensure that any duration does not exceed that which is proportionate: the Court has flexibility as to which specific prohibitions or requirements apply for the mandatory duration, and it is possible for an order to be discharged before the end of that term (upon application) with the consent of the subject of the order and a relevant chief officer of police.

Controlling another's home for criminal purposes

86. Clause 32 creates a new offence of controlling another's home for criminal purposes ("cuckooing"). It will be an offence to exercise control over the dwelling of another person, for the purpose of enabling the dwelling to be used in connection with the commission of a relevant offence without the person's consent. The relevant offences are listed in Schedule 5 (which may be amended by regulations). Clause 35 makes consequential amendments to the POCA 2002, the YJCEA 1999 and the Criminal Evidence (Northern Ireland) Order 1999.

Article 5 – Right to liberty and security

87. The creation of a new criminal offence could result in an individual's arrest and/or imprisonment and therefore deprivation of their liberty (Article 5). However the measures fall within the permissible grounds in Article 5(1)(a) and (c) of the ECHR

namely, the lawful detention of persons after conviction by a competent court and the lawful arrest or detention of a person effected for the purpose of bringing them before the competent legal authority on reasonable suspicion of having committed an offence. The Government is satisfied the penalties are proportionate to the nature and severity of the offending. The procedural safeguards required by Article 5(2) to (4) will be assured through the ordinary procedures of the criminal justice system. As such, the Government is satisfied the measures are compatible with Article 5.

Article 6 – Right to a fair trial

88. The Government is satisfied the measures comply with the criminal limb of Article 6, in particular that strict liability as to lack of consent is justified on the basis that requiring a Defendant's knowledge or belief as to consent (or lack thereof) would not adequately protect victims against cuckooing, who are often vulnerable and subject to coercion or intimidation.

89. Strict liability is not in itself incompatible Article 6 of the ECHR *(Muhamad; Barnfather v Islington Education Authority* (ibid)*).* Nor is its imposition incompatible with the presumption of innocence enshrined in Article 6(2) of the ECHR. The ECtHR has held that presumptions of fact or law operate in every criminal law system and are not prohibited in principle by the Convention (*Falk*), provided they are confined within reasonable limits which strike a balance between the importance of what is at stake and the rights of the defendant. The Government is satisfied that an appropriate balance has been struck between the harms caused by cuckooing and the defendant's rights under Article 6. In particular, the prosecution will need to prove beyond reasonable doubt that the victim did not consent to the control of their property and that the defendant intended to control the property for criminal purposes. The usual safeguards applicable to persons arrested, prosecuted and/or sentenced for an offence will apply.

90. Adding cuckooing as a criminal lifestyle offence in POCA, and the provision of special measures protections for victims of cuckooing, may engage a person's Article 6 rights on the same basis as outlined (above) in relation to CCE. The analysis is the same, and the Government is satisfied the provisions Article 6 compliant.

Article 8 and Article 1 Protocol 1 – Rights to private and family life, home and correspondence and peaceful enjoyment of property

91. Including cuckooing as a criminal lifestyle offence in POCA 2002 engages the Article 1 Protocol 1 right of the offender (and potentially of third parties) and potentially Article 8. On the same basis as outlined for CCE (above), we consider any such interference is justified as the purpose of the confiscation regime is fundamentally, to deprive offenders of the benefit of crime.

PART 5: SEXUAL OFFENCES AND OFFENDERS

Child Sexual abuse image-generators

92. Clause 36 introduces a new criminal offence in relation to fine-tuned AI models designed to produce child sexual abuse material ("CSAM"). This targets child sexual abuse ("CSA") offenders using and sharing bespoke add-ons or files which can be applied to mainstream AI models to create tailored and illegal images of children, by making it an offence to make, supply, offer to supply or possess a CSA image generator. The images are not necessarily photorealistic but may be drawings etc. The maximum penalty for the offence is five years' imprisonment.

Articles 5 and 6 – Rights to liberty and security and a fair trial

93. The ECHR articles engaged by this provision are Articles 5 and 6, as the measure may result in criminal prosecution for the offence and detention following arrest, charge or conviction. The Government is satisfied, for the same reason as outlined above in relation to other new offences, this is compatible with Articles 5 and 6.

Possession of advice or guidance about creating CSA images

94. Clause 37 makes it a criminal offence to possess guidance on creating synthetic or partially synthetic CSAM. There are guides circulating which provide offenders with instructions on creating artificial CSAM, including creating images of specific children, and on how to use AI to "nudify" images of children to carry out "sextortion" (financially motivated sexual extortion); this offence targets those guides. The maximum sentence for the offence is three year's imprisonment on conviction on indictment.

Articles 5 and 6 – Rights to liberty and security and a fair trial

95. The ECHR articles engaged by this provision are Articles 5 and 6, as the measure may result in criminal prosecution for the offence and detention following arrest, charge or conviction. The Government is satisfied, for the same reason as outlined above in relation to other new offences, this is compatible with Articles 5 and 6.

Article 1 Protocol 1 – Right to peaceful enjoyment of property

96. Article 1 Protocol 1 is also engaged as the existing power for forfeiture of advice and guidance about abusing children and taking indecent photographs of children is extended to items giving guidance or advice about making synthetic images of children. Forfeiture and confiscation are generally considered permitted 'control of property' under Article 1(2), rather than 'deprivation of possessions', additionally Schedule 1 to the Protection of Children Act 1978 which is extended to apply to these items allows a third party to give notice of a claim to the property and requires confirmation by a court that the property is forfeitable property and that it cannot be severed from other property. The Government therefore is satisfied that any interference is justified and compatible with A1P1; the advice and guidance is illegal and relates to illegal activity (CSA).

Online facilitation of child sexual exploitation and abuse

97. Clause 38 makes it a criminal offence to administer or moderate a CSA website or private group. The NCA assess that it is almost certain that the vast majority of CSA is underpinned by networking between offenders, facilitated by dedicated websites and groups on both the dark and clear web which are run and promoted by moderators and administrators. This offence targets them. The maximum sentence on conviction is 10 years imprisonment.

Articles 5 and 6 – Rights to liberty and security and a fair trial

98. The ECHR articles engaged by this provision are Articles 5 and 6. Articles 5 and 6 are engaged as the measure may result in criminal prosecution for the offence and detention following arrest, charge or conviction. The Government is satisfied, for the same reasons as outlined above in relation to other new offences, this is compatible with Articles 5 and 6.

Sexual activity in the presence of child etc

99. Clause 42 will amend the offences set out in sections 11, 18, 32, 36 and 40 of the Sexual Offences Act 2003 which criminalise sexual activity in the presence of a child or a person with a mental disorder (or where the child or person is in a place from which the perpetrator can be observed), in certain circumstances.

100. A common element of the existing offences is the requirement that for the purposes of obtaining sexual gratification, the defendant (A) was engaged in sexual activity with the knowledge or belief that the child or person with a mental disorder (B) was aware, or with the intention that they should be aware, that A was engaging in sexual activity. The clause amends the existing offences to remove this requirement. The proposed amendments engage Articles 5, 7 and 8.

Article 5 – Right to liberty and security

101. The penalties for the offences will remain unchanged by the amendments and are set out in primary legislation. As such they are in accordance with a procedure prescribed by law and would fall within the permissible grounds in Article 5(1). The defendant will be able to appeal against conviction and the resulting sentence in the usual ways. The amendments are therefore compatible with Article 5.

Article 7 – No punishment without law

102. Article 7 provides that a punishment cannot be imposed other than where it is prescribed by law. The elements of the existing offences, and the maximum penalty for each offence, will continue to be clearly set out in a way in which a member of the public can understand. The amendments will not have any retrospective effect. The amendments are therefore compatible with Article 7.

Article 8 - Right to respect for private and family life, home and correspondence

103. Article 8 - which protects the right to respect for family and private life - is engaged. The existing offences are listed in Schedule 3 to the SOA 2003, meaning that where the criteria are met, an offender will be made subject to notification requirements in accordance with Part 2 - which require offenders to notify the police of various personal details on an annual basis as well as whenever these details change, including: name, address, date of birth, passport and national insurance number

104. The broadening of the existing offences means that some acts of sexual activity in the presence of a child or person with a mental disorder that are not currently captured by the criminal law will be, once the amendments are commenced, notification requirements will be imposed in some cases where currently they cannot be.

105. Any interference with an offender's Article 8 rights is justified in accordance with Article 8(2). The amended offences will retain the requirement that the prosecution must prove a link between A acting "for the purpose of obtaining sexual gratification" and the presence or observation of B. As such, there is a clear and rational connection between the offences and the objectives of the notification requirements such that the imposition of notification requirements in these circumstances is a proportionate means of achieving a legitimate aim.

Child sex offences: Grooming aggravating factor

106. Clause 43 creates a statutory aggravating factor that applies when sentencing specified sexual offences which are committed against a child. A court must treat an offence as aggravated by grooming if the offence was facilitated by or involved the offender grooming a person aged under 18, or the offence was facilitated by, or involved, a person other than the offender grooming a person aged 18 and the offender knew, or could reasonably have known, about the grooming when the offence was committed. The measure potentially engages Article 5, Article 7 and Article 14, together with Article 5.

Article 5 – Right to liberty and security

107. While the new statutory aggravating factor may result in longer periods of imprisonment for certain offenders, any such additional imprisonment will follow the conviction by a competent court in accordance with Article 5§(1)(a). Further, the ultimate sentence length will be set lawfully by the sentencing court based on an individualised assessment of the relevant aggravating and mitigating factors in a manner that ensures that the detention will not be arbitrary.

Article 7 – No punishment without law

108. This measure has retrospective effect as the changes are to apply to those persons who may have committed offences before commencement but who have not yet been charged, convicted or sentenced. Article 7 is not breached as the maximum penalty for the offences that may be imposed before and after

commencement is unaffected, in compliance with the principles in *Coeme and Others v Belgium* (2000) and *R v Uttley* [2004] UKHL 38. For these reasons, the Government is satisfied that this measure to be compatible with Article 7.

Article 14 – Protection from discrimination

109. With respect to Article 14, together with Article 5, a claim could be brought on the basis that an offender being sentenced prior to the introduction of the statutory aggravating factor could have received a lesser custodial sentence than one sentenced after commencement of the measure, despite having committed a similar offence at a similar point in time. However, domestic courts and the ECtHR have consistently rejected Article 14 challenges put on the basis that offenders may or would have been subject to lesser sentences had they been sentenced at a different time when a different regime applied: *R v Docherty (Shaun)* [2016] UKSC 62; *Minter v UK* [2017] 5 WLUK 8.

Power to scan for child sexual abuse images at the border

110. Clause 44 creates a power for Border Force to require the unlocking of digital devices, with a criminal penalty for refusing to do so, and engages the right to fair trial and the privilege against self-incrimination under Article 6, the right to privacy under Article 8, and the right to the peaceful enjoyment of one's property under Article 1 of the First Protocol ("A1P1") to the Convention. The Government is satisfied that this new power is a necessary and proportionate limitation on these rights and is narrowly tailored to address a grave social evil.

Articles 6, 8 and Article 1 Protocol 1– Rights to a fair trial, private and family life, home and correspondence and peaceful enjoyment of property

111. The right to fair trial is engaged under Article 6 ECHR. This power puts a traveller to a choice: either unlock their device for scanning, or face arrest for obstruction. It may be said that this deprives them of the right not to self-incriminate by unlocking the device. The right not to incriminate oneself is recognised under Article 6. However, the Government would emphasise that the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers, such as the power to direct unlocking, but which has an existence independent of the will of the suspect[21].

112. The Government also emphasises the fact that the initial decision to direct unlocking will be made by an official having "reasonable grounds" to suspect the presence on the device of child sexual abuse material which is already logged by law enforcement on a special database. The Government is satisfied that there are sufficient safeguards to meet the requirements of Article 6: the officer may not require unlocking without reasonable grounds which requires sufficient evidence and/or intelligence on which such grounds can be made out. Similarly, the

[21] Saunders v. the United Kingdom, (1997) 23 E.H.R.R. 313 § 69; see also O'Halloran and Francis v. the United Kingdom (2008) 46 EHRR 21. § 47.

obstruction offence is limited to situations where a traveller refuses to unlock "without reasonable excuse." Therefore, the Government is satisfied that this measure is compatible with Article 6.

113. Article 8 ECHR is also engaged as the power will allow officers to scan devices for material that a traveller will likely regard as private. The Government is satisfied, though, that this is a proportionate interference in pursuit of the legitimate aim of "the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" under Article 8(2). Interference for one of these purposes must be made in accordance with law and must be "necessary in a democratic society." This power is aimed squarely at the prevention of crime and is necessary to secure the welfare of the nation's children, a fundamental responsibility of any democratic government.

114. As digital devices may also be seized after this power has been used, it also engages A1P1 namely the right to the peaceful enjoyment of one's possessions. A person would be deprived of their digital devices under this power if the scan confirms the presence of illegal material on the device, or in a situation where the traveller refuses to unlock it. The Government is confident that seizure in light of a positive scan or obstruction is overwhelmingly "in the public interest", as seizure is essential for further investigation of the contents of the device. Seizure will also be "subject to the conditions provided for by law", as the owner of the device will be afforded all the protections afforded other suspects who are detained under customs powers and subsequently by the police. The Government is confident that there are "no general principles of international law" which bar seizure of an unlocked device known to contain this kind of illegal material or a locked device which is reasonably suspected to contain this material.

Duty to report child sexual abuse

115. Chapter 2 of Part 5 requires a person, aged 18 years or over, who is involved in regulated activity relating to children in England, to report child sexual abuse to the police or social services. A person who fails to report is at risk of being barred from working with children. It is a criminal offence for a person to prevent or deter another person from reporting.

Article 8 – Right to private and family life, home and correspondence

116. A person who is subject to the duty (a 'relevant individual') would have to reveal very private information about a victim to either the police or social services, even where the victim does not want the abuse to be reported. This interferes with the victim's right to private life. The private life of an alleged perpetrator is also impacted, as information about them would be reported to the police or social services. There may be circumstances where the alleged perpetrator has a reasonable expectation of privacy when they confess to a relevant individual who they have a close relationship with.

117. The Government is satisfied the interference with Article 8 is justified as the duty is intended to combat child sexual abuse, and so is in pursuit of the legitimate aims of preventing crime and protecting the health, rights and freedoms of others. It has resulted from a recommendation of the Independent Inquiry into Child Sexual Abuse (IICSA)[22] which identified a serious problem with the protection of children and many past instances of failures to take action in response to child abuse.

118. It is considered proportionate for a report to be made even where the victim does not want it to be made as the primary purpose of the duty is to ensure that the police and social services are made aware of abuse so that they can decide what action to take to protect children.

119. It is unlikely that a confession made by a perpetrator to a relevant individual would enjoy a reasonable expectation of privacy applying the principals in Sutherland v HM Advocate[23]. Even were it to do so, it is assessed that any interference with such right to private life would be justified in order to prevent child sexual abuse.

Article 9 – Right to freedom of thought, conscience and religion

120. There may be circumstances where a religious or spiritual advisor hears a confession of abuse from a perpetrator. Imposing the duty may limit the perpetrator's freedom of religion (Article 9) as they may be deterred from seeking religious or spiritual guidance. The advisor's freedom of religion may also be limited as they could be conflicted between their legal obligations and their religious or spiritual convictions after hearing a confession.

121. The Government is satisfied that any such interference is justified and that confessions made in the course of seeking religious or spiritual guidance do not enjoy absolute protection under the ECHR. The social need to combat child sexual abuse is strong, and it is proportionate to apply the duty to confessions made in a religious or spiritual context.

Guidance about the disclosure of information by police for the purpose of preventing sex offending

122. Clause 55 gives the Secretary of State the power to issue statutory guidance to the police when they consider disclosing information about a person (a 'relevant individual') to others to prevent sexual harm.

[22] The Independent Inquiry into Child Sexual Abuse (IICSA) was established by the then Home Secretary in 2015 to look at the extent to which state and non-state institutions in England and Wales have discharged their duty to protect children from sexual abuse. The Inquiry published its final Report in October 2022, which made a number of recommendations based on research, investigations and the voices of victims and survivors of child sexual abuse. The duty for certain individuals to report child sexual abuse is recommendation 13 of the Report. https://www.iicsa.org.uk/reports-recommendations/publications/inquiry/final-report.html

[23] [2020] UKSC 32

Article 8 – Right to private and family life, home and correspondence

123. This measure may result in interference with the relevant individual's right to private life as the police may release information about them to members of the public, such as information about their previous convictions.

124. The Government is satisfied that the interference, if arising, with Article 8 is justified and proportionate. The Government's intention is that this measure will place the current non-statutory guidance of the Child Sex Offender Disclosure Scheme (CSODS)[24] on a statutory footing and will also include guidance on the assessment and disclosure of information where there is risk of sexual harm to vulnerable adults (with such amendments and updates as are required over time).

125. In *R (on the application of A) v SSHD*[25] the Supreme Court held that the CSODS guidance was lawful and in accordance with police obligations under Article 8 as the guidance advised the police to consider whether to seek representations from the relevant individual before making a disclosure. The new statutory guidance will include the same provision and guide the police on the disclosure of information to protect both children and adults from sexual harm; it will not mandate disclosure in all cases, and the police must still consider whether such disclosure is necessary and proportionate in each case.

Offences relating to intimate photographs or films and voyeurism

126. Clause 56 and Schedule 8 will repeal two existing voyeurism offences at sections 67(3) and 67A(2) Sexual Offences Act 2003 ('SOA') and introduce five new offences concerning taking or recording intimate photographs or films which show another person without their consent (offences A, B and C), or installing, adapting, preparing or maintaining equipment with the intention to take intimate photographs without the other person's consent (offences D and E). Offences A to C will sit in a new section 66AA of the SOA, and offences D and E will be in a new section 66AC, as inserted by the Bill.

