

## **POLICING AND CRIME BILL**

### **EUROPEAN CONVENTION ON HUMAN RIGHTS**

#### **MEMORANDUM BY THE HOME OFFICE / HM TREASURY/ MINISTRY OF JUSTICE**

##### **Introduction**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Policing and Crime Bill. Where appropriate, the Memorandum also addresses issues arising from the UN Convention on the Rights of the Child (“UNCRC”). The memorandum has been prepared by the Home Office, Treasury and Ministry of Justice. On introduction of the Bill in the House of Lords, the Advocate General for Scotland (Lord Keen of Elie QC) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

##### **Summary**

2. The Bill is in nine parts:
  - Part 1 places a duty on police, fire and ambulance services to collaborate, enables Police and Crime Commissioners (“PCCs”) to take on responsibility for fire and rescue services where a local case is made, and abolishes the London Fire and Emergency Planning Authority and transfers its functions to the London Fire Commissioner. It also provides for inspection of fire and rescue services.
  - Part 2 reforms the police disciplinary and complaints systems, provides for a new system of super-complaints and confers new protections on police whistle-blowers. This Part also further strengthens the independence of HM Inspectorate of Constabulary and ensures that it is able to deliver end-to-end inspections of the police.
  - Part 3 better enables chief officers to make the most efficient and effective use of their workforce by giving them the flexibility to confer a wider range of powers on police staff and volunteers and conferring a power on the Home Secretary to specify police ranks in regulations, thereby affording the flexibility to introduce a flatter rank structure. This Part also strengthens the accountability and transparency of the Police Federation for England and Wales.
  - Part 4 contains a number of reforms to police powers, including in relation to: pre-charge bail to put a stop to people remaining on bail for lengthy periods and introducing independent judicial scrutiny of its continued necessity; provide for the retention of biometric material where a person has committed an offence outside of England and Wales; the powers under sections 135 and 136 of the Mental Health Act 1983 to stop vulnerable people experiencing a mental health crisis being detained in police custody; to the Police and Criminal Evidence Act 1984 (“PACE”) to ensure that 17 years olds who are

detained in police custody are treated as children for all purposes; to extend the geographical reach of police enforcement powers so that they can effectively detect and investigate any offence on ships at sea; and to provide for cross-border powers of arrest.

- Part 5 extends the term of office of Deputy PCCs so that, in the event of a PCC vacancy occurring, their term automatically ends upon a new PCC taking office, rather than upon the former PCC ceasing to hold office.
- Part 6 amends the Firearms Acts 1968 to 1997, including to better protect the public by closing loopholes that can be exploited by criminals and terrorists and by ensuring, through statutory guidance, that robust background checks are made on the suitability of persons to hold a firearms licence or shotgun certificate.
- Part 7 amends the Licensing Act 2003 to make the licensing system more effective in preventing crime and disorder.
- Part 8 strengthens the enforcement regime for EU, UN and other financial sanctions by increasing the maximum custodial sentence on conviction for breaching sanctions, expanding the range of enforcement options available to Government, including a new system of monetary penalties, and by providing for the immediate implementation of UN-mandated sanctions.
- Part 9 includes miscellaneous and general provisions, including an amendment to the Sexual Offences Act 2003 to better protect children and young people from sexual exploitation by ensuring that the definition of sexual exploitation relevant to the offences at sections 48 to 50 of that Act covers situations where indecent images of children are streamed or otherwise transmitted. This Part also contains provision to require arrested persons to state their nationality; for suspected foreign nationals to produce their nationality document(s) following arrest; for defendants in criminal proceedings to provide their name, date of birth and nationality to the court; to give police and immigration officers the power to seize cancelled foreign travel documents; and to provide lifelong anonymity for victims of forced marriage.

3. The Home Office considers that clauses of and Schedules to this Bill which are not mentioned in this memorandum do not give rise to any human rights issues.

4. This is a human rights enhancing Bill. It seeks to protect and strengthen the rights of persons under investigation by the police, or otherwise come into contact with the police when undergoing a mental health crisis. The measures in the Bill to this end include: the strengthening of the police complaints system; restrictions on the use and duration of pre-charge bail; amendments to PACE to ensure that 17 year olds are treated as children for all purposes; reforms to police powers under sections 135 and 136 of the Mental Health Act 1983, including a reduction in the maximum period of detention permitted under those provisions; and a strengthening of the criminal law to better protect children and young people from sexual exploitation.

## Part 1: Emergency services collaboration

### Police and Crime Commissioners and Fire and Rescue Authorities

5. Chapter 2 of Part 1 makes provision to enable police and crime commissioners (established under section 2 of the Police Reform and Social Responsibility Act 2011), to take on the responsibilities of a fire and rescue authority (see sections 1 to 4 of the Fire and Rescue Services Act 2004 (“the 2004 Act”)), in their area where a case has been made for this locally and it is in the interests of either (a) economy, efficiency and effectiveness or (b) public safety.
6. There are to be two potential models for this described as “the governance model” and “the single employer model”. The key difference between the two models is that under the single employer model, the police force and fire and rescue service will remain entirely separate front line services but the staff of both organisations will be employed by the chief constable (to be known operationally as the ‘chief officer’), who will in turn be held to account by the PCC.
7. Under the governance model all fire and rescue personnel, property, rights and liabilities would transfer to the PCC in their capacity as the new fire and rescue authority. Under the single employer model at least some staff would transfer to the chief constable. Property may also transfer to the chief constable. Paragraphs 8 to 12 below discuss the potential Convention issues in relation to these models.

#### *Article 6*

8. In relation to employees, employer’s decisions which impact on the employment rights of staff can determine the private contractual rights of individuals but only engage Article 6 at the point that any resultant dispute is determined by a court or employment tribunal. In the case of *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 614 it was said in paragraph 102:

*“It is not that civil rights are not engaged in the disciplinary process leading to dismissal; plainly contractual rights are in issue and they are civil rights, as is the right to remain in the employment one currently holds, as Baroness Hale observed in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] AC 739, para 19, [2009] 2 All ER 129. Domestic procedures engage and may affect those rights but it has never been suggested that the decision to dismiss from a particular job engages art 6. Indeed, in *Le Compte v Belgium* the ECtHR observed (para 41) that “disciplinary proceedings do not usually lead to a contestation (dispute) over civil rights and obligations”. This cannot be because they do not engage civil rights. It is because at that stage there is no dispute which is being determined. In the employment context that comes later once an employer asserts and acts on what he believes to be his contractual rights. If the employer’s actions are challenged, a dispute arises and the determination of rights will then be made by a court or employment tribunal, as the case may be, which will be art 6 compliant.”.*

9. The Government does not consider that there will be any determination of employment rights as a result of these provisions which would engage Article 6. Staff will be transferred under a staff transfer scheme made under new section 4C or 4I of the 2004 Act or under new section 107 EA and 107EC of the Local Democracy, Economic Development and Construction Act 2009. Any staff not transferred, as a result of those staff transfer schemes would benefit from the usual statutory and contractual employment rights.
10. If there was an argument that there had been an interference with such rights, employees would have access to a civil court or an employment tribunal, which would fulfil the requirements of Article 6 by ensuring any dispute was resolved by an independent and impartial tribunal established by law. The tribunal as a public authority would also be bound by section 6 of the Human Rights Act 1998 to act compatibly with Convention rights in making any decision.
11. Paragraph 81 of Schedule 1 to the Bill makes provision for amendments to the Police Reform and Social Responsibility Act 2011 to enable a suitably qualified senior fire officer to apply for the role of chief constable where the “single employer” model is adopted. It is possible that the single employer model may lead to the removal from office of an existing chief constable. It is arguable whether such decisions would engage Article 6 (right to fair trial) because as statutory office holders decisions to suspend or remove them from post would not be determinative of civil rights and obligations. Any such removal would follow a fair procedure. In making decisions, the PCC would have to act compatibly with the Convention, and decisions would be subject to judicial review. If it were the case that civil rights were engaged, the Government considers that judicial review would be sufficient for the purposes of Article 6.

#### *Article 1 protocol 1*

12. The exercise of the powers to make a property transfer scheme could engage the right to the peaceful enjoyment of possessions under Article 1 of Protocol 1 in so far as contracts might be transferred. “Possessions” has been held to include contractual rights (*Association of General Practitioners v Denmark* (1989) 62 DR 64). However the intention is that all of the contracts of the fire and rescue authority would be transferred to the PCC and/or the chief constable. The Government would therefore contend that there would not be an interference with, deprivation or control of, that possession. Any novation or termination of the contract would be a matter for the police and crime commissioner and/or the chief constable both public authorities for the purposes of section 6 of the Human Rights Act 1998.

#### Abolition of London Fire and Emergency Planning Authority

13. Chapter 3 of Part 1 makes provision to abolish the London Fire and Emergency Planning Authority and to create a statutory “London Fire Commissioner” as a corporation sole. The provisions also transfer the fire and rescue functions of the London Fire and Emergency Planning Authority to the London Fire Commissioner. The Government does not consider that there will be any determination of employment rights as a result of these provisions which would engage Article 6.

Under clause 10 of the Bill, staff will be transferred under a staff transfer scheme. Any staff not transferred as a result of those staff transfer schemes would benefit from the usual statutory and contractual employment rights. Paragraphs 8 to 10 would apply in the same way here.

14. The exercise of the powers to make a transfer scheme could engage the right to the peaceful enjoyment of possessions under Article 1 of Protocol 1 in so far as contracts might be transferred. "Possessions" has been held to include contractual rights (*Association of General Practitioners v Denmark* (1989) 62 DR 64). However the intention is that all of the contracts of the London Fire and Emergency Planning Authority would be transferred to the London Fire Commissioner. The Government would therefore contend that there would not be an interference with, deprivation or control of, that possession. Any novation or termination of the contract would be a matter for the London Fire Commissioner who is a public authority for the purposes of section 6 of the Human Rights Act 1998.

#### Inspection of fire and rescue services

15. Chapter 4 of Part 1 amend the 2004 Act by inserting new subsections into section 28, new sections 28A and 28B and new Schedule A3. These provisions will enable inspectors appointed in exercise of the power in section 28(A1) "section 28 inspectors" to serve notices on a fire and rescue authority in England or an employee of that authority, and on a person providing services to a fire and rescue authority in England or an employee of the person to require information where the inspector reasonably requires that information for the purposes of the inspection function. The inspection function is the inspection of a fire and rescue authority in England for the purpose of reporting on the efficiency and effectiveness of that fire and rescue authority. The provisions will enable section 28 inspectors to serve a notice on a person requiring access to premises which are occupied for the purposes of a fire and rescue authority in England or for the purposes of a person providing services to a fire and rescue authority in England or for access to documents or other things on those premises. The provisions also require a section 28 inspector to produce a report after each inspection which must be published in the manner the inspector considers is appropriate.
16. Section 28 does not currently provide section 28 inspectors with power to require information or documents or to require access to premises.

#### *Article 8 and Article 1 Protocol 1.*

17. As new Schedule A3 to the 2004 Act gives powers to access premises and information/documents, they engage Article 8 and Article 1 Protocol 1. To the extent that the new Schedule gives rise to any interference with Article 8 and Article 1 Protocol 1, the Government considers that any such interference is justified. Any interference will be in accordance with the law as any notice will be issued in accordance with powers provided in primary legislation. The issuing of notices will be in pursuance of the legitimate aim of ensuring the efficiency and effectiveness of fire and rescue authorities in England by increasing the powers of section 28 inspectors.

Furthermore, it is plainly in the general interest for fire and rescue authorities to be both efficient and effective and the reports of section 28 inspectors will fulfil an important role in ensuring this.

18. There are various safeguards attached to these powers, including a bar on using a notice to require a person to provide self-incriminating information or information subject to legal privilege. Furthermore, any such notices requiring access have to set reasonable timeframes. Accordingly, the Government considers that any interference will be proportionate to the aims pursued.

## **Part 2: Police Complaints, Discipline and Inspection**

### **Chapters 1 to 4: Police complaints and discipline**

#### Handling of complaints etc

19. Schedule 5 makes changes to Schedule 3 to the Police Reform Act 2002 (“the 2002 Act”), which deals with the handling of complaints (and like matters) against the police. These changes will allow the appropriate authority (which will be either the chief officer or the local policing body (that is the PCC or London equivalent)) to resolve certain complaints informally without recording them and to resolve others without the need for a formal investigation (something which is already possible under Schedule 3 as it stands). However, it will remain the case that where the appropriate authority thinks the conduct complained of may involve the infringement of a person’s rights under Article 2 or 3, the complaint must be recorded and investigated. Moreover, there will continue to be a right of appeal/review in cases where the appropriate authority has investigated a complaint. This right will be to either the relevant local policing body or the Independent Police Complaints Commission (“the IPCC”<sup>1</sup>), with the former being able to recommend that the complaint be re-investigated, and the latter being able to direct that it be re-investigated (amongst other powers).

#### Police barred list

20. Schedule 8 inserts new Part 4A into the Police Act 1996 (“the 1996 Act”). These provisions, amongst other things, require: (i) chief officers and certain others to report certain dismissals of police officers etc to the College of Policing; (ii) the College of Policing to maintain a list of persons so reported to it (the ‘police barred list’); (iii) chief officers and certain others to consult the list before employing or appointing a person – and not to employ or appoint a person who appears on the list; and (iv) the publication of certain information on the list.
21. The dismissals and decisions which are caught by the provisions on the police barred list are as follows: (i) dismissals of members of police forces and special

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<sup>1</sup> Chapter 5 of Part 2 of the Bill provided for the re-naming of the IPCC as the Office for Police Conduct

constables for conduct or performance related issues; (ii) decisions at disciplinary proceedings that members of police forces and special constables would have been dismissed had they not resigned/retired; (iii) dismissals of civilian police staff members, where a reason for the dismissal is conduct or performance related; and (iv) decisions at disciplinary proceedings that civilian police staff members would have been dismissed had they not resigned/retired.

22. To the extent that these provisions give rise to an interference with Article 8, the Department considers that any interference is justified. Any interference will be in accordance with the law, as any report of a dismissal, inclusion of information on the police barred list and decision not to employ or appoint a person because he or she appears on the police barred list will be in accordance with – indeed mandated by – the primary legislation. The regime will be in pursuance of the legitimate aims of ensuring public safety, preventing disorder and crime and protecting the rights and freedoms of the public, since it is plainly in society’s interests to have police forces which are efficient and effective, and which do not employ etc people who have previously been (or would have been) dismissed for conduct or performance reasons.
23. The regime contains various safeguards. For instance, there are provisions on the removal of names for the list; only information on the list which is of a description specified by the Secretary of State in regulations may be published; and no information may remain published for more than five years. Accordingly any interference will be proportionate to the aim pursued.

#### Seizure and retention of evidence by the IPCC

24. Clause 19 inserts new paragraphs 19ZE to 19ZH into Schedule 3 to the 2002 Act. These paragraphs will allow a member of the IPCC’s staff who is designated under paragraph 19 of Schedule 3 in relation to an investigation, and who is lawfully on any premises for the purposes of that investigation, to seize certain items. The IPCC will have a power to retain seized items. The Government considers that these powers engage Article 8 and Article 1 of Protocol 1.
25. In respect of Article 8, any interference will be justified. Such interference will be in accordance with the law as any seizure (and retention) will be pursuant to a clear power in primary legislation. It will pursue the legitimate aim of preventing disorder and crime and protecting the rights and freedoms of others, since a designated staff member will only be able to seize an item if s/he has reasonable grounds for believing that it is evidence relating to the conduct or matter to which the investigation relates.
26. Seizure (and retention) will be proportionate to that aim, bearing in mind the safeguards included in the provisions. For instance, in addition to the precondition set out in the last sentence of the preceding paragraph, the designated staff member will only be able to seize an item if he or she has reasonable grounds for believing that seizure is necessary in order to prevent the evidence being concealed, lost, altered or destroyed. The designated staff member will have to provide, within a reasonable time, a notice stating what has been seized and the reasons for the

seizure if requested to do so by a person showing him/herself: (i) to be the occupier of the premises on which it was seized, or (ii) to have had custody or control of it immediately before the seizure.

27. The IPCC will be able to retain anything seized only for so long as is necessary in all the circumstances (including so that it may be used as evidence in criminal or disciplinary proceedings or in an inquest). Additionally, provision is made that retention is not necessary if a photograph or copy will suffice. Paragraph 19ZH also contains provision on accessing and photographing/copying items seized and retained. These safeguards are modelled on those contained in sections 19, 21 and 22 of PACE (which deal with seizure).
28. Article 1 of Protocol 1 is a qualified right. The purpose of these provisions is to provide the IPCC with the power to secure and preserve evidence in relation to investigations. This is an essential power for the IPCC to be able to effectively investigate complaints and like matters. It is clearly in the general, public interest for the IPCC to have the ability to effectively investigate complaints and like matters effectively and the proposals are accordingly in compliance with Article 1(1).

#### Transfer of staff from police force to PCC

29. Clause 23 provides a power for local policing bodies and chief constables to make a transfer scheme to transfer rights and liabilities under contracts of employment of staff from the police force to the local policing body. Such transfer schemes are to be for the purposes of dealing with the new responsibilities the local policing body takes on by becoming a relevant review body for the purposes of Part 2 of the 2002 Act (under paragraph 39 of Schedule 5 to the Bill). The local policing body may also acquire additional functions in relation to complaints handling by giving a notice under new section 13A of that Act (inserted by clause 12). Such schemes must make provision that is similar or the same as TUPE.
30. As discussed above (at paragraphs 8 to 14) in relation to transfer schemes to transfer staff from fire and rescue authorities to local policing bodies, chief constables or mayors of combined authorities, Article 6 is only engaged when there is a dispute to be resolved by a court or tribunal following a transfer scheme, and where such circumstances arise, normal employment and contract principles will apply. Article 1, protocol 1 may be engaged by a transfer, but it would be a matter for the local policing body and the chief constable whether to make such a transfer, the terms of the transfer, and therefore whether such interference was justified.

#### **Chapter 6: Inspection**

31. Clause 35 inserts paragraphs 6A to 6E into Schedule 4A to the 1996 Act. These provisions give Her Majesty's Inspectors of Constabulary ("HMIs") powers to serve notices on a person to require information or documents which an Inspector reasonably requires for the purposes of an inspection under section 54 of the 1996 Act. These provisions also allow an HMI to serve a notice on a person to allow the HMI access, which the HMI reasonably requires for the purposes of the inspection under section 54, to premises, documents and other things on those premises,

where those premises are occupied for the purposes of a police force, or otherwise in connection with the functions of a chief officer of police.

32. Schedule 4A to the 1996 Act already provides HMIs with powers to require access to premises and documents and information, but this is limited to police premises and documents by police forces. The intention behind the expansion of these powers for HMIs is to ensure that HMIs can inspect services which are contracted out by police forces to those outside the police force.

*Article 8 and Article 1 Protocol 1.*

33. As the clause gives powers to access premises and information/documents, they engage Article 8 and Article 1 Protocol 1. To the extent that the clause gives rise to any interference with Article 8 and Article 1 Protocol 1, the Government considers that any such interference is justified. Any interference will be in accordance with the law as any notice will be issued in accordance with powers provided in primary legislation. The issuing of notices will be in pursuance of the legitimate aim of preventing disorder and crime since the role of HMIs is to inspect the efficiency and effectiveness of police forces, and in order to inspect that, HMIs need to be able to determine the efficiency and effectiveness of the provision of any out-sourced services. Furthermore, it is plainly in the general interest for the police to be both efficient and effective and the reports of HMIs on the performance of the police and any outsourcing they have set up is an important part of this.