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

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[24] The Child Sex Offender Disclosure Scheme (CSODS) builds on existing law and procedures and provides a clear access route for the public to raise child protection concerns. The CSODS is focused on risk-management and the disclosure of information about a subject's convictions (including cautions, reprimands, and final warnings) of child sexual offences and any other relevant information deemed necessary to protect a child or children from harm (e.g. serious domestic violence, child cruelty/neglect). https://www.gov.uk/government/publications/child-sex-offender-disclosure-scheme-guidance/child-sex-offender-disclosure-scheme-police-guidance-accessible

[25] 2021 UKSC 37

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

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

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

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

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

133. Additionally, following the creation of four new offences at sections 66B to 66D of the SOA, as inserted by section 188 of the Online Safety Act 2023 ("OSA"), which relate to the sharing or threatening to share photographs or films which show, or appear to show, another person (B) in an intimate state, the Crime and Policing Bill will amend the OSA in the following limited ways:

a) It amends and extends the exemption in section 66C(1) to capture cases in which the defendant reasonably believed that the photograph or film they

shared had been taken in a place to which the public or a section of the public had or were permitted to have access.

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

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

134. The proposed amendments engage Articles 5, 6, 7 and 8 and A1P1.

Article 5 – Right to liberty and security

135. Since these measures create criminal offences punishable with imprisonment, Article 5 ECHR is engaged. The measure creates two summary only offences and three either-way offences punishable that carry a maximum of two years' imprisonment. Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary. The proposed penalties for the draft clauses are proportionate to the nature and severity of the offending, any deprivation of liberty resulting from a sentence of imprisonment will not be arbitrary. The penalties are also in line with those for the comparable 'sharing' offences at new section 66B(1) to (3) SOA, as inserted by the OSA, and existing offences in section 67 and section 67A of the SOA. Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard.

Article 6 – Right to a fair trial

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

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

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

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

137. The reverse burden attaching to the proposed clause is compatible with Article 6(2) ECHR. As in *R v Navabi*[26], the circumstances surrounding the taking of the image and the reasons for doing so (i.e. the relevant information) are within the knowledge and possession of the defendant. A defendant wishing to avail themselves of the reasonable excuse defence should therefore be able to provide the relevant information. If the defence imposed only an evidential burden on the defendant, this would require the prosecution to then prove that there was no

[26] [2005] EWCA Crim 2865

reasonable excuse, which is disproportionate. Finally, since the maximum penalty for offence A is 6 months' imprisonment, per Johnstone[27], the arguments in favour of a reverse burden need not be overwhelmingly compelling.

138. Each defendant will bear the evidential burden of raising sufficient evidence concerning the existence of an exemption (where they apply) to satisfy the court that the issue should be left to the court to decide: see section 101 of the Magistrates' Court Act 1980 (summary trials) and R v Hunt[28] (trial on indictment). If the defendant discharges that evidential burden, the legal burden of disproving it will be on the prosecution (see, for example, Lobell[29]). This has been held to be compatible with Article 6 (see, for example, DPP v Wright[30]).

139. Sections 75 and 76 SOA set out the evidential and conclusive presumptions around the absence of consent or a reasonable belief in consent. Sections 75 and 76 will apply to Offences A, B and C, and section 76 will apply to the offences in section 66B(1), (2) and (3). Whilst evidential and conclusive presumptions engage Article 6 and the issue of presumption of innocence, the presumption of innocence is not absolute: Falk v. the Netherlands[31]. An interference with the presumption of innocence must be reasonably proportionate to the legitimate aim sought to be achieved (*Janosevic v Sweden*[32]). The application of evidential and conclusive presumptions to Offences A, B and C, and conclusive presumptions to section 66B(1), (2) and (3) is compatible with Article 6(2), for the following reasons:

a) The evidential presumption in respect of offences A, B, and C will only be engaged in circumstances where it is plain to the defendant that the complainant would not have been able to give valid consent, since it must be proved both that one of an exhaustive list of circumstances existed and the defendant knew those circumstances existed.
b) The Defendant will still be able to adduce rebuttal evidence to rebut the evidential presumption: *R v White*[33].
c) The spirit of section 75 is already used in cases to which it does not technically apply, insofar as directions following the wording of section 75 may accurately reflect the factual dispute between the complainant's evidence and that of the defendant when it comes to the issue of consent.
d) The conclusive presumption is limited to two very specific scenarios: both require proof that the defendant intentionally deceived the complainant in respect of key issues and therefore it will be obvious that the complainant could not have provided consent to the relevant act. Requiring the Prosecution to prove otherwise would be disproportionate.

[27] [2003] UKHL 28
[28] [1987] AC 352
[29] [1957] 1 QB 547
[30] [2009] EWHC 105
[31] (66273/01)
[32] (34619/97)
[33] [2010] EWCA Crim 1929

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

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

Article 7 – No punishment without law

141. Article 7 provides that a punishment cannot be imposed other than where it is prescribed by law. The elements of the offence, and the maximum penalty for the offence, be clearly set out in a way in which a member of the public can understand. The amendments will not have any retrospective effect. The amendments are therefore compatible with Article 7.

Article 8 - Right to respect for private and family life, home and correspondence

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

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

144. Offence C is added to Schedule 3 to the SOA, as is Offence E when committed with the intent to enable commission of Offence C, meaning that where certain criteria are met, offenders will be subject to notification requirements under Part 2 of the SOA. Any interference with an offender's Article 8 ECHR rights is justified within the meaning of Article 8(2). Paragraph 150 of the explanatory notes to the SOA refers to the offences in Schedule 3 to the SOA as being "exclusively sexual offences"; both offence C and E are sexual offences, and offence C requires the defendant to act for the purposes of obtaining sexual gratification, and to the extent

offence E will be captured by Schedule 3 it requires the defendant to act with the intent that they, or another person, will commit Offence C. There is therefore a clear and rational connection between the offences themselves and the objectives of the notification requirements so that the imposition of notification requirements in these circumstances is a proportionate means of achieving a legitimate aim.

Article 1 Protocol 1 - Right to peaceful enjoyment of property

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

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

147. The measure will mean that the court has the power to make a deprivation order under its existing powers in Chapter 4 of Part 7 of the SA. Deprivation orders under the SA are not to be made as a matter of routine and can only be made when there has been a sufficient investigation to justify a finding that the property is the product of one of the offences and where the court is satisfied that the order is proportionate and justified (R v Wright-Hadley (Stephen)[34]). Consequently, not only is the measure itself justified, the courts will apply it in a way which ensures that the power is exercised in a proportionate way.

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

Exposure

149. Clause 57 amends the offence of exposure set out in section 66 of the SOA 2003 so that the offence is committed where a person (A) intentionally exposes their genitals and either:

a) intends that someone will see them and be caused alarm, distress or humiliation, or
b) where they act for the purpose of obtaining sexual gratification, intends that someone will see them, and is reckless as to whether someone who sees them will be caused alarm, distress or humiliation.

[34] [2010] EWCA Crim 1929

150. The clause also inserts a new subsection (1A) to provide that where A acts for the purpose of obtaining sexual gratification and intends only that a particular person (or persons) will see their genitals, they do not commit an offence by virtue of section 66(1)(b) unless they are reckless as to whether that particular person (or one of those particular persons) will be caused alarm, distress or humiliation.

151. The existing offence at section 66 only captures exposure with intent to cause alarm or distress. In contrast, the offence of sending etc photograph or film of genitals at section 66A of the SOA 2003 (the so-called 'cyberflashing' offence), which came into force on 31 January 2024, can be committed when the perpetrator intends to cause alarm, distress or humiliation, or when they act for the purpose of obtaining sexual gratification while reckless as to whether someone will be caused alarm, distress or humiliation. The department is satisfied it is appropriate to expand the mental element of section 66 so that it aligns with section 66A. This will provide victims of in-person exposure greater protection under the SOA and ensure that notification requirements are available where the relevant criteria are met.

152. The ECHR rights potentially engaged by this clause are those in Articles 5, 7 and 8.

Article 5 – Right to liberty and security

153. Whilst the maximum penalty remains the same, we are broadening the mental element of the offence and therefore some cases of exposure that are not currently captured by the criminal law will be following commencement of the amendments. In our view however this has no significant impact on Convention rights. The detention has a basis in domestic law; and it is not arbitrary. The existing penalties are considered proportionate to the nature and the severity of the amended offence, and the causal connection between the conviction and the deprivation of liberty is maintained.

Article 7 – No punishment without law

154. The elements of the offence are clearly set out in the clause and we consider the general public will have a good understanding of what it means for a person to intentionally expose their genitals with intent to cause humiliation or for sexual gratification while reckless as to whether someone who sees them will be caused alarm, distress or humiliation. The terms ‘reckless’ and ‘humiliation’ are not defined in the clause but are readily understood and are used elsewhere in the SOA and the broader criminal law. Additionally, the amendment will align the mental element of the section 66 exposure offence with the section 66A ‘cyberflashing’ offence, generally making the law easier to understand.

155. We therefore consider that the test is satisfied as the maximum penalty for the offence is clearly set out in the proposed clause, the offences will not have any retrospective effect, and the public will have sufficient familiarity with the concepts in the offence to identify the kinds of behaviour that would fall within it.

Article 8 – Right to respect for private and family life, home and correspondence

156. The existing section 66 offence is listed in Schedule 3 to the SOA 2003, meaning that where the criteria are met, an offender will be made subject to notification requirements in accordance with Part 2 - which require offenders to notify the police of various personal details on annual basis as well as whenever these details change, including: name, address, date of birth, passport and national insurance number.

157. As some cases of exposure that are not currently captured by the criminal law will be, once the amendments are commenced, notification requirements will be imposed in some cases where currently they cannot be.

158. It is accepted that given their connection to a person's personal data and private life, notification requirements engage Article 8. However, we consider that this is justified in accordance with Article 8(2).

159. The amended offence will require that the prosecution prove that A intends that someone will see their genitals and be caused alarm, distress or humiliation (rather than only alarm or distress, as is currently the case). Alternatively, the prosecution will need to prove that A exposes their genitals for the purpose of obtaining sexual gratification, with the intention that someone will see them and is reckless as to whether someone who sees them will be caused alarm, distress or humiliation. Furthermore, where the defendant intends only that a particular person or persons will see their genitals, the prosecution must prove that they were reckless as to whether that particular person (or one of those particular persons), as opposed to persons generally, would be caused alarm, distress or humiliation.

160. As such, there is a clear and rational connection between the offence and the objectives of the notification requirements. In our view therefore, the imposition of notification requirements in these circumstances would be a proportionate means of achieving a legitimate aim.

Sexual activity with a corpse

161. Clause 58 repeals the offence of sexual penetration of a corpse, and replaces it with an overarching offence of sexual touching of a corpse, with a maximum penalty of seven years' imprisonment if the touching involved penetration, and five years if it did not. The proposed amendment engages Articles 5, 7 and 8 of the Convention.

Article 5 – Right to liberty and security

162. We consider that the proposed penalties are not arbitrary and that they are proportionate to the nature and severity of the offending. Sexual offences against dead bodies fall into a unique category of offending. They are capable of causing significant harm to the families and friends of the dead person whose body has

been violated. It is right that, in setting the maximum penalty for these offences, the particular dignity that is afforded to a dead person within our society is taken into account, together with the fact that this offending behaviour inevitably detracts from that dignity in a way which may be irrecoverable in the eyes of family and friends. Additionally, the offence may well take place when family (or friends) are still grieving for their lost family member, exacerbating the harm that will be felt by them.

163. The potential penalty for penetrative sexual activity is higher to reflect the fact that offending that involves penetration is generally considered more serious within the framework of the SOA. The higher penalty therefore reflects the more serious nature of the offending and the harm that can flow from it, thus maintaining the causal connection between the conviction and the deprivation of liberty. Finally, the court will retain the ability to take account of all the relevant circumstances when arriving at an appropriate sentence. This provides an important safeguard.

Article 7 – No punishment without law

164. In order to comply with Article 7, the offence and corresponding penalty must be clearly defined in law. The elements of the offence and the maximum penalties are set out clearly in the proposed clause in a way in which a member of the public could understand. The offence will not have any retrospective effect. The clause is therefore compatible with Article 7.

Article 8 - Right to respect for private and family life, home and correspondence

165. Article 8 protects an individual's right to respect for their family and private life against disproportionate interference from the state. Those offenders who commit the new offence of sexual touching of a corpse will be subject to notification requirements where the relevant criteria are met. Given their connection to a person's personal data and private life, notification requirements engage Article 8. However, here, we consider that they are justified within the meaning of Article 8(2) ECHR. Paragraph 150 of the explanatory notes to the SOA refers to the offences in Schedule 3 to the SOA (those in relation to which a person becomes subject to notification requirements upon conviction) as being "exclusively sexual offences".

166. There is a clear and rational connection between the offence itself and the objectives of the notification requirements so that the imposition of notification requirements in these circumstances would be a proportionate means of achieving a legitimate aim.

Management of Sex Offenders – notification requirements

167. Clause 59 requires a registered sex offender (a 'RSO') to notify the police of a change of name not less than 7 days in advance of that change being made. Clause 60 requires a RSO to notify the police in advance (not less than 12 hours before leaving their address) of absences of more than 5 days from their notified address. Clause 61 requires RSOs who pose a risk to children to give advance

notification (not less than 12 hours before entering a premise) if entering a premise where children are present. Failing to comply with notification requirements without reasonable excuse is a criminal offence.

Article 7 – No punishment without law

168. The new requirements will have retrospective effect and apply to existing RSOs who are required to notify having been convicted of a relevant offence in the past. The Government has considered whether the new requirements impose a penalty on RSOs that is heavier than any penalty which existed at the time of their conviction and has concluded that Article 7 is not contravened. The new requirements are not punitive in nature or sufficiently severe to amount to a 'penalty' within the meaning of Article 7. Instead, the requirements are preventative measures in accordance with the ECtHR's judgment in *Gardel v France.*[35]

169. In *Gardel*, the Court decided that the notification requirements which obliged the RSO to provide proof of his address every 6 months and declare every change of address for a period of 30 years, and which had been introduced after he had been convicted of the qualifying sex offence, did not contravene Article 7 as the main aim of the obligations were to prevent reoffending and facilitate police investigations. As such, the obligations could not be considered punitive in nature or constitute a sanction. Any failure to comply with the requirements would result in another set of court proceedings.

170. The new requirements are to strengthen existing notification requirements to enable the police to manage risk sex offenders effectively.

Article 8 - Right to respect for private and family life, home and correspondence

171. The requirement to provide, in advance, additional detailed information regarding their private life interferes with RSOs rights to private and family life (Article 8). The Government is satisfied that the interference is justified and proportionate as notification after the fact does not enable the police to risk manage RSOs effectively, prevent reoffending or protect members of the public from the risk of sexual harm.

172. In *Adamson v United Kingdom*[36] the ECtHR held that the requirement on the RSO to provide information to the police (name, address etc and any changes within 14 days) amounted to an interference with his private life. Nevertheless, the measures pursued legitimate aims to prevent crime and protect the rights of others. For proportionality, it was necessary to weigh the importance of the aims pursued by legislation against the notification requirements and consider the gravity of harm which may be caused to victims of sexual offences. It is the duty of the state to take certain measure to protect those individuals from such harm. The notification

[35] Application no. 16428/05; 17 December 2009
[36] App. No. 42293/98

requirements in this case were held not to be disproportionate to the aims pursued. The Government is satisfied the same analysis applies here.

173. Certain conditions are to be satisfied for the more onerous obligations (providing additional safeguards). The requirement to notify in advance before entering premises where children are present, will only apply to those RSOs who have convictions for child sexual offences or those whom the police have served a notice upon for the purpose of protecting children from sexual harm. Therefore, this requirement will only apply to those categories of offender seen as a particular risk to children.

174. Those RSOs who are not convicted of child sex offences but have been served a notice as pose a risk to children, may appeal the police decision. The police will also be required to review notices every 12 months whereby the RSO will have the opportunity to make representations and the police are able to cancel the notice if satisfied that it is no longer necessary.

Management of Sex Offenders – restriction on applying for new identity documents

175. Clause 66 confers a power on the police to issue a notice to a RSO to require that offender to seek authorisation from the police before applying for replacement identity documents (listed in section 7 of the Identity Documents Act 2010) in a new name. A RSO who, without reasonable excuse, applies for replacement identity documents in a new name without seeking authorisation commits a criminal offence.

Article 7– No punishment without law

176. The new measure will have retrospective effect and apply to existing RSOs who are required to notify having been convicted of a relevant offence in the past and have been served a notice by the police. The Government has concluded that Article 7 is not contravened. The new requirement is not punitive in nature or sufficiently severe to amount to a 'penalty' within the meaning of Article 7. Instead, the requirement is a preventative measure in accordance with *Gardel v France*[37] (as detailed above).

Article 8 – Right to respect for private and family life, home and correspondence

177. This measure interferes with the private life (Article 8) of a RSO as it may restrict them from changing their name if they are not authorised to apply for replacement identity documents in that new name.

178. The Government is satisfied that the interference with this right is justified to prevent crime and to protect the public from sexual harm from those RSOs who have successfully changed their name on identification documents to evade

[37] Application no. 16428/05; 17 December 2009

detection by the police, to obtain a clean criminal record certificate, to create a new identity to gain access to vulnerable people or to use the new identity to circumvent border controls.

179. The measure is proportionate as the police will only issue a notice to a RSO if satisfied that it is necessary to do so for the purpose of protecting the public where the RSO is considered likely to commit a further sexual offence and the change of name may facilitate that.