34. There are various safeguards attached to these powers. In relation to the power to obtain information under paragraph 6A, there are the following safeguards:

- a) There is a bar on using a notice to require a person to provide self-incriminating information or information subject to legal privilege.
- b) The power to require information only applies so far as it is reasonably required as part of an inspection into police efficiency and effectiveness under section 54 of the 1996 Act, will have a right of appeal to the First Tier Tribunal.
- c) A person who receives a notice under paragraph 6A may refuse to comply with it if he or she has a reasonable excuse, and this would be a defence should the Chief Inspector of Constabulary certify to the High Court that that person has failed to so comply.
- d) There is an appeal route for those (other than police forces, local policing bodies and bodies providing police services) served with notices to provide information to the first tier tribunal, and an appeal can be made on the ground that a notice is not in accordance with the law. A tribunal may quash the notice or give directions about the service of further notices. This right of appeal will not be available to police forces, local policing bodies and bodies providing police services (subject to Parliament agreeing Government amendments tabled for Commons Report stage), reflecting the existing position under the 1996 Act in relation to where information is required from the police under current paragraph 6A of Schedule 4A.

35. In relation to the power in paragraph 6B to access police premises and things on those premises, this power will only apply to premises of police forces, local policing bodies and bodies providing police services. There will be no appeal right linked to this power (subject to Parliament agreeing Government amendments tabled for Commons Report stage) as the power will only apply to premises of police forces, local policing bodies and bodies providing police services and only so far as it is reasonably required as part of an inspection into police efficiency and effectiveness under section 54 of the 1996 Act. This reflects the existing position under Schedule 4A to the 1996 Act in respect of the power to access police premises.

36. There are however various safeguards to this power to access premises:

- a) The power to require access to premises only applies so far as it is reasonably required as part of an inspection into police efficiency and effectiveness under section 54 of the 1996 Act.
- b) Any notices requiring access (under new paragraph 6B to be inserted into Schedule 4A) have to set timeframes (which may be immediate), and there is a reasonable excuse defence open to those who fail to comply with a notice under paragraphs 6A or 6B.
- c) There is specific provision allowing for the eventuality that there may be reasonable grounds for not allowing the Inspector access (paragraph 6B(3)).

37. Given the nature of these powers and various safeguards described above, the Government considers that any interference with Article 8 rights as necessary and proportionate to the aims pursued.

### **Part 3: Police workforce and representative institutions**

#### **Chapter 1: Powers of police civilian staff and volunteers.**

38. Chapter 1 of Part 3 gives chief officers of police the power to designate civilian employees of police forces, and designated volunteers, with all the powers of constables, apart from those powers reserved for the sole use of constables. Chief officers will only be able to designate those staff or volunteers who meet the tests set out in section 38(4) of the 2002 Act, namely that they are suitable and capable of using the relevant powers and that they have been trained in their use. Where a civilian employee is designated as a police community support officer ("PCSO") or a volunteer is designated as a police community support volunteer, they will be able to be designated with almost all of the current powers of PCSOs. They will also be able to continue to use their existing powers to require individuals to wait with them for 30 minutes for the arrival of a constable where they have exercised the powers of a constable to require a person's name and address (which may only be exercised where there is reasonable suspicion of a relevant offence), and the person has failed to comply with that request, or where the designated employee or volunteers reasonably believes that the name and address are false or inaccurate. This power to detain for 30 minutes following a failure or suspected failure to provide name and

address details will be available for a greater range of offences (paragraph 7 of new Schedule 3B to the 2002 Act, inserted by Schedule 10) because it will also include powers of constables to require name and address details.

#### *Article 5*

39. Article 5 is engaged, given the relevant powers include extending the existing power to effectively detain a person for up to 30 minutes. Article 5(1)(c) permits detaining a person for the purpose of bringing the individual before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him or her committing an offence or fleeing after having done so. Accordingly, the Government considers that any detention for no more than 30 minutes is permitted under Article 5(1)(c).

### **Part 4: Police powers**

#### **Chapter 1: Pre-charge Bail**

40. Chapter 1 of Part 4 makes provision for pre-charge bail, in particular providing: a presumption of release without bail; a clear expectation that pre-charge bail should not last longer than a specified period of 28 days (subject to the possibility of extension); establishing a framework for the review by the courts of pre-charge bail; further clarity within the PACE provisions on pre-charge bail (namely removing contradictions between sections 34 and 37); extending the power of a constable to make a further arrest where an individual has been released on bail where further analysis identifies evidence that could not have reasonably been discovered while the suspect was in custody or on bail; and allows sensitive information to be withheld from the suspect where a bail extension application is made to the court, for example where its disclosure could harm the investigation, such as where the suspect could dispose or tamper with evidence. The overall package of measures here represents a significant human rights enhancement to pre-charge bail.

#### *Article 5*

41. These provisions introduce a presumption of release without bail, a requirement of necessity and proportionality for bail to be imposed (having regard to any conditions that would be imposed) and an introduction of time-limits for pre-charge bail of 28 days (albeit with the possibility of extension), therefore providing increased protection for Convention rights. The Bill (at clause 60) includes additional safeguards where extensions are sought, so that extensions after three months generally require an application to a magistrates' court. Currently there are no such time limits in respect of bail, so these provisions are significant human rights enhancing measures.
42. Exceptions will apply to complex cases handled by the Serious Fraud Office ("SFO"), specialised units within the Crown Prosecution Service ("CPS") and the Financial Conduct Authority ("FCA"). Where a case is 'exceptional', extensions beyond three months will be considered by the CPS and FCA with the possibility to extend up to six months. For cases being investigated by the SFO the initial grant of bail will always be for three months, with the SFO able to take a view within that period as to

whether to extend out to six months. This is because the SFO are confined by law to deal only with serious or complex fraud, which by their very nature will result in significant volumes of evidence, most of which will not be available to investigators until the suspect is arrested and their premises searched (while they are in custody). As such a three month initial period is most appropriate, in these limited circumstances. The Government does not consider that these provisions engage Article 5, particularly as they form part of a package that creates additional safeguards in respect of pre-charge bail that do not exist at present. However, if the provisions do engage Article 5, they would clearly be permitted pursuant to Article 5(1)(c) (especially given the exceptional nature of the cases involved).

43. Clause 64 expands the current test for re-arrest, so that material which was in the police's possession at the point the person was released (either with or without bail) but which was not reasonable to expect them to analyse ahead of release can provide justification for a further arrest. The Government considers it more proportionate and less intrusive to provide for the release of the individual pending that analysis where appropriate to do so and further arrest for this purpose is clearly permissible under Article 5(1)(c) in any event.
44. Clause 62 will make provision for the court to approve the withholding of information in circumstances where it is inappropriate for the full information in a bail extension application to the court to be shared with the suspect and their representative, for example where there is a risk of the suspect tampering with or destroying evidence. This includes the possibility of excluding the suspect and their representative from any part of the hearing where such information would be disclosed. Withholding information in this way may be considered to potentially engage Article 5 and Article 6 procedural rights, to the extent that it impacts on the extent to which the suspect is informed of the full reasons for a proposed extension of bail and on the ability of the suspect to make informed representations. However, there are a number of safeguards here. Firstly, an application to withhold information must be made to the court and the decision on whether the information may be withheld is at the court's discretion. If an application is refused, the applicant would need to decide whether to continue to apply for an extension and share the information with the suspect/their representative or withdraw the extension application. Where an application is granted, a redacted version of the application will in any event be provided to the suspect and their representative with only the sensitive information removed. In addition, the court can only grant an application to withhold information (and exclude the suspect and their representative from part of the hearing where the information will be disclosed) on the essential narrow grounds set out in new section 47ZH(4) of PACE. Given that there is currently no judicial involvement in respect of pre-charge bail and that these measures form part of a package that gives greater protection to suspects than at present and the safeguards detailed above the Government considers that these provisions are clearly compatible with Articles 5 and 6.

## **Chapter 2: Retention of biometric material**

45. Chapter 2 of Part 4 amends PACE to enable DNA profiles and fingerprint samples ('biometric material') to be retained on the basis of convictions *outside* England and Wales in the same way as for convictions in England and Wales (the retention power

would not apply in cases where the conviction elsewhere is for an act which is not an offence here). Currently, biometric material may only be retained from persons convicted of an offence outside of England and Wales in limited circumstances, so these provisions will close this gap and ensure consistency in the treatment of offenders.

46. Clause 70 makes equivalent provision in relation to the retention of material under the Terrorism Act 2000. At present the provisions in Schedule 8 to the Terrorism Act 2000 provide for a broadly equivalent regime to that in PACE for the retention and destruction of biometric material taken from those detained following arrest (under section 41 of the Terrorism Act 2000) or detained for examination (under Schedule 7 to that Act). Clause 70 will similarly close a gap to ensure that biometric material can be retained on the basis of *overseas* convictions in the same way as it can currently be retained on the basis of convictions in the UK.

#### Article 8

47. The Government accepts that clauses 69 and 70 clearly engage Article 8, which confers the right to respect for his private and family life. In *S and Marper v United Kingdom* (2008) 48 EHRR 1169 it was held at paragraph 73 that the retention of cellular samples must of itself be regarded as interfering with the right to respect for the private lives of the individuals concerned.

48. The Government accordingly accepts that these provisions will be lawful only if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions will be “in accordance with the law” because they will be set out in primary legislation in detail. As found in *Marper*, retention of DNA for the purposes of the detection and prevention of crime pursues a legitimate aim (see paragraph 100). The powers are also necessary in a democratic society to help prevent crime, protect public safety, and facilitate the bringing of criminal proceedings. In addition, where biometric material is retained under the regime in the Terrorism Act 2000 for counter-terrorism purposes, the Government is satisfied that such interference is necessary in the interests of national security.

49. The Government is also satisfied that these provisions are proportionate as they simply reflect (in so far as possible) those under PACE that apply in relation to the retention of biometric material from persons with convictions in England and Wales. And in relation to counter-terrorism, the provisions similarly reflect those under the Terrorism Act 2000 that apply in relation to the retention of biometric material from persons with convictions in the UK. The Supreme Court in the recent case *Gaughran v PSNI* [2015] UKSC 29 held that the current retention regime in Northern Ireland (which essentially mirrors that under PACE) constitutes a proportionate interference with Article 8.

50. Furthermore, the Government notes that to a great extent some of the concerns which led the Grand Chamber in *Marper* to conclude that there was not a fair balance between the competing public and private interests – namely the risk of stigmatisation and the perception that people whose data were retained were not

being treated as innocent (see paragraph 122) – do not arise here as the provisions apply only to persons *convicted* of an offence. Additionally, in proposing retention periods for juveniles under the PACE regime, clause 69 mirrors current provisions in PACE by setting out lesser periods of retention for juveniles convicted of their first minor offence (basing retention on the length of any custodial sentence they received).

### **Chapter 3: Powers under PACE: Miscellaneous**

#### *Article 8*

51. Clause 71 of the Bill extends section 17 of PACE to provide a power of entry to enable a constable to enter and search premises in order to exercise various existing powers of arrest for breach of bail<sup>2</sup>. This power of entry engages Article 8 to the extent that Article protects residential and business premises from being entered without permission unless a power to do so is necessary and proportionate. Any interference will be in accordance with law as the powers will be set out with clarity in primary legislation. To the extent that the power may be exercised in such a way as to interfere with rights under that Article, the Government considers that the power here is necessary and proportionate; the power of entry is subject to the conditions and limitations already set out in section 17 of PACE (namely, that the police must have reasonable grounds for believing that the person sought is on the premises, and that any search may only take place to the extent that is reasonably required to locate the person sought) and, in exercising the power, the police will need to act compatibly with the Convention rights.
52. Clause 72 amends PACE to distinguish between the treatment of an adult detainee and the treatment of a detainee under the age of 18. This is a human rights enhancing measure that gives further protection to the rights of under 17s under Article 8 of the ECHR and the UNCRC.

#### *Article 6*

53. Clause 73 provides for authorisation of further detention under PACE via live (video) link. A warrant of further detention without charge, or an extension of such a warrant, may be also issued by a court following an application by the police under sections 43 and 44 of that Act and clause 73 enables the use of live link technology for authorisations under these sections.
54. These provisions arguably engage Article 6(3) to the extent that it might be argued that procedural unfairness could arise in the treatment of the accused person at the detention stage. However, the provisions contain a number of requirements to ensure fairness to the detained person before the live link authorisation can be used (including specific safeguards in the cases of children and vulnerable adults), such as requiring the individual concerned to consent to and to have received legal advice

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<sup>2</sup> Section 30D, 46A, of PACE, sections 5B and 7 of the Bail Act 1976 and section 97 of the LASPO Act 2012.

on the use of the process. Vulnerable adults will be protected through the use of the appropriate adult (an independent representative for a vulnerable adult) and the clause defines vulnerable adults widely to ensure it applies to anyone who may have difficulty understanding the authorisation for any reason. The Government considers that the combined effect of these protections ensures the preservation of the Article 6 rights of the detained person.

#### **Chapter 4: Powers under the Mental Health Act 1983**

55. The provisions in Chapter 4 of Part 4 of the Bill amend sections 135 and 136 of the Mental Health Act 1983 (“the 1983 Act”) which give the police powers to search for, remove and detain mentally disordered persons. Clause 81 augments those provisions by also allowing for the search of those persons and the seizure of items in their possession which may be used to cause physical injury to themselves or to others. This provision therefore engages, and has the potential to interfere with, Articles 5 and 8.

##### *Article 5*

56. Clause 79 makes provision to eliminate the use of police stations as a ‘place of safety’ in respect of under 18s and to limit the use of police stations in respect of adults and therefore further enhance the rights of children under Article 3 of UNCRC. By reducing the maximum duration of detention from 72 to 24 hours (clause 80) and by expanding the definition of ‘place of safety’ (ensuring that individuals can be detained in places more suitable to meet their specific needs) the Bill provides even greater protection in respect of their Article 5 rights. The Bill will also require police officers to consult health professionals (if practicable) before using powers under section 136, again providing increased protection for those subject to these provisions of the Mental Health Act.

57. Clause 78 expands the scope of section 136 such that it will enable police to remove a person, who appears to him or her to be suffering from mental disorder and to be in immediate need of care or control, from anywhere except a private home. At present, section 136 applies only to places to which the public has access, leaving a legal anomaly in respect of “semi-public” places such as hotels, offices, shopping centres and private property such as railway lines and car parks to which the public may gain access fairly readily. Technically in such cases a warrant may be required to access the premises and to remove the person if using Mental Health Act powers, leading to unwelcome delay which is not in the interests of the individual. This extension of the powers engages Article 5. However, it clearly falls within the permitted purpose in Article 5(1)(e) (the lawful detention of persons of unsound mind).

##### *Article 8*

58. Clause 81 makes provision for protective searches to enable constables to carry out searches when exercising powers under section 135(1) or (2) or section 136(2) or (4) of the 1983 Act. At present a person detained under section 136(1) may be searched under a general power to search upon arrest. This is because section 136 of the

1983 Act was specifically preserved as a police power of arrest under Schedule 2 to PACE. The general power to search upon arrest is found at section 32 of PACE. Clause 81 requires the constable to have 'reasonable grounds for believing' that the person (a) may present a danger to himself or herself or to others, and (b) is concealing on his or her person an item that could be used to cause physical injury to himself or herself or to others. The clause also provides other safeguards comparable to those set out in section 32 of PACE, such as limiting the search to require the removal of outer clothing only. To the extent that these provisions give rise to an interference with Article 8, the Government considers that any interference is justified. Any interference will be in accordance with primary legislation and in pursuance of the legitimate aims of protecting the detained person and any others from harm. The clause itself requires proportionality; it is a power to search only to the extent that is reasonably required for the purpose of discovering the item that the constable believes the person to be concealing.

### **Chapters 5 and 6: Police Powers: Maritime enforcement**

59. Chapters 5 and 6 of Part 4 provide the police with further powers to prevent, detect, investigate and prosecute offences at sea. These include powers to stop, board, divert and detain ships and powers of search, seizure and arrest. There is also provision made for offences relating to the exercise of the law enforcement officer's powers.

#### *Article 5*

60. The power of arrest engages Article 5. The powers will only be available to law enforcement officers who are experienced in exercising similar powers. The powers will only be capable of being exercised for the purposes of preventing, detecting, investigating and prosecuting criminal offences. The individual powers are also subject to further restrictions, in that a law enforcement officer must have reasonable grounds to believe that an offence has been committed on a ship, or that there is evidence on the ship relating to an offence.

61. Any interference with the right to liberty will be compatible with Article 5 as it will be in accordance with law, as the power of arrest will be clearly set out in statute. Such arrests will fall into one of the categories set out in Article 5(1), particularly Article 5(1)(c) which permits lawful arrest or detention when it is reasonably considered necessary to prevent him or her committing an offence or from fleeing having done so.

#### *Article 8 and Article 1 of Protocol 1*

62. Powers to search and seize property engage Article 8 and Article 1 of Protocol 1. Any interference with Article 8 will be in accordance with law as any search will be carried out pursuant to a clear power in primary legislation. Any interference with Article 8 and Article 1 Protocol 1 arising from searches and seizures will pursue the legitimate aim of preventing crime by allowing the police to obtain and retain property in order to investigate criminal offences. This is a proportionate interference as the powers can only be exercised for the purposes of preventing, detecting, investigating and prosecuting crime, and where the law enforcement officer has reasonable

grounds to believe that an offence has been committed on a ship, or that there is evidence on the ship relating to an offence. The Government therefore believes that any interference will be justified under Article 8 and, in relation to Article 1 Protocol 1, justified in the general interest of preventing, detecting, investigating and prosecuting crime.

## **Chapter 7: Cross-border enforcement**

63. Chapter 7 of Part 4 amends the cross-border powers of arrest in Part 10 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”) to:

- a. confer a new power of cross-border arrest which will close a gap in the cross-border arrest powers, so that a person who commits an offence in one UK jurisdiction and is then found in another UK jurisdiction can be arrested without a warrant by an officer from the jurisdiction in which the person is found;
- b. confer a new power of entry and search for the purpose of an arrest on:
  - i. officers arresting persons in England and Wales in respect of offences in Northern Ireland;
  - ii. officers arresting persons in Northern Ireland in respect of offences in England and Wales; and
  - iii. officers arresting persons in Scotland in respect of offences in England and Wales or Northern Ireland;
- c. extend the existing powers of entry and search in Part 10 of the 1994 Act, which are available following arrest of a person under a warrant issued, or an offence committed, in England and Wales or in Northern Ireland, so that they allow searching officers to seize anything which is evidence of an offence or has been obtained in consequence of an offence.

### *Article 5*

64. The new power of cross-border arrest gives officers the power to arrest and detain a person for up to 36 hours. Article 5 is engaged by the new power. Article 5(1)(c) permits the 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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. The express purpose of the arrest under the new power is to facilitate a subsequent arrest under existing cross-border powers by officers from the investigating jurisdiction or arrest pursuant to a warrant. Arrest and detention are subject to a number of safeguards, which protect the suspect from arbitrariness (*Chahal v. UK* (1997) 23 E.H.R.R. 413, at [118]). The new power of arrest is only available where the officer has reasonable grounds to believe that the person committed an offence which is specified in secondary legislation for this purpose. The suspect can only be held by the arresting force initially for three hours. Detention beyond that period must be authorised by an officer of the rank of inspector or above in both the arresting force and the

investigating force, who must be satisfied, among other things, that it is in the interests of justice to hold the suspect. The rights of suspects in each jurisdiction in relation to the information to be provided on arrest, notification of other persons that the person has been arrested and access to legal advice are applied to persons arrested under this new power. This new power of arrest will ensure that suspected criminals cannot evade arrest simply by travelling to another jurisdiction within the UK. The Government considers that arrest and detention under this new power is permitted under Article 5(1)(c).