180. There are specified conditions where the police may grant authorisation to a RSO to apply for replacement identity documents in a new name, such as marriage, civil partnership, divorce, religious reasons or exceptional circumstances. Regulations made by the Secretary of State will also specify other conditions. If a RSO provides evidence satisfying one of the conditions, the police will provide authorisation to the RSO, unless there is need to protect the public from the risk of sexual harm.

181. There is a right for a RSO to appeal against the issue of a notice or against any refusal for a RSO to apply for replacement identity documents in their new name. The police are also required to review notices every 12 months to determine whether they should be cancelled.

PART 6: STALKING

Stalking Protection Orders (SPOs)

182. Clauses 69 and 70 give the criminal courts in England and Wales the power to grant a SPO at the conclusion of criminal proceedings, either on conviction or acquittal of the defendant. The SPO can include prohibitions and/or positive requirements. Breaching a SPO without reasonable excuse is a criminal offence.

Article 5 – Right to liberty and security

183. The Government is satisfied that imposing prohibitions and/or requirements on a person is not an unlawful interference with their right to liberty (Article 5) in accordance with *Guzzardi v Italy.*[38] In *Guzzardi* the Court held that Article 5 is not concerned with mere restrictions on liberty of movement and that to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, is a matter of degree not substance. Account must be taken of a wide range of factors including the type, duration, effect and manner of implementation. Restrictions imposed on a person's liberty by a SPO, such as a requirement to attend an appropriate perpetrator intervention programme, are likely to amount to 'mere restrictions.' These provisions allow the courts to act in a way which is compatible with Article 5 as they may only impose prohibitions and/or requirements which are proportionate if satisfied that the person has carried out acts associated

[38] [1980] ECHR 5

with stalking and the conditions are necessary to protect another person or persons from such acts.

184. Article 5 is, however, engaged as breach of a SPO is a criminal offence which can result in the arrest or detention of an individual. The applicable power of arrest lies in section 24 of the Police and Criminal Evidence Act 1984. The penalty for the offences is set out in the legislation. Consequently, the penalty and power of arrest are in accordance with a procedure prescribed by law and fall within the permissible grounds in Article 5(1), namely: the lawful detention of a person after conviction (Article 5(1)(a)); the lawful arrest or detention of a person for non-compliance with the lawful order of a court (Article 5(1)(b); and the lawful arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (Article 5(1)(c). The protections provided for by Article 5(3) in respect of arrest are met and offender subject to the order is able to appeal against conviction and sentence.

Article 6 – Right to a fair trial

185. The court can impose a SPO without having to be sure to a criminal standard of proof of the acts alleged and a SPO can be imposed on a person who has been acquitted of criminal offences.

186. Established case-law sets out three criteria (*Engel v Netherlands*[39]) to consider when determining whether there was a "criminal charge" and therefore, the application of the criminal standard of proof. This depends on the domestic classification of the proceedings, the nature of the offence, and the nature and severity of the penalty.

187. In *Chief Constable of Lancashire v Wilson and others*[40] the court applied the criteria when considering a civil order which allowed the imposition of positive requirements without the pre-requisite of a conviction. The court held that the proceedings were not criminal in nature and therefore did not attract a criminal burden of proof. The purpose of the civil order was not punitive but was preventative for protection. Additionally, *Jones v Birmingham City Council and another*[41] held that the civil standard of proof on the balance of probabilities applied to proceedings regarding civil orders and that the application of that standard was compatible with Article 6.

188. The Government is satisfied that SPOs do not involve a determination of a criminal charge and do not interfere with the right to a fair trial (Article 6). A SPO is a civil order, and its purpose is to prevent and protect, i.e., to prevent a person from carrying out acts associated with stalking and to protect a person or persons from such acts. It is not punitive in nature.

[39] 1979-80 (1 EHRR 647)
[40] [2015] EWHC 2763 (QB)
[41] [2023] UKSC 27

189. The Government is satisfied that these civil proceedings clearly satisfy any fair trial requirements arising under the civil limb of Article 6(1). The rules which govern the imposition of a SPO made by the court ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards. The Government is satisfied that adequate safeguards are provided to ensure procedural safeguards.

Articles 8 and 9 – Right to private and family life, home and correspondence and freedom of thought, conscience and religion

190. The prohibitions and/or requirements are likely to interfere with the private and family life of a person (Article 8) and may limit a person's freedom of religion (Article 9). The Government is satisfied that the interference with Article 8 is justified as a SPO is specifically designed to prevent a person from carrying out acts associated with stalking and to protect people from harm of such acts. The imposed conditions cannot go beyond what is necessary to protect another person. There are express statutory safeguards to ensure that any requirements and/or prohibitions are compatible with Article 9: the conditions of a SPO must, so far as practicable, avoid conflict with the relevant individual's religious beliefs, and not interfere with their work or education.

Articles 10, 11 and Article 1, Protocol 1- Rights to freedom of thought, conscience and religion, expression and assembly and peaceful enjoyment of possessions

191. Imposed prohibitions and/or requirements could interfere with a person's right to expression (Article 10) and their freedom of association (Article 11) by restricting the person's communication or association with other persons. Conditions may also deprive a person from their property (Article 1 of the Frist Protocol) such as being excluded from their home where they have stalked a partner. The Government is satisfied that the interference with these rights is justified to prevent crime and to protect others from harm. The conditions imposed must be proportionate and cannot go beyond what is necessary.

192. Relevant to all engaged Article's as detailed above, there is a right of appeal and provision to apply to vary or discharge a SPO which provide additional safeguards against the imposition of disproportionate terms.

<u>Guidance about disclosure of information by police forces: releasing the identity of a stalker</u>

193. Clause 72 gives the Secretary of State the power to issue statutory guidance to the police when considering releasing identifying information of a person (a 'suspected perpetrator') to another (the 'victim') where the suspected perpetrator has carried out acts associated with stalking against the victim.

Article 8 – Right to private and family life, home and correspondence

194. Releasing information about a suspected perpetrator where they have not been charged with a criminal offence may interfere with their right to private life (Article 8). The Government is satisfied that any interference which arises is justified as the statutory guidance is designed to assist the police in protecting victims who may be unaware of the true identity of their suspected stalker because the behaviour is taking place online using multiple fake aliases. Not knowing the suspected perpetrator's true identity could be placing the victim at increased risk of harm and re-victimisation. The measure is to prevent crime and to protect the public. The guidance will not compel the police to disclose information; in each case, and in accordance with their duties as public authorities under section 6 of the Human Rights Act 1998, the police will still be required to consider whether, on the individual facts, disclosure would be a justified interference with the suspected perpetrator's ECHR rights.

PART 7: OTHER OFFENCES AGAINST PEOPLE

Administering etc harmful substances (including by spiking)

195. Clause 73 creates a new offence of administering a harmful substance (including by spiking). It repeals sections 22, 23 and 25 of the Offences against the Person Act 1861 (1861 Act) and replaces section 24 with a single administering a harmful substance offence. The new offence is committed if, unlawfully, a person administers a harmful substance to, or causes a harmful substance to be taken by, another person and the person does so with intent to injure, aggrieve or annoy the other person. The ECHR rights potentially engaged are those in Articles 5 and 7.

Article 5 – Right to liberty and security

196. Article 5 is engaged as the maximum penalty for the offence upon conviction is imprisonment for a term not exceeding ten years. The measure falls within the authorised circumstances prescribed by Article 5(1)(a) where deprivation of liberty is lawful, namely detention after conviction of a competent court. The proposed penalties are proportionate to the nature and severity of the offending. The new offence will continue to criminalise broadly the same behaviour that is currently criminalised under the offences at sections 23 and 24 of the 1861 Act. The maximum sentence imposed is the same as the maximum sentence for the existing offence at section 23 of the 1861 Act and the offence at section 61 of the Sexual Offences Act 2003 (Administering a substance with intent). The courts will be able to take account of all relevant circumstances in the usual way. For example, the court can reflect the seriousness of any harm caused when sentencing. The defendant will be able to appeal against conviction and the resulting sentence in the usual way. As such, the relevant prescriptions set out in Article 5 are satisfied.

Article 7 – No punishment without law

197. Article 7 is engaged in so far as it requires the offence and corresponding penalty to be clearly defined in law. In relation to foreseeability, the new offence is explicit that it captures 'spiking' behaviour. The penalty for the offence is clearly set out in the proposed clause, the offences will not have any retrospective effect and

the public will have sufficient familiarity with the concepts in the offence to identify the kinds of acts that would fall within it. The clause is therefore compatible with Article 7.

Encouraging or assisting serious self-harm

198. Clauses 74 and 75 create the offence of encouraging and assisting serious self-harm. This measure repeals the communications offence at section 184 of the Online Safety Act 2023 insofar as it extends to England and Wales and Northern Ireland and replaces it with a broader offence covering all means of encouraging or assisting serious self-harm. The offence is committed where a person does an act capable of encouraging or assisting the serious self-harm of another person and intends for the act to encourage or assist the serious self-harm of another person. The ECHR rights potentially engaged are those in Articles 5, 7 and 10.

Article 5 – Right to liberty and security

199. Article 5 is engaged as the maximum penalty for the offence upon conviction is imprisonment for a term not exceeding five years. The measure falls within the authorised circumstances prescribed by Article 5(1)(a) where deprivation of liberty is lawful, namely detention after conviction of a competent court. The proposed penalties will be set out in primary legislation and are proportionate to the nature and severity of the offending. The sentences imposed are in line with those imposed by comparable offences. For example, the maximum penalty for unlawful wounding/inflicting GBH without intent (section 20 of the 1861 Act) is five years' imprisonment. The courts will be able to take account of the relevant circumstances in the usual way. As such, the relevant prescriptions set out in Article 5 are satisfied.

Article 7 – No punishment without law

200. Article 7 is engaged in so far as it requires the offence and corresponding penalty to be clearly defined in law. In relation to foreseeability, the terms encouraging or assisting are widely understood given their use elsewhere - for example, the inchoate offences in sections 44 to 46 of the Serious Crime Act 2007, and the offence of encouraging and assisting suicide under section 2 of the Suicide Act 1961. The clauses make clear that "encouraging" includes putting pressure on a person to self-harm (whether by threatening them or otherwise). Both the terms 'self-harm' and 'GBH' are also widely understood. The penalty for the offence is clearly set out in the clauses, the offences will not have any retrospective effect, and the public will have sufficient familiarity with the concepts in the offence to identify the kinds of acts that would fall within it. The clauses are therefore compatible with Article 7.

Article 10 – Right to freedom of expression

201. Article 10 is directly engaged insofar as the offence is capable of being committed by means of communication and will therefore make certain types of communication unlawful. However, the offence is formulated in such a way as to enable the general public to foresee the consequences of their conduct with a reasonable degree of certainty and it is being introduced in line with a legitimate

aim - to protect the health and rights of those who may be encouraged or assisted to seriously self-harm.

202. The interference is necessary in a democratic society. In *Ponson v. France*, Application No. 26935/05, the Court held that in assessing the proportionality of measures intended to protect health and morality, content capable of inciting young people to act in unhealthy ways (in that case consuming tobacco) was a relevant and sufficient reason to justify the interference with the publisher's Article 10 right. This offence is targeted at those who encourage or assist another person to seriously self-harm (equivalent to grievous bodily harm) and they also have to intend to encourage or assist another person to seriously self-harm. The offence was set at this level, as recommended by the Law Commission, to avoid criminalising those who share information about self-harming for therapeutic or mental health purposes. The offence goes no further than is necessary to protect the rights and health of others and constitutes a lawful interference with Article 10.

Child abduction

203. Clause 76 creates a new child abduction offence by amending section 1 of the Child Abduction Act 1984 (1984 Act). At any time after a child is taken or sent out of the UK with the appropriate consent, the offence is committed where a parent or person with similar responsibility detains that child outside the UK without the appropriate consent. The ECHR rights potentially engaged are those in Articles 5, 7 and 8.

Article 5 – Right to liberty and security

204. Article 5 is engaged as the maximum penalty for the offence upon conviction is imprisonment for a term not exceeding 7 years. The measure falls within the authorised circumstances prescribed by Article 5(1)(a) where deprivation of liberty is lawful, namely detention after conviction of a competent court. The maximum sentences imposed by this new offence are the same as the existing child abduction offences at sections 1 and 2 of the 1984 Act. The penalties for the offence will be set out in primary legislation and are proportionate to the nature and severity of the offending. The courts will be able to take account of the relevant circumstances in the usual way. As such, the relevant requirements set out in Article 5 are satisfied.

Article 7 – No punishment without law

205. Article 7 is engaged in so far as it requires the offence and corresponding penalty to be clearly defined in law. In relation to foreseeability, the offence is clear what kind of acts fall within in. The new offence is inserted into section 1 of the 1984 Act and therefore the same concepts that apply to the existing section 1 offence also apply to the new offence. For example, section 1 sets out who 'persons connected with a child' are, what 'appropriate consent' is and the defences available. The word 'detention' has its ordinary meaning, and the concept is further explained at section 4 of the 1984 Act. The penalty for the offence is clearly set out in the clause, the offences will not have any retrospective effect, and

the public will have sufficient familiarity with the concepts in the offence to identify the kinds of acts that would fall within it. The clause is therefore compatible with Article 7.

Article 8 – Right to respect for private and family life, home and correspondence

206. The offence engages Article 8 as it impacts the family life of the parent or person with similar responsibility detaining the child (the 'detaining parent'), the other parent or person with similar responsibility (the 'left-behind' parent) and the child.

207. The conduct of the 'detaining parent' interferes with the left-behind parent's right to maintain their relationship with their child, including, depending on the circumstances, living with their child or having regular contact with them. The measure is therefore expected to positively impact the Article 8 right of the left-behind parent. The detention also interferes with the child's Article 8 rights as the detention might cause the child actual harm, or at the minimum it is likely to have the effect of separating the child from the left-behind parent and result in the child not living at their usual address or attending their usual school.

208. The criminalisation of the detaining parent's conduct will impact their own ability to maintain their relationship with their child and/or wider family. However, there are important protections built into the offence for the detaining parent. They will have a defence if they: believed the left-behind parent consented to the detention or would have consented if they were aware of the relevant circumstances; have taken all reasonable steps to communicate with the left-behind parent to get consent to the detention but were unable to so; or the left-behind parent unreasonably refused to consent. Additionally, DPP consent is required to prosecute and therefore only cases where there is a public interest in prosecuting will be advanced.

209. Considering all the circumstances, a fair balance is struck between the competing interests of the child, the left-behind parent and the detaining parent. The interference with the detaining parent's Article 8 right is justified as it is a proportionate means of achieving the legitimate aim of protecting the rights and freedoms of the child and the left-behind parent. The offence is 'proportionate' in that given the protections in place, it is no more than necessary to address the problem.

PART 8: PREVENTION OF THEFT AND FRAUD

Electronic devices for use in vehicle theft

210. Clauses 78 and 79 introduce a new offence to criminalise the importing, making, modifying, supplying, offering to supply and possession of electronic devices for use in vehicle theft. These measures will strengthen how law enforcement agencies confront rapidly evolving tools and technologies which,

whilst currently legal, have few legitimate purposes and are being exploited by criminals in order to steal vehicles.

Article 1, Protocol 1 – Right to peaceful enjoyment of property

211. They may have the effect of depriving an individual of ownership of their property (Article 1 Protocol 1), if the articles are seized by the police as evidence and permanently confiscated if the offence is made out. The Government is satisfied the measure is clearly prescribed by law (the provisions are set out in primary legislation) and justified as a proportionate means of tackling individuals who produce such articles but are currently able to keep sufficient distance from crimes to avoid prosecution. Articles may only be seized where the police have reasonable suspicion that the device will be used in connection with a relevant offence, and it is a defence for the person charged to show that they did not intend or suspect that the device would be used in connection with a relevant offence. It will assist law enforcement to remove from circulation articles which facilitate vehicle crime and, as such, is necessary in pursuit of the legitimate aim of "preventing crime".

Article 6 – Right to a fair trial

212. It is irrelevant for the purposes of the offence at clause 78 whether the person intends to use the item in connection with a relevant offence; rather, the individual's state of mind is a defence. Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution. It is now well settled that in deciding the issue the court should focus on the particular circumstances of the case and the balance between the public interest and the protection of the rights of the individual; Lord Bingham in Sheldrake v DPP[42] set out relevant factors. Such presumptions must be within "reasonable limits" and "justified"[43].

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

Possession and supply of a SIM farm and other specified articles which may be used in connection with fraud perpetrated by means of an electronic communications network or service.

214. Clauses 80 and 81 deal with the possession and supply of SIM farms and clauses 83 and 84 deal with fraud facilitated by other (specified) articles that use an electronic communications network or service. A 'SIM farm' is a device which is capable of using five or more SIM cards to make phone calls and send or receive text messages. Clause 85 gives the Secretary of State the power to specify articles

[42] [2004] UKHL 43, [2005] 1 AC 264 at [21].
[43] See Salonika v France 13 E.H.R.R. 379, R v Foye [2013] All ER (D) 248

for the purposes of clauses 83 and 84. These measures will strengthen law enforcement agencies' ability to confront rapidly evolving technologies which, whilst currently legal, have few legitimate purposes and are being exploited by criminals in order to commit fraud on a large scale.

Article 6 – Right to a fair trial

215. These provisions engage Article 6(2) of the ECHR relating to criminal proceedings, in particular regarding the "reverse burden" on the defendant to prove the available defences, including of "good reason or lawful authority". Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution. The subject matter of the defences will be within the knowledge and ability of the accused to demonstrate, and it is accordingly not unfair to require the accused to discharge this burden of proof. These provisions are within such reasonable limits as are permitted, are justified and are compatible with the Convention[44].