#### *Article 8*

65. Officers using the new power of cross-border arrest will be able to rely on existing powers of entry after arrest, which provides for access to premises. In addition, officers using any cross-border power of arrest will be able to rely on the new power of entry, which provides for access to premises. Both provisions engage Article 8. To the extent that these provisions give rise to any interference with that Article, the Government considers that any such interference is justified. Any interference will be in accordance with law as both powers of entry are clearly defined in primary legislation. The powers of entry will be in pursuance of the legitimate aim of the prevention of disorder or crime, since the powers will be used either for the purpose of arresting a person where there are reasonable grounds to suspect has committed a crime or for the purpose of searching for evidence of the offence.

66. In exercising the power, officers will have to act compatibly with Convention rights. The safeguards attached to the powers of entry mean that they are proportionate to the legitimate aim. The powers of entry for the purpose of arresting persons in England and Wales and Northern Ireland is only available where the officer has reasonable grounds for believing that the person whom he or she is seeking is on the premises and (if there is no warrant for arrest) the offence is an indictable offence. The new power of entry for the purpose of arresting persons in Scotland carries the same safeguards as the powers of entry available to Scottish officers for offences committed in Scotland. The existing power of entry after arrest is only available where the officer has reasonable grounds for believing that there is evidence on the premises relating to the offence for which the person was arrested, and the search is only permitted to the extent that is reasonably required for the purpose of discovering any such evidence.

67. Given the nature of these powers and the various safeguards, the Government considers that any interference with Article 8 is necessary and proportionate.

#### *Article 1 Protocol 1*

68. The existing powers of entry after arrest are amended to enable seizure of items found on premises during a search. These provisions engage Article 1 Protocol 1. To the extent that these provisions give rise to any interference with that Article, the Government considers that any such interference is justified. Any interference will be in accordance with law because the powers of seizure are clearly defined in primary legislation. The powers of seizure will be in pursuance of the legitimate aim of the prevention and prosecution of crime, since they will be used to seize and retain any item where there are reasonable grounds to believe that it is evidence of an offence,

or has been obtained in consequence of the commission of an offence. It is plainly in the public interest to ensure that evidence is seized and retained by the police where it may be used to prosecute an offence. The Government considers that the safeguards on the power of seizure mean that it is proportionate to the legitimate aim. In exercising the power, officers will have to act compatibly with Convention rights. An item may only be seized if the officer has reasonable grounds for believing that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. Records of seizure must be provided and persons may request access to seized items under the supervision of a constable.

69. Given the nature of these powers and the various safeguards, the Government considers that any interference with Article 1 Protocol 1 is necessary and proportionate.

### **Part 6: Firearms**

70. Clause 112 introduces a new definition of antique firearms, which will have the effect that certain firearms that are currently regarded as being antique will now be captured by the restrictions/controls of the firearms legislation.

#### *Article 1 of Protocol 1*

71. Article 1 of Protocol 1 provides that no one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law. It also protects controls on the use of the property by the state, except where such controls are necessary in accordance with the general interest.

72. The Government accepts that the change in the legal position in respect of certain antique firearms may engage Article 1 of Protocol 1, to extent that their effect will be to submit certain antique firearms to the restrictions of firearms legislation.

73. The Government consider that the clause is compatible with Article 1 of Protocol 1. The case law on Article 1 of Protocol 1 draws a distinction between deprivations of property and controls on the use of property. This distinction is an important one, because a deprivation gives rise to a right to compensation, save in the most exceptional circumstances, whereas a control of use does not, albeit that the availability of compensation will be taken into account when deciding whether a fair balance has been struck between the general interest and the right of the individual to peaceful enjoyment of possessions.

74. Taking into account the relevant case law, the Government considers that the proposals amount only to a change of use rather a deprivation. Firstly, those in possession of relevant weapons will be permitted to retain possession under a certificate (provided that a certificate is granted). Accordingly, the Government considers in such cases that the imposition of a requirement of a certificate clearly amounts only to a control of use. Secondly, even in a case where a person is refused a certificate, the Government consider this would still amount only to a control of use. This is because, in such cases, owners will be able to sell the firearm before the provisions come into force or put it into the possession of someone else

who could sell it on their behalf. It would not therefore be the case that all the person's ownership rights would be extinguished or that the firearm has become unusable. What flows from this analysis is that, in the Government's view, payment of compensation is not necessary to render the measures compatible with Article 1 of Protocol 1.

75. In the Government's view these proposals strike a fair balance between the interests of the weapon holder and the general interest. The clause is in pursuit of a legitimate public interest, because the aim is to subject antique firearms capable of being used in the commission of criminal offences to the controls of the Firearms Act 1968 and thereby to protect the public from the threat of such firearms being used for criminal purposes.

76. The Government considers that the proposals are a proportionate approach. Firstly, the majority of antique weapons will remain as antiques and outside the scope of the 1968 Act so long as ammunition is not readily available. Only those weapons that could in practice be used in the commission of criminal offences will now be caught. The proposal is therefore narrowly targeted to those weapons that carry a public safety risk.

77. Secondly, those in possession of such weapons will be allowed to keep them under certificate (provided a certificate is granted). In considering the discretion to grant a certificate, the police would have to act compatibly with Convention rights by virtue of section 6 of the Human Rights Act 1998.

78. Thirdly, the Government intends to give persons likely to be affected advance notice of the change in the law to enable them to make arrangements to avoid an offence (whether by obtaining a certificate or selling the firearm prior to commencement to realise its value and mitigate loss).

### **Part 7: Alcohol licensing**

79. Clause 119 clarifies the position in relation to the imposition of interim steps by a licensing authority during a summary review in respect of a premises licence. A licensing authority is able to decide whether to impose interim steps, which could include the suspension of a licence to supply or sell alcohol; this change will mean that the licensing authority will be able to reconsider the interim steps at the review hearing, and modify or remove them. Those steps will have effect until any appeal is heard or the time limit for appealing has expired.

80. Clause 120 provides licensing authorities with the power to revoke or suspend a personal licence when a person has been convicted of an offence listed in Schedule 4 to the Licensing Act 2003. Clause 121 adds new offences to the list in Schedule 4.

81. These clauses engage Article 6 and Article 1 of Protocol 1.

## Article 6

82. Providing powers to licensing authorities to revoke or suspend a personal licence or to impose interim steps in relation to a premises licence engages Article 6(1) since it involves the determination of a civil right (see *Tre Traktoren AB v Sweden* (1989) 13 EHRR 309). In order to provide appropriate safeguards to anyone whose personal licence is revoked or suspended by a licensing authority under the provisions within either clause 119 or 120 each clause contains an appeal provision to allow an affected licence holder to appeal to a magistrates' court. The grounds of such appeals are not limited by the Bill. In this way sufficient safeguards are provided to ensure that these clauses are consistent with Article 6.
83. Clauses 118 and 120 permits a licensing authority to revoke or suspend a personal licence in circumstances where a court which has convicted the personal licence holder of an offence might have already decided not to order the forfeiture or suspension of the licence despite its having the power to do so. The licensing authority must take into account any information provided to it or of which it is aware about the decision of the convicting court not to order the forfeiture or suspension of the personal licence. To address any perceived injustice arising from this situation, the licence holder will be able to appeal against the decision of the licensing authority to a magistrates' court. In this way sufficient safeguards are provided to ensure that these clauses are consistent with Article 6.

## Article 1 of Protocol 1

84. Clause 120 may potentially affect an individual's enjoyment of his or her possessions since a licence to sell or supply alcohol is a possession (*Tre Traktoren AB v Sweden* (1989) 13 EHRR 309). This interference is justified for reasons of public policy, namely the protection of public health and public safety. The extension of the list of offences in Schedule 4 to the Licensing Act 2003 is justified for the same reasons.

## Part 8: Financial Sanctions

### Monetary penalties

85. Clauses 126 to 129 provide HM Treasury with a power to impose a monetary penalty on a person in the event that they breach a prohibition of a financial sanctions regime. The penalty must be beneath the "permitted maximum", which is the greater of £1,000,000 or half the value of the funds or assets involved in the transaction that constituted the breach.
86. Financial sanctions are a matter of international peace and security. To breach them is to endanger international peace and security. That requires the ability to levy a penalty commensurate to the harm that could be caused by such conduct. While many breaches involving funds and economic resources of lower value can and will continue to be adequately dealt with by way of warning letters, the Treasury over the last two years has seen many breaches involving funds or assets that can be valued at tens or hundreds of thousands of pounds. In a small number of cases the value of the funds and assets involved in the breaches are in the millions, and as we expand

our enforcement activity we expect to become aware of more high value breaches, some of which may result from conduct which does not of itself merit a prosecution.