Article 8 – Right to respect for private and family life, home and correspondence

216. Schedule 10 contains search powers for law enforcement officers. It provides them with the power to search for SIM farms and specified articles, in certain limited circumstances and subject to all the safeguards that apply under similar statutory and (in Scotland) common law regimes. These powers may engage Article 8 of the ECHR. The new powers to search for SIM farms and other specified articles are necessary for the new measures to be used effectively and are not already contained within existing legislation. There are a number of safeguards included in the new search powers modelled on those in sections 36 to 49 of the Psychoactive Substances Act 2016. These include that a search warrant would be required to be issued by a justice of the peace, sheriff or lay magistrate to enter and search premises. This will ensure that there is independent scrutiny of the necessity and proportionality of exercising the powers; especially where, for example, the premises are a person's home.

Article 1, Protocol 1 – Right to peaceful enjoyment of property

217. A1P1 is engaged by the criminal offences themselves given that some of those who are currently in possession of SIM farms, or specified articles that may be added by regulations, will effectively no longer be able to possess them for reasons other than in accordance with the defences. The Government is satisfied the approach amounts to a "control" rather than a "deprivation"[45]. The offences are intended to combat crime and protect members of the public from loss of their own property through fraud. The proposal is a control on the use of property "in accordance with the general interest"[46]. The measures will be subject to conditions provided for by law, as set out in the legislation.

[44] See Salabiaku v. France 13 E.H.R.R. 379; and R v Foye [2013] All ER (D) 248.
[45] See R (on the application of Mott) v Environment Agency [2018] UKSC 10, NA v Turkey (2005) 45 EHRR 287; and Papamichalopoulos v Greece (1993) 16 EHRR 440)
[46] Hutten-Czapska v Poland (2007) 45 EHRR 4.

PART 9: PUBLIC ORDER

Offences of concealing identity at a protest; possession of pyrotechnic articles at protests; war memorials

218. Part 9 creates three new criminal offences in relation to public order: wearing or otherwise using an item which conceals identity in a public place within a designated area; possession of pyrotechnics at protests; and climbing on a specified war memorial.

Article 5 – Right to liberty and security

219. Article 5 is engaged as the creation of new criminal offences punishable by imprisonment (the offence of concealing identity in a designated area and the offence of climbing on a war memorial) may result in a deprivation of liberty. However, the measures fall within the permissible grounds in Article 5(1)(a) and (c) of the ECHR; namely, the lawful detention of persons after conviction by a competent court and the lawful arrest or detention of a person effected for the purpose of bringing them before the competent legal authority on reasonable suspicion of having committed an offence. The procedural safeguards required by Article 5 will be assured through the ordinary procedures of the criminal justice system. The proposed penalties in the clauses are proportionate to the nature and severity of the offending (one month and three months, respectively). As such, the Government is satisfied the measures are compatible with Article 5.

Article 6 – Right to a fair trial

220. The Government is satisfied that the measures comply with the criminal limb of Article 6, and in particular that the defences creating a reverse legal burden (the offences of concealing identity in a designated area and climbing on a specified war memorial) and reverse evidential burden (offence of possession of pyrotechnics) are justified and do not violate the presumption of innocence as contained within Article 6(2). Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution. The subject matter of the relevant defences will be within the knowledge and ability of the accused to demonstrate, and it is accordingly not unfair to require the accused to discharge this burden of proof. If the prosecution should be required to prove the lack of a defence in these circumstances, the Government is satisfied that this would place an unnecessary burden on the prosecution that would significantly limit the ability to prosecute the offence. These provisions are therefore within such reasonable limits as are permitted and are compatible with the Convention.

Offence of concealing identity at protests

221. Clauses 86 to 88 create a new offence of wearing or otherwise using an item that conceals identity (either the identity of the person wearing or using the item, or the identity of another) in a public place within an area designated by police.

There is a defence where a person is wearing or using the item for a purpose relating to health, religious observance or in connection with their work.

222. As this measure relates to the policing of assemblies and processions, it has the potential to interfere with individuals' ECHR rights under Article 10 (freedom of expression) and 11 (freedom of assembly) as well as Article 9 (freedom of thought, conscience and religion) given that some items of clothing associated with religious observance can conceal identity. It also engages Article 14 (prohibition of discrimination) in relation to those rights.

Articles 9, 10 and 11: Freedom of thought, conscience and religion, expression and assembly and association

223. Articles 9, 10 and 11 are qualified rights and the Government is satisfied the measure is a necessary and proportionate means of achieving the legitimate aim of protecting public safety, the prevention of disorder and crime and the protection of public order.

224. The offence is considered to be sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2) and by Article 9(2). A pressing social need for these measures is demonstrated by the disorderly conduct witnessed at certain protests. ECtHR case law has established that states have a margin of appreciation in assessing whether such a need exists (Sunday Times v UK (No. 1)[47]. There is evidence from the police that some protestors are using face coverings to conceal their identity as a means of evading conviction for criminal offences committed during protests, and that the existing police powers to require the removal of such face coverings are not effective in preventing this.

225. The very limited context in which wearing a face covering will be a criminal offence at a protest means the measure is proportionate. It will only be an offence where a designation has been made, which requires a police officer of the rank of inspector or above to have the reasonable belief that a protest may take place in a particular locality that is likely to involve the commission of offences, and it is expedient, in order to prevent or limit the commission of offences, to make a designation. Such a designation can only last for 24 hours (unless extended by 24 hours on the basis that offences have in fact been committed or suspected to have been committed).

226. The fact that under section 6 of the Human Rights Act 1998 (HRA 1998) the police, the CPS and the courts have a duty to act compatibly with Convention rights when exercising their powers and duties also provides a safeguard against disproportionate interference.

Article 14 - Protection from discrimination

227. Article 14 may potentially be engaged in conjunction with Articles 9, 10 and 11, given it is possible that the police may take action against more people of certain

[47] 6538/74

religions, more women than men, more people with disabilities (who may be more likely to wear face coverings for health reasons than those who do not have a disability) and/or more people in urban areas than rural areas (where there is a greater prevalence of protests likely to involve the commission of offences) which may impact minority ethnic communities. However, the Government's view is that any such impact, if it materialised, would be objectively justified; arrest and charge will be dependent on the offence being made out – and as such action will only be taken against persons who are wearing the item without a legitimate purpose and who are therefore considered to be wearing the items for nefarious reasons. Those wearing face coverings for health, religious or work reasons are not within scope of the offence.

228. The fact that under section 6 of the Human Rights Act 1998 (HRA 1998) the police, the CPS and the courts have a duty to act compatibly with Convention rights when exercising their powers and duties provides a safeguard against disproportionate interference.

Offence of possession of pyrotechnic articles at a protest

229. Clause 89 prohibits the possession of pyrotechnic articles, including fireworks and flares, when taking part in a public assembly or public procession that constitutes a protest, or a one-person protest. There is a reasonable excuse defence, which explicitly includes where a person has a relevant article in their possession in connection with their work. In addition, there is a specific exemption for cultural and religious events of a kind at which pyrotechnic articles are customarily used.

230. As this measure relates to the policing of assemblies and processions, it has the potential to interfere with individuals' ECHR rights under Article 10 (freedom of expression) and 11 (freedom of assembly) as well as Article 9 (freedom of thought, conscience and religion) given the use of pyrotechnics such as fireworks at certain religious and cultural events. It also engages Article 14 (prohibition of discrimination) in relation to those rights.

Articles 10 and 11 - Freedoms of expression, assembly and association

231. The offence is sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2).

232. A pressing social need for these measures is demonstrated by the need to deter disorderly and potentially dangerous conduct in public spaces involving pyrotechnics. For example, there have been instances where fireworks have been fired at police officers while policing crowds at protests.

233. The measures pursue the legitimate aims of preventing crime and disorder and of public safety. Any interference with Articles 10 and/ or 11 is proportionate. The offence prohibits very specific conduct by those attending processions and

assemblies. It does not prevent protest participation or otherwise impose a blanket prohibition on exercise of freedom of expression or assembly rights.

Article 9 - Freedom of thought, conscience and religion, together with Article 14 - Protection from discrimination

234. Article 9 is potentially engaged, alongside Article 14, because fireworks or other pyrotechnic articles are traditionally used at some events with a religious focus. However, only those participating in protest events will fall within scope of the offence, and there is a specific exemption for those taking part in a cultural or religious event of a kind at which pyrotechnic articles are customarily used.

235. In addition, the duties on the police, CPS and the courts under section 6 of the Human Rights Act 1998 to act compatibly with Convention rights provides a safeguard against disproportionate interference.

Offence of climbing on a specified war memorial

236. Clause 90 (together with Schedule 11) creates a new offence of climbing on a specified war memorial. To the extent that the offence relates to the policing of assemblies and processions, it has the potential to interfere with individuals' ECHR rights under Article 10 (freedom of expression) and 11 (freedom of assembly).

Articles 10 and 11 - Freedoms of expression, assembly and association

237. The offence is sufficiently clear and foreseeable to be 'prescribed by law' as required by Articles 10(2) and 11(2). A pressing social need for this measure has been demonstrated by recent activity involving protestors climbing on war memorials, causing significant public concern about the regular and persistent presence of large numbers of protestors in close proximity to culturally and historically significant monuments. There is concern about the potential for damage as well as the fact that the activity implies a lack of respect for the importance of such monuments to the wider public.

238. The measure pursues the legitimate aims of preventing crime and disorder and of public safety. Any interference with rights under Articles 10 and 11 is justified and proportionate, taking into account that a person's right to freedom of expression (under Article 10) and freedom of assembly (under Article 11) will not be significantly restricted by a prohibition on climbing on specified war memorials. It will remain possible for a person to exercise their right to protest on or near war memorial sites, provided they do not seek to climb them.

239. Furthermore, when considering proportionality in this context, the ECtHR has been shown to place significant weight on the possibility of harm or insult being caused to public monuments, such as in the case Handzhiyski v. Bulgaria[48] and the case of Sinkova v. Ukraine[49]. The war memorials specified in the offence are

[48] (10783/14)
[49] (39496/11)

all grade 1 listed buildings on the National Heritage List for England, which are therefore already deemed to have legal protection given their historical importance to the country.

PART 10: POWERS OF POLICE ETC

Suspension of Internet Protocol addresses and domain names

240. Clause 92 and Schedule 12 deal with the power for investigative agencies to apply to the court for an order that a third-party entity involved in the provision of domain names or IP addresses should suspend a domain name or IP address so that information is no longer accessible.

241. The power is aimed at preventing access to servers and devices that are being used to facilitate crime, for example a server that is being used as a command-and-control node to distribute malware. The content at the IP address or domain would not necessarily be unlawful, it is that the infrastructure associated with the domain or IP address are being used to facilitate criminal activity; the Online Safety Act 2023, by contrast, is focused on regulation of content on platforms.

Article 8 - Right to respect for private and family life, home and correspondence

242. If a domain name or IP address is suspended, the user of that domain name (e.g. website) or device linked to the IP address will no longer be able to access communications intended for it, therefore impacting on a person's correspondence and their ability to communicate through any device linked to that IP address or the domain name.

243. The Government is satisfied that any interference with someone's Article 8 rights by this measure would be justified as necessary and proportionate for the purpose of the prevention and detection of crime. This method of suspending domain names or IP addresses would disrupt criminal activity by preventing malicious communications from reaching intended victims, infecting devices with malicious software or controlling devices already infected.

244. To grant an application for a suspension order, the court must, among other matters, consider the suspension is necessary and proportionate to prevent the IP address or domain name being used in serious crime. Proportionality considerations would include innocent users who might be affected by the suspension or other services using the domain or IP address. The person on whom the order is served or any other person affected by it can apply to the court for variation or discharge of the order.

Article 10 - Freedom of expression

245. A suspension order could have the effect of preventing a person from communicating information and ideas externally on the internet. Non-disclosure requirements associated with suspension applications and orders will prevent the

entity involved in the provision of IP addresses or domain names from disclosing the making of the application or order and the contents to any other person without permission of a judge or the officer that made the application.

246. The Government is satisfied that any interference with Article 10 would be justified as necessary and proportionate for the prevention of disorder or crime. There must be reasonable grounds to believe that the IP address or domain name is being used for the purposes of serious crime and that it is necessary and proportionate to prevent access to prevent it being used for serious crime. Non-disclosure requirements could be applied for when considered necessary to prevent the persons using the IP address or domain name for purposes of serious crime becoming aware of the application or order before the suspension has taken effect.

Article 1, Protocol 1 – Right to peaceful enjoyment of property

247. If a domain name or IP address is suspended, the user of that domain name (e.g. website) or device linked to the IP address will no longer be able to access communications intended for it. A person will have paid for the exclusive right to use a domain name and a domain name is considered to be intangible personal property. Suspension of the use of the domain will therefore interfere with this right. Similarly, a person provided with an IP address will have paid for the provision of internet access and the IP address will enable such activity. Suspension of the IP address linked to a device will mean that such access is restricted.

248. There is a limited pool of IPv4 addresses and therefore any suspension will have an impact on the number of addresses that an IP address provider has available to allocate. The provider may have to purchase replacement IP addresses to compensate for the suspension.

249. The Government is satisfied any interference with peaceful enjoyment of property is necessary and justified for the public interest in protecting victims of crime by disrupting connectivity with, and infection of, devices belonging to third parties. Failure to suspend an IP address for an adequate amount of time could impact future users of the IP address or if re-assigned to the same customer could result in its re-use in crime. Interference on the IP address provider will be limited to what is necessary to disrupt the criminal activity and the law enforcement or investigative agency will need to justify the suspension period. The IP address will remain with the provider which will be able to re-allocate it once the suspension period ends.

Electronically tracked stolen goods: search without warrant

250. Clause 93 provides the police with the power to enter premises and to search for stolen goods (as defined by sections 24 and 24(A)(8) of the Theft Act 1968) electronically geolocated to the premises. The measure also confers a power to seize stolen goods and evidence of theft offences, exercisable by police following

lawful entry. The power will be exercisable in relation to domestic / private and business premises. Clause 94 makes analogous provision for the service police.

Article 8 – Right to respect for private and family life, home and correspondence

251. The powers conferred by clauses 93 and 94 will interfere with the right to respect for the 'home' (which has been established by the ECtHR to include business premises[50]) and in some circumstances private life and/ or correspondence (e.g. where communications-related items are seized). In some circumstances exercise of the power will interfere with the rights of third parties in addition to those of criminal suspects.

252. The provision is clear and ensures that the circumstances and conditions required for the power's exercise are foreseeable. The power is intended to assist in detecting and preventing (by deterrence) crime and protecting the rights of victims of theft, by enabling police to act expediently within the 'golden hour' while stolen property can still be located before being further disposed of. This is required to assist both in bringing perpetrators to justice and restoring property to its rightful owner.

253. Entry and search powers with no requirement for pre-exercise judicial scrutiny[51] and those which may impact on the Article 8 rights of innocent third parties[52] such as purchasers in good faith of stolen goods, have been subjected to intense scrutiny by the ECtHR. In view of this, to aid in ensuring proportionality and exercise of the power in accordance with the law, the provision will contain a number of statutory safeguards against arbitrariness or abuse including:

a) A requirement for reasonable belief on the part of the police, regarding both the nature of the property (stolen) and its location. In addition, the authorising officer must be satisfied that there is evidence of electronic geolocation data showing that the relevant item is, or has since it was stolen been, on the relevant premises. In any event, the police must have a reasonable belief that the stolen goods are still on the premises.

b) A requirement limiting the exercise of the entry and search powers to circumstances where the police reasonably believe that the time inherently involved in obtaining a warrant would seriously prejudice the purpose of the entry and search.

c) The exercise of the entry and search power is to be authorised at police Inspector level at minimum.

d) The police constable exercising the power must be in uniform and identify themselves and the reasons for exercising the power to the occupier.

[50] E.g. Buck v Germany (41604/98).
[51] E.g. Vinks & Ribicka v Latvia (282926/10)
[52] E.g. Ratushna v Ukraine (17318/06)

e) The entry/search power must be exercised within 24 hours of authorisation, and at a reasonable hour unless this would seriously prejudice the entry/search's purpose.

f) A carve out for legally privileged material and excluded and special procedure material (the latter two categories include journalistic material and business records held in confidence) as defined in the Police and Criminal Evidence Act (PACE) 1984. These will be subject to the seizure and sift powers in Part 2 of the Criminal Justice and Police Act 2001, which include provision for the return of such material when discovered during sift.

g) Limited scope of the search (the extent reasonably required to locate the specific stolen property reported to police).

h) Any force used by police in exercise of the power will be limited to what is necessary and reasonable in the circumstances.

i) Police will be subject to a duty to produce a written record of the authorisation, including the grounds, for entry and search; and of seized items and seizure grounds. This must be done as soon as reasonably practicable following authorisation and seizure.

j) The seizure power will be narrower than that in PACE 1984 section 19(2)-(4) (which will be excluded in relation to police exercising this entry and search power), focusing on stolen goods/ theft offences only. It will be subject to the constable's reasonable belief as to both the nature and location of the item/s (stolen goods or theft offence evidence) and to the necessity of seizure to prevent circumstances which would prejudice the search purpose, such as loss or destruction.

k) There is existing provision for the rightful owner of property to apply to have the property delivered or restored to them, which will apply to items seized as a result of exercise of these powers.

254. The Government is satisfied that whilst the power is intrusive and no prior judicial oversight is required, the array of legislative safeguards will be sufficient to protect against abuse and arbitrariness and protect legally privileged and other sensitive material from intrusion. The power will be exercised in preference to an application for a judicial warrant only when reasonably deemed necessary in all the circumstances. The police, as a public authority, must exercise their functions in an ECHR compatible way (section 6 of the HRA 1998). An individual may, after the event, challenge the exercise of the power by the police via the police complaints process and/or by way of judicial review; this will provide a degree of judicial oversight and scrutiny of the practical operationalisation of the power.

Article 10 - Freedom of expression

255. Article 10 rights may be engaged where journalistic material is seized, particularly that subject to source confidentiality.[53] This is likely to be only in very

[53] E.g. Vinks & Ribicka v. Latvia (28926/10)

specific circumstances, such as if a journalist is subject to an allegation that they have stolen an electronic device, causing the police to enter their premises and seize the item. However, the search and seizure powers are not exercisable in relation to items comprising or including excluded or special procedure material (within the meaning in sections 11 and 14 of PACE 1984).

256. The provisions will be accessible, precise and foreseeable as to the scope of the seizure power and the procedure to apply for delivery / recovery of the property.

257. The provisions contain the above mentioned carve out/ safeguard for excluded and special procedure material. Excluded material includes material acquired or created for journalistic purposes which is held in confidence, and special procedure material incorporates other journalistic material. Where material is seized because it is not reasonably practicable for police to determine on the premises whether an item comprises or includes this type of material, or to separate material out, police initial examination will be restricted to what is necessary to determine whether material falls within these excluded categories, and any such material must be separated and returned (as Part 2, Criminal Justice and Police Act 2001 applies).

258. The Government is satisfied that this will ensure that Article 10 rights are interfered with in very limited circumstances and that any interference will be minimal, justified and proportionate.

Article 1, Protocol 1 - Right to peaceful enjoyment of property

259. Where property is seized in exercise of the power, it is likely to constitute state control of property and / or deprivation within the scope of A1P1 and thus interfere with this right.

260. The provisions will be accessible, precise and foreseeable as to the scope of the seizure power and the procedure to apply for delivery of the property.

261. The power is intended to protect the public interest inherent in protecting the A1P1 rights of theft victims (to their own property) and detecting and preventing crime. Proportionality will be ensured by provision of legislative safeguards, including the reasonable belief threshold in relation to the nature of the property or evidence and the necessity to seize it to prevent disappearance or damage, and in particular the requirement that there is specific evidence as to location, and a mechanism for the rightful owner of property to apply to have it released or restored to them.

Article 14 – Protection from discrimination

262. There may be the potential for Article 14 to be engaged (parasitic on the rights above) on the basis that ethnic minorities are disproportionately represented in the criminal justice system and so may be disproportionately the subjects of this new power. However, the inclusion of a requirement for reasonable belief as to the nature and location of the items which are the focus of the power, and for the

relevant property to have been electronically tracked to the premises, means that intelligence will be location-led, rather than suspect-led. In addition, the police will need to comply with their duties under section 6 of the HRA, and under the Equality Act 2010, when exercising this power. Guidance on the operation of the power is intended to be given in the PACE Codes of Practice, which may assist in mitigating against any disproportionate impacts on the basis of protected characteristics on operationalisation.

Access to driver licence records

263. Clause 95 makes changes to the existing regime of police and law enforcement access to the Driver and Vehicles Licensing Agency ('DVLA') driver register by replacing section 71 of the Criminal Justice and Court Services Act 2000 ('the 2000 Act'). This expands access for authorised persons in police and law enforcement bodies to DVLA databases.

264. Article 8 is engaged as the protection of personal data is of fundamental importance to a person's enjoyment of the right to respect for private and family life. The interference will only arise at the point of access to specific data sets contained within the DVLA database (i.e. mere right of access doesn't in itself infringe individual's rights, as no personal data is yet being processed). The provision will only allow access to the data for policing and law enforcement purposes and for the purposes of, or in connection with, the review function of Independent Commission for Reconciliation. A number of safeguards will apply to the access:

a) the Secretary of State must specify the circumstances in which information may be made available in regulations;

b) the clause explicitly sets out that the provisions do not authorise a disclosure unless it complies with data protection legislation;

c) the Secretary of State may:

i. set minimum standards, by regulations, for the handling and use of DVLA information by authorised persons;
ii. issue a Code of Practice relating to the access and use of the relevant information. All persons accessing data under the provisions must have regard to any such code of practice;
iii. prohibit a body from using the data for a specific purpose, or at all, in the event that there are concerns about that body's appropriate use of the data, such as following a poor inspection and a subsequent failure to improve.

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

Testing of persons in police detention for presence of specified controlled drugs

266. Clause 96 amends sections 63B and 63C of PACE 1984 to confer further powers on the police to drug test on arrest persons aged 18 or over (or after charge, for persons aged 14 or over) for specified Class B and C drugs in addition to specified Class A drugs. Amendments are also made to the Drugs Act 2005 ("DA 2005") by clause 97, to enable persons who test positive for any specified controlled drug to be required to attend an assessment (under Part 3 of that Act) as to their drug misuse.

267. Clause 98 amends PACE 1984 to enable the taking of up to two samples, where existing statutory conditions are met, and where the first sample is insufficient or unsuitable. The list of trigger offences for which a person who is arrested and/or charged may be automatically tested (Schedule 13) is amended, to include violent offences which have a link to drug misuse and remove existing offences where there is no longer a link to drug misuse.

Article 6 – Right to a fair trial

268. Article 6 is engaged as a person who fails to provide a sample for testing without good cause, or who fails to attend or stay for the duration of an initial or follow-up assessment following a positive drug test result, commits a criminal offence. The Government is satisfied these amendments do not alter the regime in which the criminal offences currently operate; rather they expand the circumstances in which a person may commit an offence (i.e. where a person refuses a test for specified Class B or C drugs or refuses a test where arrested and/or charged with a trigger offence). The relevant legislative safeguards will continue to apply, such as being reminded that refusal to provide a sample is a criminal offence; having a maximum of two samples taken during the period of detention (and a second sample only where the first was insufficient or unsuitable); and not being tested before having seen a custody officer. The result of a drug test is non-evidential in nature, and so will not directly impact a person's Article 6 rights regarding the underlying offence. In any bail and/or sentencing decisions, mechanisms will persist for an individual to dispute the result of a drug test and/or make representations as to its relevance. General protections available in respect of any criminal prosecution for offences will continue to apply. Moreover, the power to take an additional sample does not allow for a person to commit the offence of failure to provide a sample twice over as in order to take a second sample, a first sample must have already been taken.

Article 8 – Right to private and family life, home and correspondence

269. Article 8 is engaged as the expansion of drug testing for specified Class B and C drugs in addition to Class A drugs, the power to take a second sample where the first is insufficient or unsuitable, and expansion of trigger offences, may lead to drug testing which may interfere with a person's Article 8 rights. Private life covers the physical integrity of a person (*X and Y v Netherlands*[54]). *Peters v Netherlands*[55]

[54] App. No. 8978/80.
[55] App. No. 21132/93.

and *X v Austria*[56] show that the compulsory taking of a sample, even if of minor importance/interference, constitutes an interference with a person's body and physical integrity under Article 8. There is a positive obligation on states to secure their citizens the right to effective respect for their physical integrity (*Milićević v Montenegro*[57]). Whilst the testing in these amendments is not compulsory, a refusal to provide a sample without good cause is a criminal offence. Following a positive result, an individual may be required to attend an initial or follow-up drug misuse assessment (under the Drugs Act 2005); failure to attend, or to stay for the duration of, an assessment is a criminal offence. This may interfere with a person's Article 8 rights to private life, such as family and work life which may be affected by attending such assessments.

270. The Government is satisfied that any interference with a person's Article 8 rights will be in accordance with the law as it will be prescribed in primary legislation, with clear and detailed safeguards. It is necessary and proportionate for the prevention of disorder and crime because it aims to address a person's specified drug use which is suspected to contribute to their offence (or where there is a link between their offence and drug misuse) and reduce further reoffending. Class B and C drugs are harmful; cannabis (a Class B drug) continues to be the most commonly used drug in England and Wales. There is strong evidence of a clear established link between violent offences (for example, criminal damage, assault, harassment and football-related offending) and drug misuse, and so the Government is satisfied that, for these offences, inspector's authority is not necessary to ensure proportionality. By expanding the drug testing on arrest regime, a wider cohort of individuals will be eligible for testing and subsequent diversion into treatment, thus reducing reoffending.

271. In addition, the power to take a second sample is necessary to allow for expanded testing of specified Class B and C drugs, including on different testing machines/kits. It is also tightly constrained to be proportionate: it may only be taken where the first was insufficient or unsuitable, and where the other relevant statutory conditions are met. Permitting multiple samples is not unprecedented: see, for example, sections 63(3ZA)(b) and (3A)(b)(i) of PACE 1984, in relation to non-intimate samples, and section 6C(3) of the Road Traffic Act 1998, in relation to the offence of drug driving. Further, the police will maintain discretion when exercising this power and will need to comply with their duties under section 6 of the Human Rights Act 1998, and under the Equality Act 2010, when doing so. Guidance will be provided, through the PACE Codes of Practice, as to the circumstances in which it will be appropriate to test for specified Class B and C drugs, take two samples, and rely on trigger offences.

Article 14 – Protection from discrimination

272. There may be the potential for Article 14 to be engaged (parasitic on the Article 6 and 8 rights) on the basis that use of Class B and C drugs amongst younger

[56] App. No. 8278/78.
[57] App. No. 27821/16

people is higher, and so younger people may disproportionately have their right to private life interfered with. The Government is satisfied that any such interference may be objectively justified, as drug testing in police detention of persons aged 14 or over may only take place where a person has been arrested and charged for a criminal offence, and the purpose of drug testing is to divert users into drug treatment services and so away from further criminality. Additional safeguards are provided in existing legislation to protect persons aged 14 to 17. The police will maintain discretion when exercising this power and will need to comply with their duties under section 6 of the Human Rights Act 1998, and under the Equality Act 2010, when doing so.

Cautions given to persons having limited leave to enter or remain in UK

273. Clause 101 amends section 22(3G) of the Criminal Justice Act 2003 by expanding the definition of "relevant foreign offender" to include "*an offender (other than an Irish citizen) who has limited leave to enter or remain in the United Kingdom (within the meaning of the Immigration Act 1971)*" when the police/prosecution consider imposing a conditional caution. A conditional caution is defined in section 22(2) CJA 2003 as "*a caution which is given in respect of an offence committed by the offender and which has conditions attached to it with which the offender must comply*."

274. The amendment permits a condition to be attached to the conditional caution which has one or more of the objects mentioned in section 22(3E) CJA 2003. These objects are, "*(a) bringing about the departure of the relevant foreign offender from the United Kingdom; (b) ensuring that the relevant foreign offender does not return to the United Kingdom for a period of time*". In practice, foreign offender conditions require that the person departs from the UK as soon as reasonably practical and no later than the date specified in the caution, complies with any lawful instruction to effect removal from the UK and does not return to the UK for five years as set out in the Immigration Rules and thereafter only in accordance with the Immigration Rules.

Articles 2 and 3 – Right to life and freedom from torture and inhuman or degrading treatment

275. There is a risk that offering a foreign national a conditional caution might breach Articles 2 or 3 where the person would face treatment contrary to those articles upon leaving the UK.

276. Section 22 of the CJA 2003 provides a power to attach foreign offender conditions to conditional cautions but not an obligation to do so. The authorised person has discretion to not attach foreign offender conditions where doing so would be incompatible with the UK's obligations under ECHR. This can be set out in consultation with the Home Office or set out in the Ministry of Justice's Code of Practice for Adult Conditional Cautions and Director of Public Prosecutions Guidance. The authorised person may impose other conditions or offer a simple caution with no conditions attached. Accordingly, it is capable of being applied in a

way that is compatible with Convention rights (see *Christian Institute v Lord Advocate*[58]). It is not therefore considered necessary to create restrictions in primary legislation on the availability of foreign offender conditions in light of the expanded definition of "relevant foreign offender".

Article 8 – Right to respect for private and family life, home and correspondence

277. Clause 101 may also engage Article 8 because offenders within scope of the new definition of "relevant foreign offender" may include those who have been granted leave on the basis of rights under Article 8 and/or have established a life or family in the UK so that Article 8 is engaged.

278. It is not considered that a decision to attach a foreign offender condition to a conditional caution will be incompatible with Article 8, even where the offender has leave granted on the basis of an Article 8 right to remain in the UK, because the offender has the right to decline the caution and instead face prosecution for the offence. Accepting the conditional caution and agreeing to leave the UK and not return within a period of time is voluntary.

Article 14 – Protection from discrimination

279. There may be the potential for Article 14 to be engaged (parasitic on the above Article 8 rights) on the basis that the new provision can only be applied to 'foreign national offenders' and therefore discriminates on grounds of nationality, national origin or immigration status. Foreign offender conditions may only be offered to offenders who are not British citizens or Irish citizens, so there is a difference in treatment based on nationality.

280. However, for an issue to engage Article 14 in the first place, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. The conditional caution measures are in part designed to reinforce the maintenance of immigration control, and it is integral to the concept of immigration control that those subject to immigration control are to be treated differently from those who are not. Thus, the Government is satisfied there is no analogous comparator for a person subject to a foreign offender condition attached to a conditional caution.

281. Moreover, arguably no discrimination can be said to occur because the relevant foreign offender offered the conditional caution has the option of declining the caution and being charged for the offence. If there is any interference with Article 14 it is considered proportionate and objectively justified, given the offender will only have 'limited' leave to remain in the UK and so might be expected to depart the UK when their leave expires in any event. And as above, the provision serves the wider aim of protecting the public by ensuring the offender departs the UK. The

[58] [2017] SC (UKSC) 29

Government is therefore satisfied that the proposed amendment is compatible with Article 14.

PART 11: PROCEEDS OF CRIME AND OTHER PROPERTY

Confiscation of assets

282. Clause 102 and Schedule 14 deal with the confiscation of the proceeds of crime and associated amendments to Part 2 of the POCA 2002 ("POCA") (in relation to England and Wales). Schedule 15 makes analogous provision in respect of Northern Ireland. These measures implement several recommendations in the Law Commission's report *Confiscation of the Proceeds of Crime After Conviction: A Final Report*[59], and are designed to ensure that the confiscation regime can more effectively deprive criminals of the benefit of criminal conduct, whilst also ensuring that the regime is more flexible, realistic and proportionate.

Article 1, Protocol 1 – Right to Peaceful enjoyment of property

283. These provisions have bearing on the existing confiscation regime in POCA 2002 which, taken as a whole, engages the A1P1 right of the offender and potentially of third parties. In particular, the direct interference lies in section 6 of POCA (making a confiscation order) and in section 41 of the same (restraint orders). Nonetheless, there are numerous provisions that determine the conditions for exercise of those powers, and their value and scope. The Bill contains provisions that amend elements throughout the existing legislation. Of particular relevance for these purposes are Schedule 14, paras 1, 3, 6, 20 and 30 to 32.

284. The purpose of the confiscation regime in POCA 2002 is, fundamentally, to deprive offenders of the benefit of crime. Despite the *in personam* nature of confiscation orders, they inescapably constitute an interference in the qualified right to peaceful enjoyment of possessions. This is because those orders require offenders to divest themselves of interests in property (including money) so that they may pay to the State a sum equivalent in value to their benefit from crime.

285. However, such an interference falls within the scope of the second paragraph of A1P1, which allows States to control the use of property to secure the payment of penalties[60].

286. To be compatible with A1P1, the interference must pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. Generally, when it comes to interferences with property rights, the ECtHR has ruled that States have a wide discretion in choosing the appropriate instruments to fight crimes, including through the use of confiscation measures[61].

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[59] Confiscation of the proceeds of crime after conviction: a final report (hyperlink).
[60] Phillips v UK App No 41087/97, paras 50-51.
[61] Among many: AGOSI v UK App No 9118/80, para 52; Gogitidze and others v Georgia App No 36862/05, para 108.

287. In 2012, the Supreme Court in *R v Waya* held that it was possible to read section 6 of POCA 2002 (which governs the making of a confiscation order) as being subject to a qualification that it applied "except in so far as such an order would be disproportionate and thus a breach of article 1, Protocol 1". The Supreme Court found it was necessary to read such a qualification into section 6 in order to ensure that the statute remained ECHR-compliant[62].

288. In *Paulet v UK*, the ECtHR also confirmed that courts must determine whether a confiscation order would constitute a proportionate interference with the defendant's right to property[63].

289. Pursuant to a recommendation by the Parliamentary Joint Committee on Human Rights[64], POCA 2002 was amended by the SCA 2015 (paragraph 19 of Schedule 4), to include express reference to proportionality. Rather than requiring the court to make an order that the defendant pay the whole of his or her "recoverable amount" in all circumstances, the court must make an order that the defendant repay the recoverable amount "only if, or to the extent that, it would not be disproportionate to require the defendant" to do so (see section 6(5) of POCA 2002).

290. It being accepted that the legislation should be read to prevent a confiscation order being disproportionate, in *R v Waya* the Supreme Court said that "the difficult question is when a confiscation order sought may be disproportionate"[65]. There are, then, some specific issues that need to be addressed with respect to the assessment of proportionality.

(1) Objective of Confiscation

291. The logical issue that must precede the determination of whether a confiscation order is proportionate is the identification of the aims or objectives to which that order must be proportionate.

292. In 2020, the Court of Appeal observed in *R v Andrewes* that "the 2002 Act proffers no criteria by reference to which an assessment of disproportionality for the purposes of making a confiscation order, is to be made"[66].