87. The level of the permitted maximum has been set to deter all levels of breaches from being committed, and so it needs to encompass these higher value breaches. The level of the permitted maximum also needs to be high enough to enable the monetary penalty to remove any profit that may have derived from the breach.
88. The Government notes that monetary penalties levied by the Financial Conduct Authority in the UK and the Office of Foreign Asset Control in the United States can be much higher.
89. The Treasury will issue guidance which explicitly sets out in what circumstances in which a monetary penalty will be imposed, and what aggravating and mitigating factors (such as the nature of the conduct involved, the profit made, and ability to pay) will be taken into account when setting the level of the penalty.
90. When considering whether a prosecution rather than a monetary penalty is appropriate for an offence of failing to comply with a sanctions regime will depend on the nature of the conduct causing the breach. Where there is a deliberate attempt or intention to breach the sanctions regime this would best be dealt with by way of a criminal prosecution. Where the breach is caused by a negligent failing to have proper systems in place, or is unintentionally caused despite properly applying the mind to the issue, the monetary penalties would be more appropriate.
91. Clause 127 puts in place a number of procedural requirements which must be satisfied in order to impose a monetary penalty, including:
  - a) prior notification to a person upon whom a penalty may be levied;
  - b) a chance to make representations before a penalty is levied; and
  - c) a right to request a review by a Minister in person.All decisions of HM Treasury and the Minister are also justiciable in the High Court by way of judicial review.
92. UK law provides for other monetary penalty regimes with a similar structure. For example, the Civil Aviation Act 2012 gives the Civil Aviation Authority the power to levy monetary penalties for breach of licence conditions (section 39) or enforcement orders (section 40), with a procedural requirement for prior notification and consideration of submissions (section 41), and appeal to an independent Tribunal (Schedule 3). HM Revenue and Customs also have the ability to impose a compound penalty in respect of a breach of export controls under section 152 of the Customs and Excise Management Act 1979, imposing an unlimited monetary penalty in lieu of criminal proceedings<sup>3</sup>.

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<sup>3</sup> The largest compound penalty imposed by HMRC to date was £575,000.

## *Article 6*

93. Article 6(1) is relevant to the imposition of monetary penalties rights, and Articles 6(2) and (3) may also be relevant, depending on whether it is properly considered a civil or criminal penalty.
94. The Government's view is that the monetary penalties are civil in nature. The test of whether a penalty is 'criminal' in nature, and thus amounts to a 'criminal charge', is decided by reference to three criteria:
- a) whether the 'charge' is classified as criminal in domestic law;
  - b) the nature of the 'offence'; and
  - c) the nature and severity of the penalty<sup>4</sup>.
- It is not necessary to meet every criteria as long as the cumulative effect indicates that a 'charge' is 'criminal' in nature. The last two criteria carry more weight than the former, and can be fulfilled in the alternative.
95. In this case, the domestic classification of the monetary penalty is as a civil alternative to criminal prosecution. It is intended for use in cases where the breaching conduct is insufficiently serious to be criminal in nature – if the conduct is so serious then a criminal prosecution will be brought. However, the Government recognises that due to the level of the financial penalty being punitive, having a deterrent effect, and a potentially severe outcome upon the person involved, it is arguable that the monetary penalty could be classified as a 'criminal charge'.
96. The Government is content that, even if the monetary penalty is properly viewed as a 'criminal charge', the legislation taken as a whole is compliant with Article 6; because:
- a) the clauses do not presuppose guilt;
  - b) any person upon whom a penalty is to be imposed has the right to make prior representations, including representations upon the relevant criteria in the guidance;
  - c) there is a right of review by a Minister if a person is aggrieved by the decision to impose a penalty; and
  - d) any decision made by HM Treasury or a Minister is justiciable in the High Court, which will have the power to strike down decisions that are irrational or improperly made.

## *Article 1 of Protocol 1*

97. The imposition of a monetary penalty upon any person will impact on their enjoyment of their possessions by requiring them to use those possessions to repay the amount of the penalty. The Government considers that the imposition of a monetary penalty is both lawful and proportionate, and accordingly does not breach Article 1 of Protocol 1.

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<sup>4</sup> *Engels v Netherlands* (1976) 1 EHRR 649

98. This will be in accordance with the law as the Bill explicitly provides for this to happen. It will also be proportionate, both in terms of the existence of a regime as a proportionate method of enforcement against breaches of financial sanctions, and because the penalty itself will be proportionate to the conduct in which it is imposed:
- a) Financial sanctions are a matter of international peace and security, and breaching them endangers international peace and security. That requires the ability to levy a penalty commensurate to the harm that could be caused by such conduct, deter such conduct, and be able to remove any element of profit from it – equally so for breaches which are small in value and for those valued at millions of pounds.
  - b) The Treasury has the ability to vary the level of the penalty according to the value of the transaction, and is required to produce guidance on the circumstances in which a penalty will be set, and what factors will be relevant to the level of a penalty.
  - c) In a circumstance where the value of the breach can be ascertained, the clause sets the permitted maximum in direct relevance to the value of the breach.
  - d) The question of whether that penalty has been set at an appropriate level can be considered after the fact by both the Minister (on review) and the High Court (on an application for judicial review).

#### Implementation of UN obligations

99. The UK is a signatory of the United Nations Charter. Article 2 obliges signatories to comply with the Charter. Article 25 obliges signatories to accept and carry out decisions of the UN Security Council (“UNSC”). Article 41 empowers the Security Council to decide what measures not using the use of armed force shall be taken to combat such threats, and call upon signatories to apply them. UNSC Resolutions made under Article 41 of the Charter require the UK to put into place a number of measures, including financial sanctions, “without delay”. There is no definition of “without delay”, but the Financial Action Task Force<sup>5</sup> has interpreted it as meaning “ideally within hours”, and at the most “within 48 hours”.
100. It takes the EU an average of 3.5 weeks after a UNSC Resolution to implement a directly effective EU Regulation. While the EU has committed to reducing this time, there remain concerns that it will not be practically possible to legislate within 48 hours of a UNSC Resolution. The Government is also concerned that delays in implementation will enable those persons and entities that sanctions are aimed at the ability to move their funds and assets out of the UK and so defeat the purpose of any asset freezes.
101. Clauses 132 to 135 create powers for the UK to take temporary measures to implement their Charter obligations in the UK, pending legislation from the EU. In particular:

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<sup>5</sup> An inter-governmental body established in 1989 by the UK and other countries to set standards and promote effective implementation of measures to combat threats to the international financial system, including breach of financial sanctions.

- a) For financial sanctions regimes where an EU regulation is in place, they enable new ‘listings’<sup>6</sup> by the UN to be temporarily deemed to be part of the ‘listing’ under the relevant EU Regulation (clause 128). This takes effect for 30 days from the date of the UNSCR, and stops when the EU amends the EU Regulations to include the UN ‘listing’.
- b) For financial sanctions regimes where no EU regulations are yet in place, they enable the UK to create a temporary financial sanctions regime to implement the UNSC Resolution (clauses 125 and 126). This temporary regime will take effect for up to 30 days (capable of being extended once by a further 30 days), and will stop when a directly effective EU Regulation is put into place to implement the UNSC Resolution.

102. Clause 136 enables the effect of temporary ‘listings’ under clauses 134 and 135, and temporary regimes under clause 134, to be extended to the Crown Dependencies and British Overseas Territories (‘the relevant territories’) by way of an Order in Council. In the case of a temporary regime under clause 132 only, the Order in Council can extend the period that this regime takes effect in those relevant territories for up to 120 days (60 days longer than in the UK). This is because the EU Regulation does not take direct effect in most of the relevant territories when it is enacted, and further legislative steps (by the UK Government and potentially also the government of the relevant territory), and therefore more time, are required to implement the UNSC Resolution in the relevant territories. Some relevant territories are in the process of taking their own legislative steps to implement UNSC Resolutions ‘without delay’, and where this has been done the Government does not propose to use this power.

#### Article 6

103. The temporary imposition of a sanctions regime (whether contained in an existing EU Regulation or a temporary UK regime) may be capable of impacting upon the civil rights of a person made temporarily subject to that regime. Under Article 6(1), where the civil rights of a person are so impacted by the provisions of legislation, they are “*entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*” Articles 6(2) and 6(3) are not relevant as this is clearly a civil matter.

104. No right of appeal is provided for by the clauses. This does not mean that the express legislative words should be read as denying the person the right of access to a court, or that this is a necessary implication of those words. Rather, the Government takes the view that there is, in fact, no infringement of the requirement of Article 6(1) of access to a court “*within a reasonable time*”. This is because any imposition of sanctions under this regime will be temporary; and can only last:

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<sup>6</sup> A term used to describe the process of formally identifying a financial sanctions target as being subject to the sanctions regime. In a fictional example, if General Ydobon was ‘listed’ by the UN as being a sanctions target under the Erewhon financial sanctions regime by way of a UNSCR, the Charter obligation upon the UK would be to ensure that the provisions of that regime (such as an asset freeze) applied to General Ydobon ‘without delay’. In the example given, General Ydobon would also be deemed to be ‘listed’ under the EU regulation implementing the Erewhon financial sanctions regime and the asset freeze in it would automatically apply to him.

- a) in the case of a temporary listing, for up to 30 days;
- b) in the case of a temporary regime in the UK, up to 60 days; and
- c) in the case of a temporary regime in the relevant territories, up to 120 days.

In most cases, the temporary regime will not last as long, as it will lapse upon the EU Regulations taking effect. The temporary sanctions regime provided for by these clauses may only last a few days<sup>7</sup>.

105. At the end of that time, the person will either be subject to sanctions imposed by an EU Regulation, in which case they will be able to challenge those sanctions by way of an application to the General Court of the EU, or they will not be subject to any other sanctions, and have no need of access to a court to challenge them.

106. In considering whether this is reasonable, the Government notes:

- a) that the temporary imposition of a sanctions regime is necessary in order to discharge the UK's international treaty obligation to impose the financial sanctions upon those persons "without delay";
- b) that any person affected by this regime is able to challenge the UN over their listing;
- c) that any person affected by this regime may be able to challenge the regulations by way of judicial review, and apply for a license to pay legal expenses to do so;
- d) that financial sanctions are an extremely serious matter, dealing with threats to international peace and security, and any interference with the civil rights of persons subject to those sanctions must be viewed in that context;
- e) that the clauses explicitly record the will of Parliament that temporary application of sanctions regimes can apply in these circumstances; and
- f) that the person who is temporarily subject to them will still be able to access, throughout the short period of time the temporary provisions apply, funds to provide for their basic needs, legal expenses, and other extraordinary expenditure that is necessary from time to time, and they will retain ownership of their funds and assets throughout.