293. On the basis that a proportionality assessment necessitates statutory objectives against which the measures can be assessed, the aim of POCA 2002 is "to deprive criminals of the proceeds of their criminality".[67] That enables courts to assess the proportionality of the confiscation order by reference to the legitimate

[62] R v Waya [2012] UKSC 51, [2013] 1 AC 294 at [16].
[63]Paulet v UK App No 6219/08, paras 65 to 69.
[64] House of Lords and House of Commons Joint Committee on Human Rights Second Report of Session 2014-15, HL Paper 49 HC 746 paragraph 1.23.
[65] R v Waya [2012] UKSC 51, [2013] 1 AC 294 at [20] (emphasis added).
[66] R v Andrewes [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [78].
[67] R v Andrewes at [81] (emphasis added).

aim – as identified by the Supreme Court in *Andrewes* – "of stripping the criminal of the fruits of crime" [68].

294. Para 1 (the principal objective) thus amends POCA 2002 so as to include a "principal objective" with respect to the exercise of powers under Part 2 of the Act. That principal objective is the deprivation of the defendant's benefit of criminal conduct, so far as within the defendant's means.

(2) Third-party rights

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

296. In *Andonoski v the former Yugoslav Republic of Macedonia*[69] and in *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*[70], the ECtHR held that the confiscation of the third-parties' vehicles was disproportionate, because the applicants had not been aware that the vehicles had been used for the commission of criminal offences. In addition, the fact that the confiscation was mandatory prevented the applicants from challenging the confiscation measure. Finally, there was no realistic possibility for the applicants to obtain compensation. The ECtHR concluded that a fair balance had not been struck between the demands of the public interest and the applicants' right to peaceful enjoyment of the possession of their vehicles[71].

297. By contrast, in *Yaşar v Romania*[72], the ECtHR observed that the applicant had been provided with sufficient opportunities to challenge the confiscation measure against his vessel, since he had been allowed to submit evidence and to be represented by a lawyer of his own choice during adversarial proceedings. The interference with the applicant's right in those circumstances was not disproportionate.[73]

298. The ECtHR has adopted the same approach in cases where confiscation measures have been imposed against properties held by family members of the defendant. For example, in *Silickienė v Lithuania*,[74] the ECtHR found that the confiscation of an apartment and of some shares in the possession of a widow of a corrupt public official (acquired with the proceeds of unlawful activities) was proportionate, since the applicant, although not convicted, was suspected of being involved in the criminal activities run by her late husband and in any event was

[68] R v Andrewes [2022] UKSC 24 at [38].
[69] App No 16225/08.
[70] App No 42079/12.
[71] Andonoski v the former Yugoslav Republic of Macedonia, paras 34-41; B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia, paras 43-53.
[72] App No 64863/13.
[73] Yaşar v Romania, paras 60-66.
[74] App No 20496/02, paras 60-70.

provided with sufficient opportunities to challenge the confiscation measures before the national courts. Similarly, in *Balsamo v San Marino*,[75] the ECtHR ruled that the confiscation of assets possessed by the defendants' daughters was proportionate, because the daughters were able to challenge the confiscation measures before the national courts and failed to rebut the presumption that they had unduly benefited from unlawfully acquired properties.

299. It is evident from these cases that a fundamental feature of proportionality is "procedural": the ECtHR is usually satisfied that a confiscation measure is proportionate if the third party is afforded meaningful opportunities to challenge the confiscation of their property before national courts.

300. Section 10A of POCA 2002 gives the court the power to make a determination as to the defendant's (and any relevant third party's) interest in property for the purposes of determining the defendant's benefit figure and available amount. This determination is appealable by any third party to the Court of Appeal pursuant to section 31(5)(b).

301. It follows therefore, that the proportionality of confiscation orders as they apply to third parties is subject to appropriate scrutiny by way of the appeal and review mechanisms as they exist and as contained in the Bill. The Government is therefore satisfied that proportionality of the interferences with third-party interests is compatible with the ECHR.

(3) Calculation of benefit and recoverable amount

302. It is axiomatic that proportionality demands that the calculation of benefit and of the recoverable amount accurately reflect the defendant's benefit from crime and their ability to repay that benefit.

303. Para 6 (recoverable amount) provides that the recoverable amount must be determined taking into account property seized or otherwise disgorged to the State. This ensures that a confiscation order is not made in respect of property for which the State has already accounted.

304. Para 15 allows for subsequent downward reconsideration of the confiscation order where the value of an asset identified in the original confiscation order realises a lower amount than its original valuation. This reconsideration would reduce their overall assessed benefit, so as to prevent a defendant from being exposed to continuing liability in respect of an artificially high benefit figure.

(4) Restraint

305. A restraint order is intended to prevent realisable property being dissipated or put beyond the reach of the court before a confiscation order is made or enforced.

[75] App No 20319/17 and 21414/17, paras 89-95.

It works by prohibiting any person from dealing with any realisable property specified in the order.[76]

306. Alongside the statutory test for the granting of restraint pre-charge or after proceedings have been commenced, the courts have introduced an additional test that must be satisfied before a restraint order can be granted, known as the risk of dissipation test.[77] The prosecution must "establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order".[78] The objective of this test is to determine whether any interference with A1P1 rights is proportionate given the need to preserve assets for confiscation.

307. The primary concern with the test for restraint has been with the risk of dissipation test. The test makes it difficult to obtain restraint orders because there are many cases in which a risk of dissipation cannot be easily established. This is particularly so in cases where an application for restraint is not made at the outset of an investigation.

308. Para 24 (conditions for making of restraint order: risk of dissipation) places the "risk of dissipation" test on a statutory footing. This paragraph also provides a list of factors to which the court may have regard when determining the risk of dissipation.

309. The Government is satisfied this to be of benefit for a number of reasons. First, it would provide prosecutors and the courts with clear guidance that multiple factors may be relevant, rather than the determination of the issue resting on whether there has been any dissipation to date. In turn this should avoid those situations where investigators and prosecutors have had to let some assets be dissipated to establish the risk.

310. Second, because prosecutors and the courts would have a clear list of indicative factors to be taken into account, the reasonableness of the arguments on the risk of dissipation may be more readily established. This not only speaks directly to the question of proportionality but will also lead to a reduced risk of an adverse costs order. This should give greater confidence to prosecuting authorities and encourage greater and responsible use of restraint powers.

311. Third, the court would be assisted in performing its function of examining each application and this would align the approach adopted with consideration of deprivation of liberty, another fundamental right.

312. Fourth, by articulating factors to which the court and prosecutors should have regard, we considered that a better steer might be provided to parties in considering whether a prosecutor has complied with their duty of candour.

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[76] Proceeds of Crime Act 2002, s 41.
[77] R v B [2008] EWCA Crim 1374 at [9].
[78] R v B at [9], [13], citing Jennings v CPS [2005] EWCA Civ 746, [2006] 1 WLR 182.

313. Ultimately, the measures in the Bill mean that it will be clearer on the face of the statute when it will be necessary and proportionate to interfere with a defendant's A1P1 rights through restraint.

Article 6 – Right to Fair Trial

(1) Criminal lifestyle assumptions

314. Section 10 of POCA provides that a number of assumptions are to be made by the court in determining the benefit from criminal conduct. This engages Article 6(1) (right to fair trial), which applies throughout criminal proceedings including confiscation proceedings.79

315. It is worth noting that these assumptions do not engage Article 6(2). The Privy Council in *McIntosh v Lord Advocate and another* considered that the words of Article 6(2) did not apply to an inquiry relating to an application for a confiscation order, because at that stage the defendant will already have been convicted and the confiscation process "involves no accusation of any other offence."80

316. This approach was endorsed by the ECtHR in *Phillips v. UK*,81 in which the Court held that Article 6(2) is not applicable to a post-conviction inquiry into whether or not the defendant had benefited from drug trafficking offences.

317. Section 10 of POCA 2002 provides that, if the court has determined that the defendant has a criminal lifestyle, it must make four assumptions in calculating the value of benefit (ie the offender's benefit from crime). The criminal lifestyle assumptions are one of the most far-reaching and demanding elements of the POCA 2002 post-conviction confiscation regime. They require the defendant to account for the last six years of financial activity, to prove that it does not represent benefit from crime.

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

319. Section 10(6)(b) of POCA 2002 states that the court must not apply one of the assumptions if "there would be a serious risk of injustice if the assumption were made". Case law has construed this provision particularly narrowly, and it is now largely concerned with preventing double counting,[82] rather than more general considerations of justice. Further, defendants often struggle to provide sufficient documentary evidence to meet the reverse burden.

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[79] Phillips v UK App No 41087/97, para 39.
[80] McIntosh v. Lord Advocate [2003] 1 AC 1078 at [25] (Lord Bingham of Cornhill).
[81] Phillips v UK at paras 31-35.
[82] R v Harvey [2015] UKSC 73, [2017] AC 105; although the courts appear to have recognised the potential for wider application of the serious risk of injustice test (see R v Waya at [25]).

320. The clauses in the Bill do not remove the reverse burden. Nonetheless, the clauses do enhance the protection of an offender's Article 6(1) rights.

321. It is first worth noting that the assumptions under POCA have not been found to constitute an unlawful interference in a person's Article 6(1) rights. Such assumptions by way of reverse burden have long been held to be a "fair and proportionate response to the need to protect the public interest."[83]

322. Nonetheless, to mitigate potential interference in Article 6(1) rights, the Bill contains a number of clauses clarifying and refining the application of the criminal lifestyle assumptions.

323. Firstly, para 2 (prosecutor's discretion) provides that prosecutors should have discretion in requesting that the criminal lifestyle assumptions be applied. This will, in appropriate cases, avoid the need for extensive, costly and intrusive investigations at the beginning of the confiscation process where it is nonetheless clear that such assumptions ought not apply.

324. Secondly, para 3 (the serious risk of injustice test) further defines the "serious risk of injustice" test under section 10(6)(b) of POCA to ensure that it is not construed unduly narrowly (ie not limited to the issue of double counting). In particular, the clause requires the court to give appropriate weight to any evidence before it and, in particular, "any explanation given by the defendant for being unable to provide evidence that would have shown the assumption to be incorrect."

(2) Reconsideration of benefit on decrease in value and sale etc

325. New section 21A of POCA, as inserted by para 15, will make provision for the reduction of the "benefit" figure for a confiscation order. That figure is the value of the defendant's criminally-acquired property, as determined by the court. Where criminally-acquired property was taken into account in calculating the benefit figure, but was subsequently sold at a lower value than had previously been ascribed to it, an enforcing party will be able apply to the court to reduce the overall benefit figure to reflect the reduction in value.

326. Applications under new section 21A can only be brought by those enforcing the order (prosecution, receivers, or designated officers), and not by the defendant.

327. This restriction on who can make an application is to ensure that applications are only brought where an assessment has been made that the overall benefit has not increased, without placing significant demands upon the court to take evidence to ensure this is the case (in effect requiring the court to make a new benefit calculation from scratch).

[83] *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [8] (Lord Steyn).

328. Decisions by courts concerning property rights are subject to the right to a fair hearing and access to the court (Article 6(1)[84]). Further, Article 6(1) has been held to be applicable when the court is assessing the amount at which a confiscation order should be set (*Phillips v UK*[85]).

329. There is no explicit duty for an enforcing party to bring an application under section 21A any time it believes that the test for reducing the benefit figure is met. A number of parties can bring an application. Which one is best placed to bring the application will depend on all the circumstances. However, each enforcing party, as a public authority for the purposes of section 6(1) of the Human Rights Act 1998, must act in a way that is compatible with the defendant's Convention rights. This will include considering (and sharing between them, if necessary) any relevant new information that comes to light about the defendant's assets.

330. A section 21A application will be relevant where certain specific events occur after the confiscation order, such as a sale. It does not limit or replace the defendant's existing right to bring an appeal against the original order where the initially assessed benefit figure was inaccurate nor to bring an application under existing section 23 of POCA where their available amount has decreased.

Article 8 – Right to private and family life, home and correspondence

331. There is significant overlap between the scope of A1P1 and the scope of article 8 of the ECHR, since the concept of "home" under the latter provision might fall within the concept of "property" under the former. The ECtHR has consistently held that "home" for the purpose of article 8 is an autonomous concept that does not depend on the classification under domestic law: therefore, "whether or not a particular premises constitutes a 'home' which attracts the protection of Article 8 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place"[86].

332. The ECtHR has clarified that the existence of a "home" is not dependent upon the existence of property rights or interests. It follows that a person might have property rights over a building or land for the purpose of A1P1, without having sufficient ties with the property for it to be considered their "home" for the purpose of Article 8 of the ECHR[87]. Conversely, a person may have a home in which they hold no property rights. Where, however, a person has property rights in their home, both Articles may be engaged. For this reason, the ECtHR has sometimes found a violation of both Articles[88], whereas in other instances it has found a violation of one of the two Articles only[89].

[84] Raimondo v Italy App No 12954/87.
[85] Phillips v UK App No 41087/97.
[86] Among many: Winterstein and Others v France App No 27013/07, para 141; Prokopovich v Russia App No 58255/00, para 36.
[87] Khamidov v Russia App No 72118/01, para 128; Surugiu v Romania App No 48995/99, para 63.
[88] Sargsyan v Azerbaijan App No 40167/06 (Grand Chamber decision) paras 259-261.
[89] Ivanova and Cherkezov v Bulgaria App No 46577/15, paras 62 and 76.

333. The approach followed by the ECtHR to evaluate the lawfulness of the interference with article 8 is substantially similar to the approach followed when A1P1 is engaged. However, an important difference between interferences with A1P1 and interferences with Article 8 of the ECHR concerns the level of discretion afforded to States. In fact, the ECtHR has clarified that the level of discretion regarding Article 8 is narrower than that enjoyed by States when A1P1 is engaged, due to "the central importance of Article 8 to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community"[90]. Therefore, it is possible that the ECtHR might find a violation of article 8 and yet no violation of A1P1[91].

334. In *Aboufadda v France*[92], the ECtHR found that the confiscation of the applicants' house was lawful, since such an interference pursued one of the legitimate aims mentioned in paragraph 2 of Article 8 (namely, the prevention of disorder and crime). In addition, the ECtHR held that the interference was not disproportionate, since national authorities had taken into account the personal circumstances of the applicants, allowing them to remain in the house until they had the possibility to find other accommodation (and in any event until the conclusion of the confiscation proceedings)[93].

335. As noted above with respect to A1P1, the clauses in the Bill are designed to ensure there is a clear relationship of proportionality between the aim of depriving the offender of the proceeds of their criminal conduct and the confiscation measures adopted. Where confiscation involves confiscation of the offender's home, this will involve close scrutiny by the court in order to avoid unlawful interference in their Article 8 rights. As such the Government is satisfied the provisions are compatible with Article 8.

Proceedings for civil recovery: costs and expenses

336. Clause 103 amends the Proceeds of Crime Act 2002 ("POCA") to provide that the court may not make an order for costs (or, in Scotland, expenses) against a law enforcement authority in civil recovery proceedings in the High Court (or Court of Session) unless the authority acted unreasonably in taking or furthering the proceedings; acted dishonestly or improperly in the course of proceedings; or it would be just and reasonable to make the order.

Article 6 – Right to fair trial

337. Proceedings under Part 5 of POCA (civil recovery) are not considered to involve the determination of a "criminal charge" within the autonomous meaning of that concept for the purposes of Article 6. However, civil recovery proceedings involve the determination of civil rights or obligations and therefore engage the civil limb of Article 6. The Government considers that restrictions on the ability to recover legal

[90] Gladysheva v Russia App No 7097/10, para 93.
[91] As happened in Ivanova and Cherkezov v Bulgaria App No 46577/15, paras 62 and 76.
[92] Aboufadda v France App No 28457/10.
[93] Aboufadda v France paras 38-43.

costs are capable of constituting an interference with the right of access to a court, which would accordingly need to be justified as pursuing a legitimate aim and proportionate to that aim.

338. The right of access to a court is a long-standing common law right, as well as being guaranteed by Article 6 per *Golder v United Kingdom*[94]. *Černius and Rinkevičius v Lithuania* (2020) concerned modest fines levied against the applicants for a failure to comply with local labour laws. In each case, the decision to issue the fines was successfully challenged in domestic proceedings. However, the legal costs incurred in doing so exceeded the level of the fine, thereby leaving the individuals financially worse off than if they had not challenged the fines. The domestic legal system made no provision for the recovery of costs even in the event that the impugned decisions had been unlawful. The applicants successfully alleged a violation of the right to access to court, under Article 6(1).

339. The Court in *Černius* acknowledged that public interest-related financial considerations could sometimes play a part in the State's policy to decrease State expenses. However, *"restricting an individual's right to recover the costs incurred in court when challenging the unlawful acts of public authorities, with the sole aim of reducing the possible financial burden on the State"* would be incompatible with the Convention.

340. In *Stankewicz v Poland*[95] the Court recognised that restrictions on the recovery of costs against, in that case, a public prosecutor who is unsuccessful in civil proceedings could be justified for the "protection of the legal order". The Court in *Černius* did not disregard the possibility that to limit reimbursement of litigation fees in administrative proceedings would be legitimate in the public interest provided: (a) the sole aim of such restriction was not reducing the possible financial burden on the State, and (b) the proceedings to which the restriction applied were not concerned with challenging the lawfulness of an administrative decision.

341. The Government acknowledges the importance of the general principle on costs in ensuring that the right of access to a court is practical and effective. However, in this particular context, it is also satisfied that there is both a need for limitations on the ability of those subject to civil recovery proceedings to recover their costs; and sufficient discretion for the court to prevent unfairness in individual cases.

342. The Government is satisfied that this measure is necessary to ensure that enforcement agencies acting in the public interest are able effectively to exercise their powers in support of the legitimate aim pursued by the civil recovery regime i.e. the prevention and detection of crime. And that, when taking reasonable steps to protect the public, enforcement authorities should not be exposed to excessive potential costs risk if they act with integrity and bring a reasoned case.

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[94] (1979-80) 1 EHRR 524
[95] (2007) 44 EHRR 47

Article 1, Protocol 1 – Right to peaceful enjoyment of possessions

343. It is also assessed that Article 1 of the First Protocol is engaged by the effect of a civil recovery order being to deprive a person permanently of their property. This makes the right of access to a court particularly important.

344. The Government is satisfied that the exception in the clause, which enables the Court to make the order for costs where it would be "just and reasonable", provides adequate safeguard against the risk that a person whose property is subject to attempted civil recovery is unable to secure, or to fund, legal representation; that a successful defendant may be left in the same financial position or worse off than if they had not defended the civil recovery action at all; and/or that issues regarding equality of arms may arise due to the fact that where the civil recovery application is successful the persons whose assets were recovered can still be required to pay the costs of the relevant enforcement authority even where the person has not acted unreasonably improperly or dishonestly[96] .

345. The exception creates a flexible test, allowing room for judicial discretion. The courts, as public authorities for the purposes of the Human Rights Act 1998, would be required by section 6 to exercise that discretion compatibly with the Convention rights. The proposed approach is consistent with the approach taken in respect of forfeiture proceedings in the case of *R. (Perinpanathan) v City of Westminster Magistrates' Court*[97]. Accordingly, the Government is satisfied that the restrictions proposed strike a fair balance between the rights of affected individuals to access justice and the public interest in ensuring that civil recovery powers can be used effectively.

PART 12: MANAGEMENT OF OFFENDERS

Extension of polygraph conditions to certain offenders

346. Clause 104 makes provision for offenders convicted of murder who pose a risk of sexual offending, offenders sentenced concurrently for a sexual offence and another (non-sexual) offence, offenders convicted of non-terrorism offences which are considered to be linked to terrorism ("terrorism linked offenders"). The ECHR rights potentially engaged by this clause are Articles 5, 6, 7, 8 and 14.

Article 5 – Right to liberty and security

347. Offenders who have the polygraph testing condition included in their licence can be recalled to prison if they do not comply with testing procedures, if they make admissions during the examination that other conditions have been breached, or if there is evidence that their risk had increased. Therefore, Article 5 is potentially engaged. However, the Government is satisfied that there is no unlawful

[96] See Stankiewicz v Poland.
[97] [2010] EWCA Civ 40

interference with Article 5. When indeterminate sentenced prisoners, or prisoners serving the extended licence period of an extended determinate sentence, are recalled, Article 5(4) is engaged. However, the recall process is compliant with Article 5(4) because in these cases the prisoner has access to review by the Parole Board who will consider the evidence and determine whether the offender is safe to be released.

Article 6 – Right to fair trial

348. Information from polygraph tests can be shared with police by way of Multi Agency Public Protection Arrangements where there is a legislative gateway to do so under section 325 of the Criminal Justice Act 2003. Police can use the information shared from the test to conduct further investigations into whether criminal offences have taken place. As a result, Article 6 is potentially engaged. However, protections against any unlawful interference with Article 6 in relation to criminal charges are built into the Offender Management Act 2007 - section 30 of which contains express provision prohibiting the use in criminal proceedings of information obtained from a polygraph test. Article 6 could be engaged in relation to civil rights if information from the tests was used to apply for a civil order against the offender, for example a terrorism prevention and investigation measure. The Government is satisfied that this would not breach the offender's Article 6 rights as the evidence presented would need to meet the relevant test for the order, and the result of a failed polygraph test would not be the only evidence provided in such an application but would be supported by other evidence. There would also be further safeguards in the judicial process, as the court would be able to assess the evidence as presented and could refuse to grant the order or make the evidence inadmissible, if it would be unfair to the offender to admit it. In considering these issues the court would of course be bound to act in compliance with the Human Rights Act 1998. Consequently, if the court concluded, considering relevant public interest matters, that making any such order based on information from a polygraph test would breach the offender's Article 6 rights it would be obliged to refuse the application for the order.

Article 7 – No punishment without law

349. As the provision is to apply to all offenders serving a relevant custodial sentence and not just to offenders sentenced after the date on which the measure comes into force, Article 7 should be considered. As polygraph conditions are a licence condition, they are an execution or enforcement component of the sentence which has been handed down by the court, and are not an additional or new penalty being imposed retrospectively for the purposes of Article 7 of the ECHR. Article 7 is therefore not breached by these measures.

Article 8 – Right to respect for private and family life, home and correspondence

350. Mandatory polygraph testing engages Article 8, however the Government is satisfied that any interference with an offender's rights by imposition of this condition is justified in pursuit of a legitimate aim: namely, that it is necessary in a

democratic society in the interests of public safety, for the prevention of crime/disorder, and for the protection of the rights and freedoms of others. Polygraph testing has been proven to be effective in managing the risk posed by offenders convicted of sexual and terrorist offences, and therefore where these types of offending (or a risk of offending) are identified, its imposition on these offenders is considered a necessary and important tool to manage the risks they pose. Further, if the availability of a polygraph condition allows offenders to be released on licence who would otherwise be deemed unsafe and would remain in prison, then this is a less restrictive outcome for those prisoners. For example, the Parole Board recently expressed their concern around their inability to impose a polygraph condition on an offender despite the sexually motivated nature of the crimes committed. It is the Government's intention that the condition will only be imposed on offenders who are assessed as high/very high risk of causing serious harm in their static risk assessment, or on a discretionary basis on offenders who are not assessed as high/very high risk, but the polygraph condition is necessary and proportionate in order to manage them in the community. These cases will only arise in limited circumstances where offenders have not been assessed as high or very high risk of serious harm in their static risk assessment but there is evidence of dynamic risk factors that indicate an imminent risk of serious harm upon release. This will be regulated by way of a published policy.

351. Information from polygraph testing may be shared with partner agencies such as the police and other listed agencies, in accordance with section 14 of the Offender Management Act 2007 or other statutory information-sharing provisions. Owing to the sensitivity of polygraph testing information, such information sharing will be conducted in strict compliance with the legislative scheme, in compliance with the Data Protection Act 2018 to ensure it is proportionate, lawful and necessary, in accordance with information protection already in place for sex offender polygraph information. The Government is therefore satisfied that any interference with offenders' Article 8 rights will be compliant with the ECHR.

Article 14 – Protection from discrimination

352. Although Article 14 should be considered, since the measures fall within the ambit of other Convention rights, we do not consider that these measures breach the Article. The Government does not consider that the cohorts affected by these measures have a protected "status". Offenders will be subject to the polygraph condition either due to the gravity of their offending or to the nature of their sentencing, neither of which the Government is satisfied that relevant statuses. There are strong arguments for the objective justification of the proposed extension of polygraph testing. The imposition of the condition in each case pursues a legitimate aim, this being public safety, the prevention of crime/disorder, and the protection of the rights and freedoms of others. Polygraph testing has been proven to be an effective tool to help manage the risks posed by sexual and terrorist offenders, and it is just and proportionate for it to be used to assist in protecting the public from those who pose a high risk to public safety. As set out above, testing

will only be imposed on offenders where the polygraph condition is necessary and proportionate in order to manage them in the community.

Duty of offenders to notify details

353. Clause 105 places a new duty on offenders serving a sentence in the community, requiring them to inform their responsible officer if they change their name, use a different name (for example, an alias), or change their contact information. This will ensure that while an offender is serving a sentence in the community, the responsible officers have the information they need to manage that the offender, with the ability to take enforcement action where necessary.

354. Community sentences are punitive and rehabilitative sentences imposed by the court that are served by offenders in the community instead of in prison custody.

355. Under the Sentencing Code:

a) A referral order must be imposed on a youth offender under the age of 18 with no prior convictions who pleads guilty to an imprisonable offence. The court has the power when dealing with an offender for breach for non-compliance of a referral order to allow the order to continue, extend the length of the order for up to a maximum of 12 months, impose a fine up to a maximum of £2500, or revoke the order and resentence the offender.

b) A youth rehabilitation order is available to a court where the individual is under the age of 18, and a community order is available to a court where the individuals is the age of 18 or over, where a criminal offence is imprisonable. Individuals who breach the requirements of their community sentence and are brought back before a judge can, at the more lenient end, be subject to having their existing order made more onerous or extended, or have a fine imposed, and at the most grave can be re-sentenced in any way that they could originally have been had they only just been convicted of the offence, including being sentenced to imprisonment (if there has been wilful and persistent breach of the requirements) unless it would be unjust to do so. As community sentences may only be imposed for offences which carry a custodial penalty, custody will be an option on re-sentencing.

c) A suspended sentence order is available for individuals aged 21 or over where a court passes a prison sentence of at least 14 days but no more than 2 years. For individuals between the ages of 18 and 20, it is available where the term of sentence is not more than 2 years. A suspended sentence order provides that a sentence of imprisonment or detention in a Youth Offender Institution is not to take effect unless an “activation event” occurs and there is a court order that the sentence is to take effect. An “activation event” occurs if the individual commits another offence when the order is in force or contravenes any community requirement during the supervision period of the order.

356. Accordingly, these community sentences (except referral orders) are subject to enforcement, with committal to custody for non-compliance as a prospective sanction under Schedule 7, 10 and 16 of the Sentencing Code.

357. This measure will place a new duty on offenders serving a sentence in the community, and who are supervised by probation or a youth offending team, requiring them to inform the responsible officer if they change their name, use a different name (e.g. an alias) or change their contact information. The name change could be for any reason. The intention is for this measure to capture not just formal legal changes of names by deed poll but also any aliases. For example, the use of an online alias.

358. This measure also places a duty on offenders to inform the responsible officer of any additions or changes to contact details, including any phone number or email, and to provide the power to initiate breach proceedings. This is intended to reinforce the supervisory role of the responsible officer and relationship with the offender. Any breach of the duty mentioned above would be treated as a breach of a requirement, also set out above.

359. In August 2022, the Criminal Justice (Sentencing) (Licence Conditions) (Amendment) (No.2) Order 2022 (SI 2022/703) amended the Criminal Justice (Sentencing) (Licence Conditions) (Amendment) Order 2015 (SI 2015/337) requiring offenders sentenced to imprisonment serving part of that sentence on licence in the community to inform their probation officer if they change their name. This measure therefore creates consistency about the way offenders serving a sentence in the community, are managed.

360. The ECHR rights engaged by this clause are Articles 5, 7, and 8.

Article 5 – Right to liberty and security

361. The clause engages Article 5, because offenders who are serving Suspended Sentence Orders may have their original custodial sentence activated following a breach hearing if they do not comply with the duty to notify while being managed in the community. Also, offenders serving a community sentence who breach the duty in the order imposed by the court can be resentenced and receive a custodial sentence, and the court can also impose a custodial sentence for breach of a youth rehabilitation order. However, the detention for non-compliance measure falls within the authorised circumstances prescribed by Article 5(1) where deprivation of liberty is lawful, namely after conviction of a competent court, and it does not breach Article 5 because the detention will at all times be in accordance with Article 5(1)(a). For these reasons, this clause is considered to be compatible with Article 5.

Article 7 – No punishment without law

362. This measure will affect offenders who have committed an offence but have not yet been convicted when it comes into force. Further, offenders would be breached

for a failure to comply with the duty to notify while being managed in the community under the Sentencing Code. Article 7 should therefore be considered. However, there is no retrospective increase to a penalty as the measure is a management tool for the administration of the sentence going forward and it is incapable of altering the sentence imposed by the court before commencement (in compliance with the principles in *Del Rio Prada v Spain*, and (*Uttley v UK*, *Csoszanski v Sweden* and M v Germany). It is well-established that a change in the administration of a sentence does not form part of the 'penalty' within the meaning of Article 7 (*Hogben v United Kingdom*; and again confirmed in *Abedin v the United Kingdom,* and *R (Khan) v Secretary of State for Justice*. For these reasons, the Government is satisfied that this clause to be compatible with Article 7.

Article 8 – Right to respect for private and family life, home and correspondence

363. Article 8 is engaged by this measure because the duty to notify probation or youth offender team of name changes or contact details requires offenders to provide information about their private life. However, the Government is satisfied that any interference with Article 8 rights is necessary, justified and in accordance with the law. The measure pursues a legitimate aim: to protect members of the public, and for the prevention of crime and disorder. The requirement to inform the responsible officer is necessary to effectively manage the offender. Furthermore, the requirement for offenders serving referral orders or community sentences to inform the responsible officer if they use a different name or change their contact details is proportionate as the requirement is for enforcement of the sentence imposed by the court and is only applicable while the order imposed by the court is in force. For these reasons, this clause is considered to be compatible with Article 8.

PART 14: TERRORISM AND NATIONAL SECURITY

Youth Diversion Orders

364. Chapter 1 of Part 14 creates new Youth Diversion Orders ("YDOs") to disrupt under-21s involved in terrorism and divert them from the wider criminal justice system, including prosecution. The police will be able to apply to the youth or magistrates' court to impose a YDO on someone under 21 if, on the balance of probabilities, the court assesses there is evidence that the individual has committed a terrorism offence; or a non-terrorism offence with a terrorism connection; or has conducted him/herself in a way that is likely to facilitate the commission by him/herself or another person of a specified terrorism offence (whether or not the offence is committed); and the court considers the order is necessary for the purposes of protecting the public from a risk of terrorism or other serious harm ("terrorism" has the meaning given by section 1 of the Terrorism Act 2000, and "serious harm" is defined in clause 111 and includes, for example, harm from conduct that involves serious violence against a person).

365. The YDO would allow the court to impose various measures on the YDO subject, such as to control their use of electronic devices, who they can associate with and to mandate their attendance at appointments with mentors.

Articles 8, 9 and 10 – Rights to respect for private and family life, home and correspondence, freedom of thought, conscience and religion and freedom of expression.

366. The conditions imposed by a YDO may engage Articles 8, 9 or 10. In respect of these rights, the Government is satisfied any interference will be justified as being in pursuance of the legitimate aims of protecting national security. Crucially, any interference will only be applied where considered necessary by the court to achieve this aim and to protect the public. The court must tailor measures to the particular harms they seek to prevent on a case-by-case basis, ensuring proportionality. The legislation will contain examples of the most likely measures.

Article 5 – Right to liberty and security

367. These provisions engage Article 5 because breach of an order will be a criminal offence which can result in the arrest and detention of an individual. To the extent that this offence results in a person being deprived of their liberty, the Government is satisfied that the offences fall within the authorised circumstances prescribed by Article 5(1) where deprivation of liberty is lawful (Article 5(1)(a), (b) and (c). The procedural safeguards required by Article 5(2) to (4) will be assured through the ordinary procedures of the criminal justice system.

Article 6 – Right to a fair trial

368. In respect of Article 6, the YDO is not considered to involve the determination of a criminal charge and therefore the application of the civil standard or proof is considered appropriate with the imposition of positive requirements without the pre-requisite of a conviction. Applying the *Engel* criteria, the aim of the YDO is the prevention of crime and rehabilitation of young people and a YDO can only be made in circumstances where an order is necessary to address the risk to the public. See also *Jones v Birmingham CC and Secretary of State for the Home Department*[98] and *Secretary of State for the Home Department v MB*[99]. The Government is satisfied that these civil proceedings clearly satisfy any fair trial requirements arising under the civil limb of Article 6(1). The rules which govern the imposition of a YDO made by the court ensure participation of the person concerned in the court process and the existence of a prescribed right of appeal and ability to apply to the court to vary or discharge the order affords further safeguards. The Government is satisfied that adequate safeguards are provided to ensure procedural safeguards.

[98] [2023] UKSC 27
[99] [2008] 1 AC 440

Prevention of terrorism and state threats: weapons etc (TPIMs and STPIMs)

369. The effect of clause 122 is to widen the things that can be covered under the weapons and explosives measure that can be imposed on someone given a TPIM notice under the Terrorism Prevention and Investigation Measures Act 2011 or a STPIM under the National Security Act 2023. This is to ensure TPIM and STPIM subjects can be prohibited from possessing articles, such as kitchen knives or vehicles, which may have other legitimate uses but are assessed as having potential to be used as a weapon by the TPIM or STPIM subject, and that are broader than the current definition of 'offensive weapons'.

Article 9 – Right to freedom of thought, conscience and religion

370. Article 9 may be engaged as the measure might have the effect of depriving an individual of an article that might be used in religious observance, where such an article might also be used as a weapon. Any interference would be justified as it is necessary to protect national security specifically to reduce the risk of a terrorist attack or hostile state activity, and it is proportionate as it can only be imposed where a court has assessed the decision that it is necessary for public protection.

Article 1 Protocol 1 – Right to peaceful enjoyment of property

371. A1P1 may be engaged as the measure may have the effect of depriving an individual of ownership of their property which could have other legitimate uses, such as a kitchen knife or vehicle. This prohibition can be imposed where the court approves the Secretary of State's assessment that such a measure is necessary, for purposes connected with protecting members of the public from a risk of terrorism or hostile state activity.

372. As above, any interference would be justified as it is necessary to protect national security specifically to reduce the risk of a terrorist attack or hostile state activity, and it is proportionate as it can only be imposed where a court has assessed the decision that it is necessary for public protection.

Offence of wearing or displaying articles in support of proscribed organisation

373. Under section 13(1) of the Terrorism Act 2000 ("TACT"), it is an offence for a person in a public place to wear an item of clothing or wear, carry or display an article (e.g. a flag) – in a way or circumstances that arouse reasonable suspicion that they are a member or support of a proscribed organisation.[100] It is a strict liability offence and, on summary conviction, a person is liable to a fine and/or imprisonment for no more than 6 months.