107. This is a completely different situation to that of the indefinite application of a sanctions regime to a person without any ability to challenge that regime, as has been criticised in the past by UK<sup>8</sup> and EU<sup>9</sup> courts. For all these reasons, the Government believes that the temporary application of sanctions regimes to persons designated as sanctions targets by the UN does not breach the requirement of Article 6(1) for a person to have access to a court "*within a reasonable time*".

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<sup>7</sup> For example, a temporary sanctions regime imposed by the Libya (Financial Sanctions) Order 2011 was in force for only 3 days before being replaced by an EU Regulation

<sup>8</sup> Ahmed & Ors v HM Treasury, [2010] 4 All ER 745, which considered an indefinite financial sanctions regime set up under section 1 of the United Nations Act 1946

<sup>9</sup> Nada v Switzerland, [2012] ECHR 1691

## *Article 8*

108. The Government recognises that the temporary imposition of a sanctions regime (whether contained in an existing EU Regulation or a temporary UK regime) may be capable of impacting upon the private and family life of a person made temporarily subject to that regime. This is because the prohibitions and restrictions placed upon them might place barriers to their enjoyment of their private life and life with their family, if they are unable to access funds and assets to sustain that private or family life. Funds and assets of family members will not be subject to any asset freeze if they are held independently from the designated person, or are available for the mutual benefit of the designated person and their family members<sup>10</sup>.

109. This is both lawful and proportionate. It will be expressly authorised by primary legislation. It is proportionate for the same reasons as are given above (required to discharge a treaty obligation, capable of being challenged, seriousness of the subject matter, time-limited). It is also proportionate because the ownership of the funds remains unchanged, and the person in question will be able to apply for licenses to unfreeze funds to provide for the basic needs of their family, legal expenses, and other extraordinary expenditure that is necessary from time to time.

## *Article 1 of Protocol 1*

110. The temporary application of a sanctions regime to a person will have a far-reaching effect, at least in the short term, upon such a person's enjoyment of their possessions. Nevertheless, the Government believes that this is both lawful and proportionate, and so does not breach Article 1 of Protocol 1.

111. The temporary application of a sanctions regime to a person will be lawful in that it will be the result of the explicit and plain words of primary legislation<sup>11</sup>, which not only anticipates the imposition of these temporary measures (per clause 133 for temporary listings and clause 132 for temporary regimes) but also exactly what these measures entail (the substantive content of EU Regulations temporarily applied and clause 133 respectively). The temporary imposition of financial sanctions regime is also proportionate, for the same reasons given above.

## **Part 9: Requirements to confirm nationality**

### Requirement to state nationality/produce nationality documents

112. Clause 139 inserts new sections 43A and 43B into the UK Borders Act 2007. New section 43A requires any non British national who has been subject of arrest to state his nationality if required to do so by an immigration officer or a constable. New section 43B sets out the offence for failing to provide nationality or providing false or incomplete information. These provisions raise potential issues in respect of Articles 6, 8 and 14 of the ECHR.

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<sup>10</sup> M v UK [2010] C-340/08

<sup>11</sup> Per Entick v Carrington, *ibid*

### *Article 6*

113. Article 6 of the ECHR is potentially engaged, on the basis that compelling defendants to provide information on their nationality could undermine the right against self-incrimination (see *Funcke v France* (1993) 16 E.H.R.R. 297) We have therefore included a provision at 46E(2) excluding the information provided by defendants in compliance with this requirement to be used in criminal proceedings other than those brought in relation to clause 139 itself. This upholds the general principle against self-incrimination while still requiring defendants to provide the information requested. The prosecution for the giving of false information would not be considered to itself involve self incrimination (see *Allen v UK* [2003] Crim. L.R. 280) as the statement would not be about a previous offence but would be the offence itself.

### *Article 8*

114. It is accepted that Article 8 is also potentially engaged, as the provision requires a defendant to provide personal information in respect of themselves. However, to the extent that this Article is engaged, any interference will be justified. Such interference will be in accordance with the law as any retention of identity information will be pursuant to a clear power in primary legislation. The information would enable early actions to be undertaken to assist in documenting a person should removal from the UK be considered appropriate. Any interference with Article 8 will pursue the legitimate aim of maintaining the UK's immigration controls by allowing police or immigration officers to establish a person's nationality. The Government therefore believes that any interference will be justified under Article 8.

### *Article 14*

115. To the extent that the requirement to provide requested nationality document might be seen to affect particular groups more than others (for example, foreign nationals as compared to British nationals) the same considerations as outlined in respect of Article 8 above would apply and can be justified as necessary and proportionate to the pursuit of a legitimate aim.

### Requirement to produce nationality document

116. Clause 140 inserts new sections 46A, 46B and 46C into the UK Borders Act 2007. New section 46A requires any suspected non British national who has been subject of arrest to provide a nationality document within 72 hours of being required to do so by way of written notice. New section 46B provides the power for an immigration officer or police officer to retain the nationality document provided in accordance with section 46A. New section 46C provides for an offence for the failure to comply, without reasonable excuse, with a notice given under section 46A. These provisions raise potential issues in respect of Articles 8 and 14 of the ECHR.

### *Article 8*

117. The Government accepts that Article 8 is also potentially engaged, as the provision requires a defendant to provide personal documents in respect of themselves. However, to the extent that this Article is engaged, any interference will be justified. Such interference will be in accordance with the law as any retention of a document will be pursuant to a clear power in primary legislation. The information within the document would be used to carry out criminality checks so as to be able to determine whether immigration action need be considered against a person. The document would enable removal from the UK should that be considered appropriate or would very likely assist in the obtaining of a valid travel document. The Government therefore believes that any interference will be justified under Article 8.

### *Article 14*

118. To the extent that the requirement to provide requested nationality document might be seen to affect particular groups more than others (for example, foreign nationals as compared to British nationals) the same considerations as outlined in respect of Article 8 above would apply and can be justified as necessary and proportionate to the pursuit of a legitimate aim.

### Criminal Procedural Rules: requirement to give information

119. Clause 141 inserts a new section 86A into the Courts Act 2003, which requires any defendants in criminal proceedings to provide the criminal court (being a magistrates' court or the Crown Court for these purposes) with details of their name, date of birth and nationality when requested to do so by the court. Defendants who, without reasonable excuse, fail to provide this information or provide incomplete or false information will be guilty of an offence punishable by a term of imprisonment not exceeding six months and/or a fine. How and when the court will require this information to be provided will be set out in the Criminal Procedure Rules. This provision raises potential issues in respect of Articles 6, 8 and 14 of the ECHR.

### *Article 6*

120. Article 6 of the ECHR is potentially engaged, on the basis that compelling defendants to provide information on their name, date of birth or nationality could be said to undermine the privilege against self-incrimination (see *Funcke v France* (1993) 16 E.H.R.R. 297). We have therefore included a provision in the clause excluding the information provided by defendants in compliance with this requirement to be used in criminal proceedings other than those brought in relation to clause 141 itself.

### *Article 8*

121. It is accepted that Article 8 is engaged, as the provision requires a defendant to provide personal information about themselves which may then be shared with immigration enforcement authorities. However, to the extent that this Article is

engaged, it is considered that the provisions are in pursuance of a legitimate aim, namely the facilitation of immigration control, and are proportionate to pursuance of that aim.

#### *Article 14*

122. As the requirement to provide your name, date of birth and nationality applies to all defendants in the criminal court, it is not accepted that Article 14 would be engaged. To the extent, however, that the requirement to provide the information requested might be seen to affect particular groups more than others (for example, foreign nationals as compared to British nationals) the same considerations as outlined in respect of Article 8 above would apply and can be justified as necessary and proportionate to the pursuit of a legitimate aim.

#### **Part 9: Seizure etc. of travel documents**

123. Clause 142 amends Schedule 8 to the Anti-social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”). This provides for an extension of the existing powers of search and seizure to include searches for foreign travel documents as well as providing a new power of entry in relation to both British passports and foreign travel documents.

124. The extension of the power of search and seizure to include foreign travel documents is proposed in order to disrupt the travel plans of would-be foreign fighters travelling to Syria or other conflict zones. Since December 2014, European Economic Area (“EEA”) Member States, plus Switzerland, have been distributing details of such travel documents to law enforcement officers across Europe, asking that the documents be seized. The police and Immigration Enforcement, however, currently have no power to comply with such a request unless the passport is encountered at a port. So police officers and immigration officers who believe an individual is in possession of such an invalidated travel document currently have no power to search for or seize such documents away from a port and these new provisions will rectify that position.

125. The new power of entry for constables will enable constables to enter premises to search for and seize invalid travel documents. This means constables can enter premises to search for invalidated foreign travel documents and British passports that have been cancelled by Her Majesty’s Passport Office (“HMPO”) on public policy grounds (where the person to whom it has been issued has been involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities). This is a power that is used primarily to disrupt the travel of British passport holders who wish to travel for terrorist related purposes.

126. The existing requirement in the 2014 Act for Secretary of State authorisation to use the Schedule 8 powers in relation to British passports cancelled under the Royal Prerogative for national security reasons will be removed in order to ensure that the power can be used more flexibly during operations and to align the powers relating to British passports with those in relation to foreign travel documents. This

change will enable the police to act quickly to seize a cancelled British passport where it is necessary to do so; any decision to cancel a British passport on public interest grounds would, as now, continue to need the Home Secretary's agreement. In addition, as an authorisation is not appropriate in relation to foreign travel documents, leaving it in place would result in a mis-match between the powers in relation to British passports as compared to those in relation to foreign travel documents.

#### *Article 5*

127. The power to search a person for a cancelled British passport already exists. This may be exercised at a port by a constable, an immigration officer or a customs officer or away from a port by a constable. The new provisions would allow immigration officers to search a person away from a port and would allow both immigration officers and constables to search for a wider range of documents – foreign travel documents invalidated by the issuing authorities. These searches are likely to be carried out very rarely and are likely to require only a very short detention of the person searched. Article 5 will be engaged by such searches and the case law (for example, *Gillan & Quinton*<sup>12</sup>) has held that such searches must be lawful and in accordance with a procedure prescribed by law. The Government considers that the short period of detention necessary to carry out a search of a person is necessary and proportionate to the aim of disrupting the travel of those suspected of serious criminal intent and will, if carried out in accordance with these powers as set out, be in accordance with the law.

#### *Article 8*

128. The new power of entry into premises to search for and seize invalid travel documents will engage Article 8. The numbers of such searches are likely to be small and the pre-conditions that must arise before any such search is carried out are likely to occur only rarely. In relation to foreign travel documents the issuing state will have actively decided to invalidate the document on public protection grounds and requested all other EEA member states to seize and return the document. Without this new power being available the person in possession could retain the document and continue to use it to travel abroad or prove identity even though there is good reason to believe that such travel may be for terrorist-related purposes.
129. In relation to British passports, the Secretary of State will have made a decision on public policy grounds – most commonly that the person should not hold a British passport on the grounds that it may be used for terrorist-related travel. Once a passport has been cancelled by HMPO it is necessary to retrieve the document in order to ensure that it cannot continue to be used. Without the power of entry the police have no effective way of ensuring that the document is retrieved and put beyond use.
130. Given the nature of these powers and the various safeguards, the

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<sup>12</sup> [Gillan and Quinton v. United Kingdom - 4158/05](#) [2010] ECHR 28

Government considers that any interference with Article 8 is necessary and proportionate. Any power of entry must be justified and necessary and in accordance with law for a legitimate aim. The Government believes that this power is justified in the interests of national security and for the prevention of crime.

131. In addition to the safeguards provided for in this Bill, any constable effecting a power of entry will be subject to the requirements of the Home Office code of practice on powers of entry<sup>13</sup> which provides detailed guidance on the exercise of powers of entry.

132. It is likely that such entry will be a measure of last resort where the document has not been returned voluntarily and it is believed that there is a real risk of its use for criminal purposes.

#### *Article 1 Protocol 1*

133. British passports remain the property of the Crown at all times and therefore their seizure in the exercise of these powers will not directly engage Article 1 Protocol 1. In relation to foreign travel documents, the only documents to be seized under these powers will be those actively invalidated by the issuing authorities where the state concerned has requested their seizure and return by way of an Article 38 Schengen Information System<sup>14</sup> alert. These documents will be returned to those states at their request. If it is the case that these documents are legally the property of the person to whom they have been issued, there will be an interference with that person's Article 1 Protocol 1 rights but such interference will be necessary and proportionate in order to comply with the request of the issuing state and to disrupt travel of the person in the public interest.

#### **Part 9: Forced marriage: anonymity for victims**

134. Clause 143 inserts new section 122A and new Schedule 6A into the 2014 Act. These provide for anonymity for the alleged victim where an allegation has been made that an offence of forced marriage has been committed against them. Under the new provisions, the publication of any matter likely to lead members of the public to identify the alleged victim during that person's lifetime is an offence.

#### *Article 10*

135. Article 10 provides the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference.

136. Paragraph 2 of new Schedule 6A makes it an offence to include in any publication any matter likely to lead members of the public to identify a person against whom the offence of forced marriage is alleged to have been committed

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/383079/Code\\_of\\_Practice\\_-\\_Powers\\_of\\_Entry\\_\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383079/Code_of_Practice_-_Powers_of_Entry__web_.pdf)

<sup>14</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:205:0063:0084:EN:PDF>

during that person's lifetime. This engages Article 10.

137. The purpose of the new offence is to provide protection for victims of forced marriage. Forced marriage is a form of so-called 'honour-based' violence (that is, a type of crime which is committed to protect or defend the 'honour' of the family and/or the community), and victims of it may fear that coming forward will expose them to public shame or put them at further risk of harm. In providing them with anonymity both at the investigation stage and at the trial stage, it is hoped that more victims will have the confidence to report this offence to the police without the fear of these consequences.
138. A victim of forced marriage may have suffered other offences before or during the course of the marriage, for example, rape or sexual assault. The victims of these types of offence are already provided with anonymity of the sort that the new provisions provide through provisions in the Sexual Offences (Amendment) Act 1992. In the same way that public knowledge of the indignity and violation that a person suffers through the commission of sexual offences can be extremely distressing so too can public knowledge of a forced marriage.
139. For these reasons, restrictions on reporting matters that would lead to the identification of an alleged victim pursue the legitimate aims under Article 10 of protecting the victim's physical safety and reputation as well as that of preventing crime. Paragraph 1(3) of the new Schedule 6A allows a court to disapply, by direction, the reporting restriction where: (a) a person's defence would be substantially prejudiced if the direction were not given; or (b) the effect of the anonymity provision is to impose a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to remove or relax the restriction.
140. The Government is therefore satisfied that any restriction on Article 10 rights is justified as a proportionate means of achieving the legitimate aim of protecting a victim's rights and increasing the possibility of bringing proceedings against people accused of forced marriage offences (see by way of analogy *Gordon Brown v UK Appn No 44223/98*, 2 July 2002 (unreported)).

#### *Article 6*

141. The offence of breaching the prohibition on publication as drafted is constructed as a strict liability offence with statutory defences. However, the Government recognises that paragraph 3(2) and (3) of new Schedule 6A may be viewed as imposing a reverse legal burden on the defence and so has considered the compatibility of paragraph 3(2) and (3) with Article 6.
142. The imposition of a reverse burden does not in principle represent an infringement of a defendant's rights under Article 6(2) (*Gordon Brown v UK Appn No 44223/98*, 2 July 2002 (unreported)). In *Sheldrake v DPP* [2005] 1 AC 264 the House of Lords held that both *Lambert* [2002] 2 AC 545 and *Johnstone* [2003] 1 WLR 1736 should be regarded as primary domestic authorities on reverse burdens. The domestic authorities make it clear that whether statutory provision imposing a

reverse legal burden is compatible with Article 6(2) varies according to the particular offence and underlying policy objective in question. An assessment must be made of whether the provision is objectively justified and proportionate (*Lambert*).

143. According to *Lambert*, the question of whether the reverse burden is compatible with Article 6 should be approached in three stages. First, whether the provision interfered with Article 6(2), secondly whether there was an objective justification for the interference and thirdly whether the interference was proportionate. Regard should be had to the punishment which may result, to the extent and nature of the factual matters which the defendant must prove, how readily provable they are and their relative importance to the matters to be proved by the prosecution (*Johnstone*).

144. The Government is satisfied about the compatibility of these provisions with Article 6, taking into account the case law. There exists a clear and objective justification for the reversal. The policy aim behind the offence is to encourage victims to report forced marriage offences committed against them and to increase the number of prosecutions by helping ensure that the victim feels safe in reporting the crime. There is a strong public interest in achieving this. Forced marriage is a serious crime and this new provision forms part of a wider package of measures to further the Government's commitment to end it. The reverse burden imposed invites the defendant in a particular case to justify their publication of a matter identifying the alleged victim of forced marriage on the basis that they were not aware and did not suspect or have reason to suspect that the allegation had been made or that the publication included the matter likely to lead members of the public to identify the alleged victim. These matters to be proved on the balance of probabilities are matters within the knowledge of the defendant.

145. In these circumstances, and bearing in mind the consequences of a breach and the nature of the penalty which can be imposed, the Government considers that this burden on the defence is both justified and proportionate.

#### *United Nations Convention on the Rights of the Child*

146. The measure supports the United Kingdom commitments, in particular those under Articles 16, 19, 34, 36 and 39.

### **Part 9: Child sexual exploitation: streaming indecent images**

147. Clause 144 extends the definition of exploitation in section 51 of the Sexual Offences Act 2003 ("the 2003 Act") so that it covers situations where an indecent image of a child is streamed or otherwise transmitted as well as (as is the case currently) those situations where such images are recorded. This definition is for the purposes of the offences at section 48 to 50 of the 2003 Act, which respectively criminalise causing or inciting the sexual exploitation of a child, controlling a child in relation to their sexual exploitation and arranging or facilitating the sexual exploitation of a child. The provision raises issues in respect of Articles 8 and 10.

### *Article 10*

148. It is arguable that Article 10 does not apply to behaviour concerning indecent images of children, by virtue of the exclusion in Article 17 of the Convention. However, if Article 10 does apply, the Government considers that the material caught by the offence would be likely to fall within its scope - see *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, where Article 10 applied to material considered by the domestic courts to be obscene. To the extent that it does fall within its scope, criminalising those who arrange the streaming or transmission of this material could amount to an interference with Article 10. However, that interference is prescribed by law and clearly justified by reference to a number of legitimate aims in Article 10(2), namely: the prevention of crime, the protection of health or morals and the protection of the rights of others (*R v Smethurst* [2001] EWCA Crim 772). The Government considers that clause 144 is a proportionate means of meeting those legitimate aims. The streaming of such material is no more acceptable than is the recording which is already included within the definition.

### *Article 8*

149. Insofar as similar issues arise under Article 8(1) as under Article 10, the Ministry of Justice's view is that the measure is justified under Article 8(2) for the same reasons as set out above.

### *UNCRC*

150. This measure extends the scope of the bespoke child sexual exploitation offences at sections 48 to 50 of the 2003 Act and it therefore supports the United Kingdom's commitments under Article 34 of the UNCRC and under the Optional Protocol on the sale of children, child prostitution and child pornography.

**Home Office/HM Treasury/Ministry of Justice  
June 2016**