374. A "public place" is defined at section 121 TACT as a place to which members of the public have, or are permitted to have, access. The wings of a prison would not satisfy this definition, for example. The Independent Reviewer of Terrorism

[100] A proscribed organisation is an organisation that is listed in Schedule 2 TACT for being concerned in terrorism (the power to amend this list is in section 3 of that Act).

Legislation (IRTL) recommended in his 2022 report[101] that the offence at section 13(1) should be capable of being committed in a prison.

375. The proposed measures in clause 123 amends section 13 TACT such that conduct that would be an offence under section 13(1) could be an offence if it happened in a prison or another place listed in the Bill. The relevant premises are listed at subsection (4), which includes immigration removal centres (IRCs).

376. In these settings, there is considered to be a cohort of people vulnerable to being drawn into terrorism due to various factors, including in particular their history of offending and relating to their detention. The proposed measures serve the policy aims of deterring people from terrorist-related activity, reducing the risk of radicalisation, and the State's maintenance of good order and prevention of crime in detention facilities.

Article 10 - right to freedom of expression

377. Insofar as the amendments to s13 TACT interfere with rights under Article 10, the interference can be justified under Article 10(2) and the proposed measures are compatible with the ECHR in this respect.

378. The existing offence at section 13(1) TACT was found compatible with Article 10 in *Pwr v. DPP*[102]. The proposed measures would not amend the components of the offence beyond the locations at which the offence may be committed. They will be prescribed by law and serve the same legitimate aim as the existing offence in depriving proscribed organisations of the "oxygen of publicity".

379. In serving this aim, the proposed measures are necessary to disrupt radicalisation and other terrorist-related activity in prisons and other places of detention as is presently the case for public places. They will ensure that authorities can maintain good order in State detention and prioritise addressing concerning behaviour that is considered to radically influence others and potentially draw them into terrorism. The Government considers it necessary that, where persons are subject to detention, the State can control the environment to prevent and deter the radicalisation of others, particularly vulnerable individuals.

380. The extension of the existing, ECHR-compatible offence to these places is a proportionate means of achieving these legitimate aims. Whilst the range of locations at which the offence can be committed is expanded, the relevant conduct remains narrowly drawn to be concerned with wearing, carrying or displaying articles that arouse suspicion relating to membership or support of proscribed organisations, i.e. those considered by HMG to be concerned in terrorism and accordingly listed in Schedule 2 TACT. In this way, the offence focuses on associations with the most harmful groups.

[101] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1071318/terrorism-in-prisons
[102] [2022] 1 W.L.R. 789

381. Interference with the qualified right to freedom of expression at Article 10 ECHR is, accordingly, justified in the interests of national security and the prevention of crime and disorder.[103]

Article 1, Protocol 1 – right to peaceful enjoyment of property

382. The proposed measure does not criminalise the possession of items of clothing or other articles and so does not deprive a person of their possessions but it does extend the circumstances in which the wearing, carrying or display of such an item or article constitutes a criminal offence and, to that extent, may represent a control of use. This Government is satisfied any interference in this respect justified.

383. The provisions amend existing powers in legislation. Any interference will be prescribed by law and proportionate to the general or public interests of preventing terrorist-related activity and preserving good order in State detention as set out for Article 10 above.

Management of terrorist offenders - notification requirements and stop and search

384. Clause 124 and Schedule 16 enable the Secretary of State or the police to apply to a court to impose the notification requirements under Part 4 of the Counter-Terrorism Act 2008 on certain offenders who are not presently subject to them. The court will be required to make the order if it is satisfied that the offence had a terrorist connection, and that the offence was not eligible to be determined as having such a connection when it was dealt with by the courts.

385. An order will be available only in respect of serving prisoners or offenders who are released on licence. If the order is made, the offender will be subject to the notification requirements for a period calculated by reference to the length of their sentence.

386. An offender who is the subject of an order will also become subject to the police powers under sections 43B and 43C of the Terrorism Act 2000 ("TACT") while they are released on licence. The offender can be arrested on reasonable suspicion of a breach of their licence conditions while a decision is made on whether or not to recall them to prison (if the arrest is considered necessary to protect the public). The offender can also be stopped and searched if it is a condition of their licence that they submit to such a search and the officer conducting the search considers it necessary to protect the public from a risk of terrorism.

387. The application of the notification requirements to persons who were sentenced in the past does not engage Article 7 ECHR. Although the notification requirements are directly linked to an offender's sentence, they do not constitute a penalty. In

[103] Donaldson v the United Kingdom 56975/09

Ibbotson[104] the ECtHR held that the application of notification requirements that were very similar to these did not amount to a penalty. In reaching that conclusion, the court emphasised that the purpose of the notification requirements was to be preventative (i.e. in terms of managing the risk posed by the offender) rather than punitive.

Article 8 ECHR – Right to respect for private and family life, home and correspondence

388. The application of the notification requirements to an offender who is the subject of an order may constitute an interference with their Article 8 rights. Similarly, if an offender is, following the order, later subjected to a stop and search (under section 43C TACT), the search may also involve an interference with their Article 8 rights.

Notification requirements

389. The imposition of the notification requirements is in accordance with the law, is justified by the need to protect the public from the risk of terrorism, and is a proportionate means of achieving that justification. Offenders will be subject to the notification requirements only if a court grants the order, which provides protection against the risk of the arbitrary application of the requirements.

390. In *Irfan*[105], the Court of Appeal held that the terrorism notification requirements were proportionate (the requirements were expanded in 2019, although the principles remain the same). The Court observed that terrorism offences fall into a special category of seriousness such that a precautionary approach is appropriate. Each requirement can clearly be linked to managing the risk associated with terrorist activity. For example, notification of foreign travel can help prevent a person travelling abroad to receive terrorist-related training.

Stop and search power

391. The interference that will arise if an offender is subject to a stop and search under section 43C is in accordance with the law, is justified by the need to protect the public from the risk of terrorism, and is a proportionate means of achieving the justified aim.

392. Section 43C was introduced following a recommendation made by the Independent Reviewer of Terrorism Legislation. It may be exercised without the need for reasonable grounds; and is therefore a so-called "suspicion less stop-and-search" power. Such powers may be in accordance with the law for the purposes of Article 8, provided that, considered in all the relevant circumstances, they provide adequate safeguards against arbitrary use.

[104]Ibbotson v UK [1999] Crim. LR. 153. The Court made similar findings in Gardel v. France (Application no. 16428/05).
[105] R (on the application of Irfan) v Secretary of State for the Home Department [2012] EWCA Civ 1471.

393. In *Beghal*[106] the Supreme Court held that the powers under Schedule 7 to the Terrorism Act 2000 that allow for persons to be detained, searched and questioned while passing through the UK Border, without the need for a basis of suspicion, were in accordance with the law for the purposes of Article 8.

394. In finding that the Schedule 7 power was in accordance with the law, the Court noted various factors, including that the powers could be exercised only against an identifiable group, and for a specific purpose. The power under section 43C may be exercised only in relation to terrorist offenders out on licence; and only those in respect of whom the Parole Board or the Secretary of State has concluded that it is necessary and proportionate to include this as a licence condition. The power is therefore restricted to persons who pose a substantially greater terrorism risk to the public.

395. In order to exercise the power, the constable carrying out the search must consider that the search is necessary for purposes connected with protecting the public from a risk of terrorism. While the constable does not have to have reasonable grounds for that view, they must honestly hold it; and if necessary be able to set out the reasons why they formed that belief. The officer must consider that the search is necessary rather than merely useful or expedient. Finally, officers must exercise this power in accordance with the relevant PACE Code of Practice.

396. These factors are sufficient to ensure that the search power, and its extension to this group of offenders, is proportionate.

Sentences for offence of breaching foreign travel restriction order

397. Clause 125 makes provision for an additional offence (breaching a foreign travel restriction order ('BFTRO')) to be captured by the terrorist offenders sentencing, restricted release, and management on licence regimes. ECHR Articles 5, 7, 8 and 14 may be engaged but they are not infringed by this measure.

Changes to sentencing arrangements

Article 5 – Right to liberty and security

398. Offenders convicted after date of commencement of these provisions will no longer receive a standard determinate sentence, but must, if they do not receive an extended determinate sentence for this offending, receive a sentence for offenders of particular concern (or terrorism sentence in Scotland or Northern Ireland), which is a determinate sentence, with a licence period fixed for one year to supervise the offender. The sentencing regime provides the court with discretion, when imposing the overall sentence, to ensure that the resulting deprivation of liberty is not arbitrary for the purposes of Article 5 and is proportionate in all the circumstances

Changes to release arrangements

[106] Beghal v DPP [2015] UKSC 79.

Article 7 – No punishment without law

399. If any offenders are convicted of BFTRO between now and the coming into force of the changes, their release arrangements will be altered from halfway automatic release to two-thirds Parole Board release. This provision also gives power to specify in a warrant for a repatriated prisoner charged with/convicted of an equivalent offence that they will be subject to all the same measures as a domestic terrorist offender. However, although the power to amend a warrant is broad in that it applies to warrants issued before the coming into force of the provisions, it is strictly cast to only permit the Secretary of State to prescribe on the face of the warrant that the offender has committed a terrorism or terrorist designated offence the equivalent of which is strictly delineated in the Bill measures and corresponding legislation, and based upon findings made by the court before which the prisoner was tried or sentenced for the overseas offence. These amendments are changes to the administration of the sentence, not the sentence itself. For the same reasons, it is not considered that the repatriation clause(s) will contravene Article 7: *R (Khan) v Secretary of State for Justice [2020] 1 WLR 3932 Morgan v Ministry of Justice [2024] AC 130.*

Article 8 – Right to respect for private and family life, home and correspondence

400. Offenders convicted for BFTRO will become eligible for and subject to polygraph licence conditions like other terrorist offenders. Information from polygraph testing may be shared with partner agencies such as the police and other listed agencies, in accordance with s14 of the Offender Management Act 2007 or other statutory provisions. Due to the sensitivity of polygraph testing information, such information sharing will be in conducted in strict compliance with the legislative scheme (i.e. Data Protection Act 2018) to ensure it is proportionate, lawful and necessary, in accordance with information protection already in place for sex offender polygraph information. Thereby any interference with offenders' Article 8 rights will be ECHR compliant.

<u>Power of arrest</u>

Article 5 – Right to liberty and security

401. Article 5 is engaged only where an act of detention constitutes a deprivation of liberty rather than a restriction of movement. It is unclear whether this new power crosses the threshold of a deprivation of liberty given the maximum period of detention of six hours and the requirement to release the prisoner sooner if possible. However, given that there is uncertainty, and given that is involves a power of arrest, the compatibility of the power with Article 5 has been analysed on the basis that it may involve a deprivation of liberty. The lawful basis for deprivation is provided for by primary legislation and is exercisable only in relation to prisoners serving their sentence while released on licence, in connection with the anticipated recall of the prisoner. The Government is satisfied that the new power contains sufficient safeguards against arbitrary use such that it is meets the necessary requirements for the purposes of Article 5(1).

<u>Power to search a terrorist prisoner released on licence</u>

Article 8 – Right to respect for private and family life, home and correspondence

402. The search condition will constitute an interference with the Article 8 rights of prisoners. The power created by this clause may be exercised without the need for reasonable grounds; and is therefore a so-called "suspicion-less stop-and-search" power. Such powers may be in accordance with the law for the purposes of Article 8, provided that, considered in all the relevant circumstances, they provide adequate safeguards against arbitrary use. Adding BFTRO offenders to the terrorism management conditions regime is considered to be justified and proportionate: for example, the terrorist attacks at Fishmongers Hall and Streatham demonstrated the risk posed to the public from terrorist prisoners who are released from prison on licence; and the licence conditions are therefore justified in order to protect the public.

<u>All changes within this clause</u>

Article 14 – Protection from discrimination

403. There may be groups with characteristics who are over-represented in receiving BTFRO. However, the measures are imposed based on the gravity of offending (which is not an 'other status') the provision will apply equally to all relevant terrorist offenders, regardless of race, religion or otherwise. The court held in *R (Khan) v Secretary of State for Justice [2020] EWHC 2084 (Admin)* that prisoners treated differently due to the category of offence they have committed are not protected by Article 14, and if a category of offence is chosen due to the gravity of offence, this cannot be an "other status" (see also *Gerger v Turkey (application no. 24919/94 1999 [GC]).* In any event, it is considered that there is objective justification to treat terrorist offenders differently than other offenders, given the unique nature of offences and unquantifiable risk posed. It is therefore considered that, given the wide margin of appreciation afforded to States in the area of penal policy requiring a measure to be manifestly without reasonable foundation before a breach will be found (see *R(CS) v Secretary of State for Work and Pensions (2021 UKSC 26* at para 160) any differences of treatment are justifiable in pursuing the legitimate aim of protecting the public from terrorist offenders In any event, any differential treatment related to type of offending is justified, proportionate and necessary as a public protection measure, given the serious risk to the public. Therefore, Article 14 is not breached.

<u>Length of terrorism sentence with fixed licence period in Northern Ireland</u>

404. Clause 126 ensures terrorism sentences with a fixed licence period available for terrorist offenders in Northern Ireland are handed down consistently with the equivalent sentence in England and Wales. ECHR Articles 5, 7, 8 and 14 are engaged but not infringed by this measure.

Article 5 – Right to liberty and security

405. The terrorism sentence provides the court with discretion, when imposing the sentence, to ensure that the resulting deprivation of liberty is not arbitrary for the purposes of Article 5. The sentence imposed is one which the court considers is

proportionate in all the circumstances, as required at section 231 of the Sentencing Code. The discretion is retained because the court decides whether to impose a custodial sentence and if so, the length of it. The court does not have a discretion over the licence period but retains the discretion as to the length of the custodial term. The Department is satisfied that this provision does not infringe Article 5.

Article 7 – No punishment without law

406. The Sentence for Offenders of Particular Concern (SOPC) additions will apply to all offenders in Northern Ireland sentenced for specified terrorist offences after commencement, which means that it will be available to the courts to impose on offenders who had committed an offence prior to commencement but not yet been sentenced and Article 7 should therefore be considered. However, the availability of SOPC disposal for these offences is not an effect that breaches the prohibition against the retrospective application of a heavier penalty in Article 7; where the court looks to determine if a heavier penalty has been applied than that initially applied, it will look at the maximum applicable penalty that applied to the offence at the time of the offending itself. These changes to do not operate to change the maximum applicable penalty. The Government therefore is satisfied that Article 7 is not breached.

Article 8 – Right to respect for private and family life, home and correspondence

407. Article 8 is engaged as an offender will spend time in prison which is an interference to the right of a family life. However, there is no breach of Article 8 because the imposition, and the serving of a prison sentence is a proportionate interference with that right, further to conviction by a competent court.

Article 14 – Protection from discrimination

408. There may be groups with certain protected characteristics who will be over-represented in receiving a SOPC. Any difference in treatment is based on the type of offending which can have catastrophic consequences and not on the personal characteristics of the offender. The new provision will apply equally to all relevant terrorist offenders, regardless of race, religion or otherwise. The court held *in R (Khan) v Secretary of State for Justice [2020] EWHC 2084 (Admin)* that prisoners treated differently due to the category of offence they have committed are not protected by Article 14, and if a category of offence is chosen due to the gravity of offence, this cannot be an “other status” (see also *Gerger v Turkey (application no. 24919/94 1999 [GC]*). In any event, it is considered that there is objective justification to treat terrorist offenders differently than other offenders, given the unique nature of offences and unquantifiable risk posed. It is therefore considered that, given the wide margin of appreciation afforded to States in the area of penal policy requiring a measure to be manifestly without reasonable foundation before a breach will be found (see *R(CS) v Secretary of State for Work and Pensions [2021] UKSC 26* at para 160) any differences of treatment are justifiable in pursuing the legitimate aim of protecting the public from terrorist offenders. Therefore, Article 14 is not breached.

PART 16: MISCELLANEOUS AND GENERAL

Criminal liability of bodies corporate and partnerships where senior manager commits offence

409. Clause 130 enables a corporate body or partnership to be held criminally liable where a senior manager commits any offence while acting within the actual or apparent authority granted by the organisation. These provisions expand on the reform of such liability for economic crimes under the Economic Crime and Corporate Transparency Act 2023 and provide a clear test for prosecutors and courts to apply, and better capture situations where control is dispersed among a number of senior managers.

410. Clause 130 imposes liability upon a relevant body for the conduct of a senior manager, and potentially amounts to an interference with the Article 6 presumption of innocence. However, it is recognised that the UK courts have long accepted liability in the context of employer-employee relationships, in both civil and (with more reluctance) criminal law. The senior manager must be acting within the scope of his/her actual or apparent authority; the relationship is a voluntary one, and the company has chosen to put the manager in a position in which s/he is able to engage in criminal conduct while acting in their capacity as a senior manager.

411. In principle, any penalty imposed in proceedings using the new doctrine is capable of amounting to an interference with A1P1 rights of owners, shareholders, partners, etc. Where a company or partnership is involved in the commission of criminal offences, through its senior management, it is reasonable and proportionate to impose penalties.

412. Where a fine is imposed, this is a "deprivation" and must be in the public interest and subject to conditions provided for by law and by general principles of international law. In this case, any fine could only be imposed following criminal proceedings with concomitant protections for the rights of defendants, including procedural rights and discretion on the part of prosecutors (as to whether to institute proceedings) and courts (as to the penalty to be imposed); public prosecutors and courts are public bodies for the purposes of the Human Rights Act 1998 and required to comply with the Convention rights.

Home Office, Ministry of Justice and Ministry of Defence

25 February 2025